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PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA,

BY

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PREFACE.

THIS Volume contains the Indian cases decided by the Privy Council from 1879 to 1886, and comprises all the cases to be found in the (English) Law Reports, Indian Appeals Vols. 7 to 14, and in the Indian Law Reports, Calcutta Series Vols. 5 to 14, Madras Series Vols. 3 to 9, Bombay Series Vols. 3 to 10 and Allahabad Series Vols. 3 to 9.

Some additional cases have been given in the Appendix which are not to be found in any of those authorized reports.

The Editors have tried their best to make the work as complete as possible. When they commenced the publication in 1878 they entertained grave apprehensions whether they would be able to complete the heavy task they had undertaken, and they are now glad to find that by the blessing of God they have been enabled to do so by four large Volumes, the present Volume containing cases down to 1886.

The Editors hope and trust that with regard to Courts, legal practitioners and the general public who cannot have access to all the books in which the Privy Council rulings have been published, this work will supply a real want, and will put them at a small cost in possession of all the final authorities in case law in this country. Those who are in possession of the original reports will also find it convenient to have in four volumes all the cases which are scattered over volumes whose number is legion.

The Editors acknowledge with thanks the patronage which has been afforded to them by Government in the publication of this work.

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BANERJEE

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PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA.

13th and 14th November, 1878, and 1st February, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SURAJ BUNSI KOER (Mother and Guardian of the Infant Sons) (Plaintiff) ... ... } *Appellant,*

and

SHEO PERSHAD SINGH and Others, (Defendants) } *Respondents.*

Mitakshara Law—Ancestral Property—Son's Share—Rights of Co-parceners—Alienations—Liability of Sons for Father's Debts—Execution-Purchaser—Notice.

Under the law of the *Mitakshara* each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, and can compel his father to make partition of such estate.*

The rights of the coparceners in a joint *Hindu* family consisting of a father and his sons do not differ from those of the coparceners in a like family consisting of undivided brethren, except in so far as the sons are affected by the obligation of the *Hindu* law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate.

It is a settled law in the *Madras* Presidency, that one coparcener may dispose of ancestral undivided estate to the extent of his own share, even by private conveyance, whether for value or by gift.

In the *Bombay* Presidency, unauthorized alienations voluntarily made by one coparcener, are good, even for his own share, only when made for value.

In *Bengal*, the law which prevails in the other Presidencies as to alienation by private deed has not yet been adopted, but it is now settled, that the purchaser of undivided property, sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property, with the power of ascertaining and realising it by partition.

Under the *Hindu* law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. Accordingly, where ancestral property has passed out of the family, either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution-sale, being a stranger to the suit without such notice, is not bound to make enquiry beyond what appears on the surface of the proceedings.

In a suit by the members of an undivided *Hindu* family governed by the law of the *Mitakshara*, to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that, prior to the sale, the Plaintiffs had preferred a claim of objection

* 6 Cowell's I. A., p. 88; 5 I. L. R. Cal, 148.

thereto on the same grounds, and that the Court of execution had declined to adjudicate the claim, and had directed the sale to proceed, referring the claimants to a regular suit. *Held*, that the purchasers at the execution-sale must be taken to have had notice, actual or constructive, of the objections made to the sale by the Plaintiffs, and of the order passed thereon by the Court, and to have purchased with knowledge of the Plaintiffs' claim, and subject to the result of their suit. *Held* also, that the property having been attached for the debt of a co-sharer during his lifetime, the sale was good for his share, but, that as it appeared on the evidence in the suit that the debt was one for which, according to *Hindu* law, the other co-sharers could not be made liable, the sale was not good for their shares.

1st February. 1879.

THE Judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE:—

The question to be determined on this appeal is, what are the respective rights of the infant Plaintiffs and Appellants on the one hand, and of the Respondents claiming as purchasers at an execution-sale on the other, in an eight *anna* share of *mouzah Bissumbhurpore*, a village situate in the district of *Tirhoot*. The material facts out of which this question arises, are the following:—

Baboo Adit Sahai, the father of the Plaintiff, became on the death of his father *Nursing Sahai* in 1862, or by virtue of a subsequent partition effected with a coparcener, the sole owner of certain ancestral immoveable property in *Tirhoot*, including eight *annas* of *mouzah Bissumbhurpore*. It has been assumed throughout the proceedings that the case was governed by the law of the *Mitakshara*; that, or the *Mithila* law, which is the same in respect of the questions raised in the suit, being the general law of the district. He had afterwards two sons, who are the infant Plaintiffs. Of these, *Ram Sahai* was born in 1862, and *Bhugyobutti* in October, 1869. These dates were disputed, but have, in their Lordships' opinion, been conclusively established in the suit. On the 21st of January, 1870, *Adit Sahai* executed, in favour of one *Bolaki Chowdry*, a Defendant in the suit, though not a Respondent on this appeal, an instrument in the form of a bond and *Bengali* mortgage, whereby he bound himself to repay the sum of Rs. 13,000, which he had borrowed from *Bolaki*, with interest at the rate of 15 per cent. per annum, and pledged as security for such repayment the whole and entire proprietary shares owned and possessed by him in *mouzah Surakdeeha* (also part of the ancestral estate) and *mouzah Bissumbhurpore*. This bond does not expressly state any reason for incurring the debt, but it refers to a negotiation for a loan of a smaller sum from another party, which had fallen through, and says that that sum was not then sufficient to meet the payments of the obligor's several creditors. It was registered on the 21st of January, 1870.

On the 30th of December, 1872, *Bolaki Chowdry*, suing on this instrument, obtained an *ex parte* decree against *Adit Sahai alone* for the sum of Rs. 16,901, 13*a*. 3*p*., the amount due for principal, interest and costs. The terms of this decree were in the usual terms of a decree in such a suit, viz., that the sum decreed should be realized by the sale of the mortgaged property, and that if the said property should not be found sufficient to meet the payment of it, the person and other properties of the judgment-debtor should be held liable for it.

On the 21st of March, 1873, *Adit Sahai* presented a petition to the Court. This, after stating that execution having been issued in the usual way, the mortgaged property had been ordered to be put up for sale; that on production of Rs. 3,000 out of the decretal amount the Court had granted time for one month, and postponed the sale to the 7th of April; that the Petitioner was very ill, and would be ruined by a forced sale, prayed the Court to grant a further postponement of the sale, and, under the provisions of the 243rd section of the Act VIII. of 1869, to appoint a *surbarakar* of the *mouzahs* in question, and certain other portions of the ancestral estate From the order made on this petition it appears that the attachment of *Bissumbhurpore* had for some reason been already quashed, and that a new attachment was about to be made; and it was accordingly directed

that in the meantime the petition should stand over. That second attachment must have been made, for subsequent proceedings in execution were had, in the course of which *Binda Koer*, the mother of *Adit Sahai*, claimed to be entitled in her own right to one *anna* of *mouzah Bissumbhurpore*, and to some part of the other property taken in execution. Her latter claim was allowed, but that affecting *Bissumbhurpore* was rejected; and the execution-sale stood fixed for the 23rd of May, 1873, when, on the 19th of that month *Adit Sahai* died. The proceedings against *Adit Sahai* were thereupon revived in the usual way against his two sons as his heirs, and the 28th of July, 1873, was fixed as the day of the sale of the property liable to the execution. On the 14th of that month, however, *Mussumat Suraj Bunsi Koer*, as the mother and guardian of the infant Appellants, filed a petition of objections for the protection of their interests as the sons of, and, therefore, under the *Mitakshara* law, the co-sharers with, their father in his lifetime in the property; and the order passed on that petition was in effect that the objections could not be heard and decided in the execution department, but that if the Petitioners had any interest in the property attached apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The execution accordingly proceeded, the sale took place on the 28th of July, and the lot described as "the eight *annas* share of the judgment-debtor in *mouzah Bissumbhurpore*, part of the mortgaged property as per inventory of the decree-holder" was purchased by the Respondents for Rs. 6600. The sale proceeding was ordered to be duly kept with the record. Whether the usual certificate was afterwards issued to the purchasers, or in what terms, if issued, it was expressed, does not clearly appear on the record; but it is certain that they had not been put into possession on the 27th of August, 1873, when the present suit was commenced.

That is a suit by the infant Appellants, suing, by their mother and guardian, against the Respondents as the purchasers of the eight *annas* of *Bissumbhurpore* at the execution-sale, and also against *Bolaki Chowdry*, the execution creditor. The plaint prayed for the adjudication of the right of the Plaintiffs to, and the confirmation of their possession in the eight *annas* of *Bissumbhurpore;* to have the mortgage bond of the 21st of January, 1870, the *ex parte* judgment obtained by the Defendant *Bolaki* thereon, the miscellaneous orders rejecting the Plaintiffs' objections, and the auction-sale of the 28th of July, 1873, set aside; and for an injunction to restrain the delivery of possession of the disputed property to the Respondents. The claim to this relief was founded on the rights which, under the law of the *Mitakshara*, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber, or waste that property; and the plaint contained the charges, usual in such cases, of immoral and extravagant conduct on the part of *Adit Sahai*.

The subordinate Judge, by his judgment of the 27th of April, 1874, found for the Plaintiffs on all the issues in the suit, and gave them a decree for the confirmation of their possession, and the cancellation of the bond of the 21st of January, the decree founded thereon, and the execution sale.

He found in particular that there was no justifying necessity for the loan of the Rs, 13,000, or for the former loans in repayment of which part of that money was employed; that the balance of the money was not shewn to have been applied to family purposes; that *Bolaki* had failed in his duty to make *boná fide* inquiry into the necessity, but had lent without such inquiry the money to a man whom he well knew to be over head and ears in debt, and living a life of debauchery and sensuality; that consequently the *ex parte* decree was void of all legal force against the family estate of which the debtor was but a joint owner; and that for the same reason the execution-sale effected thereunder could not stand so far as the family property was concerned. He also held that the rights of the purchasers stood on no better ground than those of the execution-creditor; that they were "not innocent purchasers in the proper sense of

the term, since notice was given before the sale by the Plaintiffs that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family."

On appeal to a Division Bench of the High Court the learned Judges, in their judgment of the 21st of July, 1875, said :—

"The Subordinate Judge has decided (in the words of the well-known case of *Hunooman Pershad* (1) that although the creditor would have been justified in advancing his money if he had made such inquiry as was open to him, and satisfied himself, as well as he could, as to the existence of the necessity, he did not in this case make such inquiry; or rather, perhaps, his words may be taken to mean that the result of any inquiry must have shewn him quite clearly that the only necessity of *Adit Sahai* was his own improper and immoral way of life, which required the expenditure of funds not derivable from his regular income. And this decision would, we think, have been perfectly fair and right, were we dealing with *Bolaki Chowdry* only; for he appears to have acted as the family *mahajun* for a long time previous, and must necessarily have been acquainted with *Adit's* circumstances and way of life."

The learned judges, however, proceeded to rule that the purchasers (the Respondents) stood on higher ground; that under the authority of the case of *Muddun Thakoor* v. *Kantoo Lall* (2) they were to be treated as strangers who had purchased at public auction for valuable consideration, and had bought on the faith that the decree under which the sale was made was a proper decree, and properly obtained. In a subsequent part of their judgment they threw out that the *onus* of shewing against the purchasers that the decree was an improper one lay upon the Plaintiffs; and that the evidence in the cause as to the habits and immoral conduct of *Adit Sahai*, though strong enough to support a decree against *Bolaki Chowdry*, might not be strong enough to support one against the purchasers. The formal decree passed was that the decree of the Lower Court should be reversed, and the suit as against the purchasers, Defendants, dismissed.

The result, then, of the judgment and decree under appeal is that the Plaintiffs had established, as against the execution-creditor, a case which, had he been the purchaser at the execution sale, would have entitled them to full relief against him; but that they had not established a title to any relief against the purchasers, the Respondents.

The extreme contention on the part of the Appellants is, that nothing passed or could pass to the Respondents under the execution sale, because, on the death of the judgment-debtor before the sale, the whole of his interest vested by survivorship in his sons, leaving nothing upon which the execution could operate.

The extreme contention on the part of the Respondents is, that the sale took effect on the whole of the mortgaged property, and passed the interest of the sons, as well as that of the father therein.

An intermediate proposition is, that the sale was operative upon the right, title, and interest of the judgment-debtor in the property put up for sale, so as to pass the share to which, upon a partition effected in his lifetime, he would have been entitled in eight *annas* of *mouzah Bissumbhurpore*.

The arguments addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the *Hindu* law which are the foundation of the Plaintiff's claim, and what the rights which flow from them. These questions are of course determinable by the texts of the *Mitakshara*, as interpreted by judicial decisions either of the Courts of *India* or of this Board; and it cannot be said that the course of decision has been altogether uniform and consistent.

That under the law of the *Mitakshara* each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and

(1) 6 Moore, Ind. Ap. Ca. 421; 1 P. C. J., p. 82.

(2) 14 B. L. R., 187; Law Rep. 1 Ind. Ap., p. 52; 3 P. C. J. 380.

nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the *Mitakshara* are to be found in the 27th and following *slokas* of the first section of the first chapter. It was argued at the bar that, because in the 3rd *sloka* of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and that "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary which are to be found in the *Mitakshara* itself (see *slokas* 5, 7, 8, 11 of the 5th section of the 1st chapter). But it seems to be now settled law in the Courts of the three presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh* v. *Rajcoomar Singh* (1) and *Rajah Ram Tewarry* v. *Luchman Pershad* (2), decided by the High Court of *Calcutta*; that of *Kalipershad* v. *Ram Charan* (3), decided by the High Court of the North-West Provinces; that of *Na'galina Mudali* v. *Subbiramaniya Mudali and Others* (4), decided by the High Court of *Madras*; and the case of *Moro Vishvanath and Others* v. *Garnesh Vithal and Others* (5), decided by the High Court of *Bombay*. The decisions do not seem to go beyond *ancestral* immoveable property.

Hence, the rights of the coparceners in an undivided *Hindu* family governed by the law of the *Mitakshara*, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the *Hindu* law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of *India*, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied, at least in the case of minors, if it can be shewn that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required; but this is a question which does not arise in the present case.

To what extent an unauthorized alienation can be impeached by coparceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of *India* upon it.

A distinction has been often made, both by Courts of Justice and by text writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasvami Gramini* v. *Ayyasvami Gramini* (6), of *Peddamuthulaty and Others* v. *N. Timma Reddy* (7), *Palanivelappa-Kaundan* v. *Munnaru Naikan*

(1) 12 B. L. R., p. 373.
(2) Beng. Full Bench Rulings from 1863, to 1867, p. 731; 8 W. R. 15.
(3) Ind L. R. 1 Allahabad, 159.
(4) 1 Madras H. C. R. 77.
(5) 10 Bomb. H. C. R., 444.
(6) 1 Madras, H. C. R 471.
(7) 2 Madras, H. C. R, 270.

and Another (1), and *J. Rayacharlu* v. *J. V. Venkataramaniah* (2), it has been settled law in the presidency of *Madras* that one coparcener may dispose of ancestral undivided estate, even by contract and conveyance, to the extent of his own share; and *á fortiori* that such share may be seized and sold in execution for his separate debt.

That the same law now obtains in the presidency of *Bombay* is shewn by the cases of *Damodhar Vithal Khare* v. *Dhamodar Hari Soman* (3), *Pandurang Anandrav* v. *Bhaskar Shadáshiv* (4), and *Udaram Sitaram* v. *Ranee Panduji and Another* (5). But it appears from the case of *Vrandavandás Rumdás* v. *Yamunabai* (6), and the cases there cited, that, in order to support the alienation by one coparcener of his share in undivided property, the alienation must be for value. The *Madras* Courts, on the other hand, seem to have gone so far as to recognise an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided *Hindu* family; and the law as established in *Madras* and *Bombay* has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition: see 1 *Strange, Hindu* Law [1st Ed.] p. 179, and App. vol. ii. pp. 277 and 282.

In *Bengal*, however, the law which prevails in the other presidencies as regards alienation by private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Pershad Sahu* v. *Foolbash Koer* (7), the law was carefully reviewed, and the Court, refusing to follow the *Madras* and *Bombay* decisions, held that, according to the *Mitakshara* law as received in the presidency of *Fort William*, one coparcener had not authority without the consent of his co-sharers to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case the Chief Justice intimated a doubt upon a question which did not then call for decision, viz., whether, under a decree against one coparcener in his lifetime, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal* v. *Jugdeep Narain Singh* (8), by which the law has so far been assimilated to that prevailing in *Madras* and *Bombay*, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition.

But then the question arises, what is the consequence of the debtor dying before the execution is complete; whether in that event the coparceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it.

This was much considered in the case of *Udaram Sitaram* v. *Ranee Panduji and another*, already cited from the 11 *Bombay* H. C. Report, p. 76. There the debt was the separate debt of a son joint in estate with his father. The suit was brought, after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was ruled that this could not be done; that, though a son might be liable to pay his father's separte debts, there was no corresponding obligation on a father to pay his son's debts; that the right of a son to a share in the joint ancestral property had died with him;

(1) 2 Madras, H. C. R. 416.
(2) 4 Madras, H. C. R. 60.
(3) 1 Bomb H C. R. 182.
(4) 11 Bomb. H. C. R 72.
(5) 11 Bomb. H. C. R. 76.
(6) 12 Bomb. H C R 229.
(7) 3 Beng. L. R. Full Bench Rulings, p. 31.
(8) Law Rep. 4 Ind. Ap. 247; 3 P.C.J., p. 370.

and that his share, having survived to the father, was no longer a subject upon which the execution could operate. This case is the more important, because the Court, whilst coming to the above conclusion, fully recognised the alienability of the share of one coparcener, as established at *Bombay*; and shewed, with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's lifetime.

Mr. *Mayne*, in his valuable Treatise on *Hindu* Law and Usage, section 288, states that there had recently been a decision to the same effect as that just stated at *Madras*. Indeed, this was stronger than that at *Bombay*, because the debtor had died after decree, though before execution. The case is cited as that of *Kooppookonan* v. *Chinayen* (1), but their Lordships have been unable to obtain access to a copy of those reports, and can refer only to the abstract of the case in Mr. *Mayne's* work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a coparcener, as recognised at *Madras* and *Bombay*, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the *Bombay* Case (2) Chief Justice *Westropp* cites a decision of the High Court of the North-Western Provinces, *Goor Pershad* v. *Sheodeen* (3), which is still stronger than the last-mentioned case at *Madras*, because there the property had been actually attached in the debtor's lifetime.

It may be further observed that the Chief Justice in the case already cited from 3 *Bengal* Reports (4), seems to have intimated an opinion in favour of the general rule that an undivided share in joint property cannot be followed in the hands of coparceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

(1) 1 Madras Reporter, 68.
(2) 11 Bomb. H. C. R. p. 85.
(3) 4 N. W. Prov. Rep. 137.
(4) See p. 36 *et seq.*

Their Lordships have hitherto dealt with the powers and rights of ordinary coparceners. They have now to consider how far those rights and powers are qualified by the obligation which the *Hindu* law lays upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice *Westorpp* (5):—

"Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

And as authorities for this proposition he cites *Colebrooke's* Digest, Book I., chap. v., par. 167, and *Girdhari Lall* v. *Kantoo Lall* (6). One of the earlier authorities cited at the bar upon this point was a case decided by the late *Sudder* Court of *Lower Bengal* in 1861, which is reported at p. 213 of the Decisions of the *Suddur Dewanny Adawlut* of *Bengal* for that year. In it an infant son sued by his guardian, in the lifetime of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the *Mithila* law, and the first point decided was that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the *Mitakshara*.

This case recognised the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sales by conveyance because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of

(5) 11 Bomb. H. C. R. p. 83.
(6) Law Rep. 1 Ind. Ap., 321.

Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are, "Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under *Hindu* law, can be succesfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the Plaintiff has been unable to shew that the expenses for which these decrees were passed were, looking to the decrees themselves, and we cannot now look beyond them, immoral, and such as, under *Hindu* law, the son would not be liable for."

The decision of this tribunal in the before-mentioned case of *Kantoo Lall* has, however, gone beyond this decision of the *Sudder Dewanny Adawlut*, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court. The judgment, moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle laid down in the judgment of the *Sudder Dewanny Adawlut*, that a purchaser under an execution is not bound to go further back than to see that there was a decree against the father; and that the property was propety liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions;

1st. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they shew that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be extracted from the authorities which have been considered in the case before them.

It has been found by both the Indian Courts, and, in their Lordships' opinion, properly found, that the Plaintiffs, as between them and *Bolaki Chowdhry*, the judgment creditor of *Adit Sahai*, had established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to *Bolaki* which had been contracted by their father. The two material issues on this point were, 1st, Whether the bond to *Bolaki* executed by the late father of the minors, was legally valid so far as the minors' interest is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence; and, 2ndly, What sort of a life did *Adit Sahai* live; did he spend the money borrowed from *Bolaki Chowdhry* in immoral purposes? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favour of the Plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards *Bolaki Chowdhry*. On the contrary, the words of the learned Judge who wrote the judgment of the Court are, "And this decision would, I think, have been perfectly fair and right were we dealing with *Bolaki Chowdhry* only.' There is

no doubt a subsequent passage to the effect that the *onus* was clearly on the Plaintiffs of shewing against the Respondents, who purchased at the execution, that the decree against *Adit Sahai* was an improper one, and that the evidence was insufficient to prove the fact.

If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above mentioned, and the matters of fact involved in them against *Bolaki Chowdhry*, was insufficient to prove them against the Respondents, that ruling would, in their Lordships' opinion, be erroneous. The Respondents were parties to the suit, they went to trial upon those issues, and had equally with *Bolaki Chowdhry* the means of cross-examining the Plaintiffs' witnesses, and of adducing counter evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the Plaintiffs' suit as against the Respondents, viz., that upon the authority of the decision of this Board in *Muddun Thakoor* v. *Kantoo Lall*, the Respondents are to be treated on the footing of purchasers for value, without notice; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be taken to affect the authority of *Muddun Thakoor's Case*, or of the cases which may have since been decided in *India* in conformity with it. The material passage of the judgment in *Muddun Thakoor's Case* is in these words:—

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the fathers; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and he having inquired into that, and *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defendant."

It appears to their Lordships that the present case is clearly distinguishable from that of *Muddun Thakoor*, and does not fall within the principle laid down in the passage just cited. It has been seen that before the Respondents purchased, the claim of the Plaintiffs was preferred in the Court wherein the execution proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution proceeding, and accordingly allowed the sale to take place, but made an order referring the Plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the Respondents must be taken to have had notice, actual or constructive, of the Plaintiff's objections, and of the order made upon them, and therefore to have purchased with knowledge of the Plaintiff's claim, and subject to the result of this suit. It follows that, as against them as well as against *Bolaki Chowdhry*, the Plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt.

The question remains, Whether they are entitled to any and what relief as regards the father's share in this suit? It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of *Fort William* were identical with that of *Madras*, the mortgage executed by *Adit Sahai*

in his lifetime, as a security for the debt, might operate after his death as a valid charge upon *mouzah Bissumbhurpore* to the extent of his own then share. The difficulty is that, so far as the decisions have yet gone, the law, as understood in *Bengal*, does not recognise the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of *Adit Sahai's* death, the execution proceedings under which the *mouzah* had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment creditor, a valid charge upon the land, to the extent of *Adit Sahai's* undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-Western Provinces (1), already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognised the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deendyal Lal*. If this be so, the effect of the execution sale was to transfer to the Respondents the undivided share in eight-*annas* of *mouzah Bissumbhurpore*, which had formerly belonged to *Adit Sahai* in his lifetime; and their Lordships are of opinion that, notwithstanding his death, the Respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will therefore humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely set aside the bond, the decree, and the execution sale, and in lieu thereof to make an order declaring that by virtue of the execution sale to them the Respondents acquired only the one undivided third share in the eight-annas share of *mouzah Bissumbhurpore*, in the pleadings mentioned, which formerly belonged to *Adit Sahai*, with such power of ascertaining the extent of such third part or share by means of a partition as *Adit Sahai* possessed in his lifetime; and ordering that the Appellants be confirmed in the possession of the said eight-*annas* share of *mouzah Bissumbhurpore*, subject to such proceedings as the Respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party Plaintiff is only partially successful. But the Appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

Solicitors for the Appellant: *Watkins & Lattey.*

Solicitor for the Respondent: *E. M. Hore.*

(1) 4 N. W. Prov. Rep 137.

23rd and 24th January, and 1st March, 1879.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Sir Barnes Peacock, The Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the Court of the Commissioner of Seetapore, Oudh.

THAKOOR HURDEO BUX, (Plaintiff) ... } *Appellant,*

and

THAKOOR JOWAHIR SINGH (Defendant) ... } *Respondent.*

Oudh Talookdar—Implied trust for joint family—Act I. of 1869.

Although the *talookdary Sunnud* was granted by Government in the name of the Defendant alone, it is to be presumed from his acts and transactions that there was a declaration of trust by him in favour of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit, including the villages comprised in the Summary settlement, and those acquired from the profits thereof, as also the villages granted in reward for services during the mutiny, were held by the

* 6 Cowell's Ind. App., p. 161.

Defendant, in trust for the family, as a joint family estate, governed by the rules of the *Mitakshara*.

The suit was Commenced on the 28th August 1865 long before the passing of Act I. of 1869, but that act did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate.

The Court has nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, but the decree would be without prejudice to any question that may arise in respect to the said subsequent agreement or arrangement, if any.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

When this case was before their Lordships on a former occasion it was remanded with a direction to the Commissioner to try or cause to be tried by the Settlement Officer the following issue, viz., Whether the Respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement or *sunnud*, or any and what part thereof, or of the rents and profits thereof, in trust for the Appellant and *Parbut Singh*, or either and which of them.

The Commissioner very properly took upon himself the trial of the issue, and correctly disposed of the several objections which were raised in the course of the investigation.

The nature of the present suit, the circumstances under which it was instituted, the effect of the decision of the Settlement Officer, and of that of the Commissioner from which this appeal was preferred, are fully stated in the reasons expressed by their Lordships in recommending a remand of the case for the trial of the above-mentioned issue. The case is reported in Law Rep. 4 Ind. App. 178.

In those reasons their Lordships stated that they were of opinion that, up to the time of Lord *Canning's* proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the Appellant, the Respondent, and *Parbut Singh*, and that they were either ancestral or purchased with the proceeds of ancestral estate. Their Lordships also referred to the case of *Thakrain Sookroj Koowar* v. *The Government and Others* (1), and also to the case of *Shunker Sahai* v. *Rajah Kashi Pershad*, decided in the Privy Council on the 29th of July, 1873, and since reported (2), as an authority for the proposition "that a person who has been registered as a *talookdar* under Act I. of 1869, and has thereby acquired a *talookdary* right, may, nevertheless, have made himself a trustee for another of the beneficial interest in the lands comprised within the *talook*, and be liable to account accordingly," and they remarked that the Lower Courts in the present case appeared to have decided the case merely upon the ground that the Defendant was protected by the *sunnud*, without adverting to sect. 15, Act. I. of 1869, or inquiring whether, notwithstanding the summary settlement, the *sunnud*, and the statute, the Plaintiffs or the Appellant had either *before* or after the passing of Act I. of 1869 acquired or become entitled to a beneficial interest in any part of the property. They said that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question; that on the materials before them they did not feel competent to decide it, and that they had no evidence of the circumstances under which the summary settlement was made, nor of those under which the *sunnud* was granted, nor of what was done with respect to it or to the property comprised in it before the registration of the Defendant under Act I. of 1869. The issue was accordingly directed, and there can be no doubt, and indeed it has not been disputed, that the evidence adduced upon the trial fully warranted the conclusion at which the Commissioner arrived, that the actual relation of the Appellant, the Respondent, and *Parbut Singh* remained that of a joint and undivided *Hindu* family from the date of Lord *Canning's* proclamation up to the quarrel and removal of the Respondent to *Kaswara* in 1865. The Commissioner also found, and in their Lord-

(1) 14 Moore's Ind. App. Ca. 112; 2 P. C. J., p. 705.
(2) Law Rep. 4 Ind. App. 198; 3 P. C. J., p. 289.

ships' opinion correctly found, that the evidence proved that during that period there had been a joint interest in, and common management of, the property. Such an interest could not have existed unless the Defendant had consented that the villages should be held as the joint property of the family.

Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement to the effect that *Hurdeo Bux* was his partner, and with his deposition of the 8th of July, 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Parbut Singh*, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and *sunnud* should be held by him in trust for the joint family, and as a joint family estate subject to the law of the *Mitakshara*.

The suit was commenced long before the passing of Act I. of 1869, viz., on the 28th of August, 1865, and it follows from what has just been said that, if judgment had been given before the passing of the Act, it ought to have been held that the Defendant was bound by the trust to be presumed as above mentioned. But in consequence of numerous delays and references, to which allusion has been made in the judgment of remand, the case was not decided by the Court of first instance until after the passing of the Act. It therefore became necessary to determine whether Act I. of 1869 operated so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate.

Their Lordships are of opinion that it did not.

By the 3rd section it was enacted that every *talookdar* with whom a summary settlement of the Government revenue was made between the 1st day of April, 1853, and the 10th day of October, 1859, or to whom, before the passing of the said Act, and subsequently to the 1st of April, 1858, a *talookdary sunnud* had been granted, should be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kábuliyat* executed by such *talookdar* when such settlement was made, subject to all the conditions affecting the *talookdar* contained in the orders passed by the Governor-General of *India* on the 10th and 19th days of October, 1859, and republished in the first schedule annexed to the said Act, and subject also to the conditions contained in the *sunnud* under which the estate was held.

The Commissioner very properly classified the villages in suit, and ruled that the issue directed was intended to apply to the whole of them.

The details are:—

1st. Villages comprised in the summary settlement ...	78
2nd. Villages granted in reward for services during the mutiny	20
3rd. Villages acquired from the profits of the estate after summary settlement and before the institution of the suit ...	15
	113

It should be remarked that the twenty villages granted for loyal services have since been demarcated into twelve.

The Defendant, as well as the villages Nos. 1 and 2 in the detail, fall within the category of sect. 3 of the Act.

That section, it should be observed, does not state that the *talookdar* shall be deemed to *have*, but that he shall be deemed *to have acquired* by the summary settlement and *sunnud* a permanent heritable and transferable right in the estate. The right so acquired was subject to the provisions of sects. 11 and 15 of the Act, by the latter of which it was enacted that if any *talookdar* should *theretofore have transferred* or should thereafter transfer the whole or any portion of his estate to a person not being a *talookdar* or grantee, and if such person would not have succeeded *according to the provi-*

sions of the Act to the estate if the transferor had died without having made the transfer and intestate, the transfer of and succession to the property so transferred should be regulated by the rules which would have governed the transfer of such property if the transferee had bought the same from a person not being a *talookdar*.

If, therefore, the Defendant had, before the passing of Act I. of 1869, and at any time after the date of the summary settlement and *sunnud*, and after he had thereby acquired the right which, according to the provisions of the 3rd section, he must be deemed to have acquired thereby, expressly declared that he held and would hold the estate in trust for the joint family as joint family estate governed by the rules of the *Mitakshara*, there can be no doubt that the estate would have been subject to the trust so declared, and that it would not have been converted by Act No. I. of 1869 into an estate held by the Defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the Defendants.

Sects. 13 and 14 of the Act provide for certain formalities as regards gifts or transfers to be made by *talookdars* of estates acquired or held in the manner mentioned by sect. 3 of the Act; but no question can arise in the present case as to the effect of those sections, for it has been held that the formalities thereby required are not requisite to give validity to gifts or transfers executed by a *talookdar* before the passing of the Act: *Hurpurshad* v. *Sheo Dyal* (1.)

Their Lordships have come to the conclusion that, under the circumstances of the case, there are no grounds for making any distinction as regards the rights of the parties between the seventyeight villages included in the summary settlement and the twenty villages, now consolidated into twelve, which were granted by the *sunnud* for services during the mutiny, or those which were acquired from the profits of the estate. As regards those which were granted for services during the mutiny, the Plaintiffs *Hurdeo Bux* and *Parbut Singh* were doubtless as loyal as the Defendant *Jowahir Singh*, and rendered equally good services to the British Government. It is, however, stated by the Commissioner, and there seems to be no reason to doubt the correctness of his opinion, that he was fully convinced that the Government at the time they conferred the reward estate believed that they were conferring it on *Jowahir Singh*, the Respondent, alone. He says:—

"I do not think they had any remembrance of the admission in the A Statement of the summary settlement, a document that would not be before them at the time, and the Respondent's name appeared alone as proprietor. But if he gave loyal support to Government it was with the means of a *talook* in which the Appellant and *Parbut Singh* had an actual, practical, existing common right at the time, and they had carried off the family and its effects to a place of safety, and returned in time to retake their fort, and at least quicken and molest the retreat of the rebel chief *Feroz Shah*, who was one of the sons of the King of *Delhi*, as deposed to by witnesses 8, 10, 11, and 12, for Appellant and witness 2 for *Parbut Singh*. I do not think that if the whole facts had then been before the Government, it would not have given the reward to the brotherhood all the same. In this matter I think the Respondent was acting at the time as the representative of the family; and I do not see it any where shewn that the common interest and the common management did not include these villages subsequent to their acquisition, and up to the rupture in 1865."

It appears from the evidence, as well as from the finding of the Commissioner, that the Plaintiffs, *Hurdeo Bux* and *Parbut Singh*, were just as loyal as the Defendant *Jowahir Singh*, and rendered loyal services to Government equally as valuable as those which were rendered by him; that after the rebels had defeated the Defendant and he had retreated to *Lucknow*, *Hurdeo Bux* and *Parbut Singh*

(1) Law Rep. 3 Ind. App. 278. 3 P C. J., p. 611.

came to *Bassadeh*, drove the rebels away, and retook the fort; and that they also, with their followers, attacked the rebel *Feroz Shah*, one of the sons of the King of *Delhi*, after he had crossed the *Sarain*, took from him a gun, and hastened and molested his retreat.

These loyal acts, if not in the remembrance of the Government or of its officers, must have been known by the Defendant, and it must also have been known to him that the loyal services which he rendered to the Government were rendered by means of the then joint family property, and that in accepting the reward from Government he acted as the representative of the family. It may therefore reasonably be presumed that the knowledge of these facts induced him to treat the reward villages granted by the *sunnud* in the same manner as the ancestral villages which were the subject of the summary settlement, and accordingly it appears that from the time of the *sunnud* to the time of the quarrel in 1865, the reward villages, like all the others, were treated as part of the joint family estate, and were subject to the common management. This part of the case is similar in many respects to the case of *Hurpershad* v. *Sheo Dyal* (1), to which reference has already been made.

Upon the whole, then, their Lordships are of opinion that it is to be presumed from the acts and transactions of the Defendant that there was a declaration of trust by him in favour of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit were held by the Defendant in trust for the family, as a joint family estate, governed by the rules of the *Mitakshara*; and they rejoice to find that a loyal subject of the Crown, who rendered good service to the Government in the time of the rebellion, has not been deprived of all his property by the act of confiscation, and through the want of knowledge or the absence of remembrance on the part of the officers of Government of the moral claim which he had upon the Government for the restoration of his property.

(1) Law Rep. 3 Ind. App. 270; 3 P. C. J., p. 611.

The plaint does not allege that the Plaintiffs have been dispossessed of their rights, but merely that the Defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that, after inquiry, proper orders may be passed that they be not deprived of their right.

Their Lordships must deal with the case as it stood at the time of the commencement of the suit.

At that time there does not appear to have been any complete separation or division of the family, and the Plaintiffs do not pray for a partition of the estate. *Hurdeo Bux* was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint *Hindu* family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal and to reverse the judgments and decrees of both the Lower Courts, and to declare that the Defendant holds the villages in suit in trust for the joint family, and as a joint family estate, governed by the rules of the *Mitakshara*, and to order and decree that the Defendant do cause and allow the said villages, and the proceeds thereof, to be managed, used, dealt with, and applied accordingly; and that he do pay the costs of the Plaintiff *Hurdeo Bux* in both the Lower Courts out of the estate.

Further, their Lordships do order that the costs of the Plaintiff, *Hurdeo Bux*, in this appeal be paid by the Respondent out of the estate.

A question has been raised on the argument of this appeal, whether, by reason of an arrangement alleged to have been entered into by *Hurdeo Bux* and *Parbut Singh*, pending the suit, the latter is entitled to the benefit of this appeal or the former to recover *Parbut Singh's* share as well as his own.

It was also suggested that *Parbut Singh* had, after the arrangement with *Hurdeo Bux*, entered into an arrangement with the Defendant.

Their Lordships have nothing to do with any agreement or arrrangement which may have been made by any of the parties subsequently to the commencement of the

suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit subsequent to the commencement thereof.

Agent for the Respondent: *F. Banow.*

Agent for the Appellant: *T. L. Wilson.*

6th February, 1879.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, The Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

On Appeal from the High Court, of Judicature at Fort William in Bengal.

RAJ BAHADOOR SINGH, (Defendant)* ... } *Appellant,*

and

ACHUMBIT LAL, (Plaintiff) *Respondent.*

Limitation—Suit on accrual of right to possess—Adoption.

The law of Limitation provides that with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (or at the option of the Plaintiff) the date of the death of the adoptive father." This provision, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued.

THE judgment of their Lordships was delivered by

THE RIGHT HON. SIR ROBERT PORRETT COLLIER:—

In this case the Respondent (the Plaintiff) *Achumbit Lal* brought his suit to recover possession of certain property to which he alleged that he was entitled as joint heir with his brother one *Doorga Pershad.* The Defendant *Raj Bahadoor Singh,* to whom was joined the brother of the Plaintiff, claims under *Jusoda Chowdrain* the widow of *Doorga Pershad,* and the real question in the cause is whether, under a certain document called a *waseeutnamah,* executed by *Doorga Pershad* on the 24th of May, 1820, the widow's estate was enlarged from the ordinary estate of a *Hindu* widow to an absolute estate. The main contention in the Court below appears to have been that the document operated in the nature of a will, conferring upon her, or granting to her, an absolute estate; but the main contention before their Lordships has been somewhat different. It has not been seriously argued that the document conferred upon her or granted to her any estate which she had not before, but it is contended that it operates by its recitals as an admission on the part of *Doorga Pershad,* by which a person claiming under him would be bound, that the widow had in fact a joint interest with *Doorga Pershad* in the property which is the subject of the *waseeutnamah,* a part of which is claimed in this suit.

The case was heard before the two Courts in *India,* both of whom found in favour of the Plaintiff. The High Court was composed of Mr. Justice *Glover,* and a very learned native, Mr. Justice *Romeshchunder Mitter,* and those learned Judges had the original document before them. They appear to have considered that the translation which is now in the Record was to some extent imperfect, and they gave their decision upon the construction which they put upon the original document. It would have been more satisfactory to their Lordships if they could have had before them the translation of the document on which the High Court relied, and they cannot help thinking that it was incumbent on the Appellant, who desires to satisfy them that the High Court was wrong, to furnish them with that translation, or at all events some information with reference to it. As it is, however, their Lordships must deal with the document which is before them. Undoubtedly it is somewhat ambiguous in many of its expressions, but

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6 Cowell's Ind. App., p. 110.

they think it clear, as has been before observed, that there was no intention on the part of *Doorga Pershad* to grant any new estate to this lady; and they do not see their way to differ from the construction which was put upon it by the High Court, and which is expressed in these terms in the judgment of Mr. Justice *Glover*, agreed to by Mr. Justice *Mitter*: "I take the meaning of *Doorga Pershad* to be, that feeling old and unable to manage the complicated affairs of a large estate, and knowing that his wife, a *purdanashin* lady, would likewise be incompetent to the business, he agrees to pay a manager to take all the trouble off their hands, and to do so at once. He speaks of his wife as being joined with him as owner, but these words cannot be taken literally, as throughout the document he speaks of himself as the sole proprietor, and all his arrangements are made with reference to his own comfort and advantage in the first instance. *Jusoda Chowdhrain* is to get nothing till his death. The warning given to his other heirs refers to the time between his own death and *Jusoda's*. That the lady herself did not understand the *wasceutnamah* to be a will giving her the property to dispose of after her death is clear from her own statement" in another suit. Their Lordships, on the whole, are not prepared to disagree with this view, which was taken by the learned Judges of the High Court, and this construction of the document disposes of the main point in the case.

It only remains to notice two subsidiary questions. The widow executed, on the 7th of July, 1851, a *putnee* lease in favour of *Raj Bahadoor Singh* of two out of three of the *mouzahs* which are the subject of this suit, and part of the prayer of the claim is that that *putnee* lease be set aside. Inasmuch as it has been found as a fact by both Courts that there was no necessity for borrowing the sum for which the *putnee* was granted, it follows that if the widow had no more that a *Hindu* widow's estate the *putnee* could only bind her life interest. It appears that the lady also executed what has been called a deed of adoption on the 24th of May, 1860, by which she professed to adopt, in pursuance of the permission of her husband, who had died in 1825, the father of *Raj Bahadoor*, to whom the *putnee* had been granted, and *Chutturdhari Lal*, the brother of the Plaintiff and a Defendant, and to make over to them her property. But the gift was not to take effect until her death, possession being retained by her during her lifetime. It has been admitted on the part of the Appellants that this document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. A part of the claim is that this document also be cancelled. Upon this part of the case a question has been raised concerning the *Statute of Limitations*, and the schedule to the *Statute of Limitations* of 1871 has been quoted, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the option of the Plaintiff) the date of the death of the adoptive father." On the above view of the document, the words of the statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the Plaintiff whether it be set aside or not. Their Lordships however think it well to say that the decree of the Court below in setting aside this document and the *putnee* lease, must be considered to have in effect decided no more than that the Plaintiff was entitled to recover notwithstanding those documents, without in any de-

gree compromising any rights which other parties may have under them.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: *Henderson & Co.*

Solicitor for the Respondent: *E. M. Hore.*

12th and 13th March 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJAH KISHENDATT RAM, (Defendant) } *Appellant*,

and

RAJAH MUMTAZ ALI KHAN, (Plaintiff) } *Respondent.**

Mortgage—Acquisitions by Mortgagor and Mortgagee—Redemption.

Semble.—Under the English law, which in so far as it rests on principles of equity and good conscience may properly be applied in India, it is recognized as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee; and, conversely, that many acquisitions by a mortgagee are, in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption.

But *semble.*—It cannot be affirmed that every purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms:—*e. g.*, where there is a mortgage of a *zemindari* in Lower Bengal, out of which a *patni* tenure has been granted, the mortgagee in possession might buy the *patni* with his own funds and keep it alive for his own benefit.

An *Oudh talukdar* granted an usufructuary mortgage of a portion of his *taluk*, in respect of which there existed certain subordinate *birt* tenures. The mortgagee having subsequently acquired these *birt* tenures by purchase, did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the *taluk*. The mortgagor, many years after, brought a suit for redemption, when the question arose, whether upon repaying the sum expended by the mortgagee in the purchase of the *birts*, in addition to the amount due on the face of the mortgage-deed, the plaintiff was entitled to the possession of the estate as then enjoyed by the mortgagee; or whether the latter was entitled to retain the *birt* rights and interests purchased by him as an absolute under-proprietary tenure in subordination to the *talukdar*, and to have a sub-settlement on that basis,—

Held, that the plaintiff on repayment of the original mortgage debt, and on reimbursing the defendant the sum expended in purchasing the *birts*, was entitled to re-enter on the estate with all the rights and privileges enjoyed by the latter.

THE principal question raised on this appeal, which was preferred from a decision of the Judicial Commissioner of *Oudh*, dated the 9th February 1875, was as to whether a *talukdar*, who had mortgaged a portion of his *taluk* and afterwards sued to redeem on payment of the mortgage loan, was entitled not merely to recover the estate as it was possessed by him at the time when the mortgage was executed, but also to be put into possession, on repaying the actual purchase-money, of certain *birt* or subordinate rights and interests which had been purchased by the mortgagee while in possession.

The Judicial Commissioner, in deciding in favor of the plaintiff, observed:—

"It appears to me that this case may fairly be decided on the principle of the civil law, that any *bonâ fide* possessor, as for instance a creditor, who has laid out money in preserving, repairing, or substantially improving an estate, should be allowed a privilege or lien for such meliorations—(Story's 'Equity Jurisprudence,' Vol. II, s. 1239). This principle must at the same time be held subject to another, *viz.*:—That a mortgagee has no right to charge on the mortgagor the costs and expenses of unnecessary improvements, and should not be per-

* 6 Cowell's I. A., p. 145; 5 I. L. R. Cal., 198.

mitted to increase the value of an estate in such a way as to make it impossible for the mortgagor ever to redeem—(see 'Addison on Contracts,' 5th Ed., page 260). In the present instance, then, I find the facts to be, that the plaintiff mortgaged the estate of *Itiba Khera* for Rs. 36,000 to the defendant, and that by this mortgage he intended to convey to the defendant whatever proprietary rights he then held in the estate. The defendant on taking possession found himself hampered in the full and free enjoyment of the assets of the estate by the existence of certain incumbrances, and he, therefore, bought out some of the incumbrance holders. I consider this to have been, under the circumstances, a legitimate mode of increasing the value of the estate, and provided the expenditure incurred is not such as to render it impossible for the mortgagor to redeem, the mortgagee should in my opinion be allowed a lien for such melioration. Accepting the facts found by Captain Forbes, it appears the expenditure by defendant in the purchase of *birts* has been Rs. 3,139. This cannot be held to be an exorbitant expenditure, and I think plaintiff should reimburse the defendant this amount or allow him to retain the *birt* rights, which is proved that he has purchased."

The defendant appealed to Her Majesty in Council.

Mr. *Leith*, *Q. C.*, and Mr. *Doyne*, for the appellant, contended, that the relief decreed to the plaintiff should have been limited to the redemption of the interest which he possessed in the property mortgaged at the date of the mortgage, and should not have extended to the subordinate rights which the appellant, the mortgagee, had acquired at his own expense while in possession. The rights so acquired were wholly distinct and separable from the *talukdari* rights which were the original subject of mortgage, and ought not to have been treated as a mere improvement of the estate mortgaged. If the plaintiff was entitled to have these rights conveyed to him, the order for their transfer should have been made on payment of their present actual value, and not on payment merely of what was given for them at the time when they were bought.

Mr. *Cowie*, *Q. C.*, and Mr. *Graham*, for the respondent, supported the judgment of the Judicial Commissioner.—As between the mortgagor and the mortgagee the whole estate was mortgaged, and not merely certain rights therein, and the mortgagor was accordingly entitled to redeem the whole estate. The benefit of the purchase made by the mortgagee in possession enured to the mortgagor on his repaying to the former the expense actually incurred.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE :—

The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd of May, 1846, *Rajah Umrao Ali Khan*, described as the Zemindar of *Ilaka Utraola* (the father of the Respondent), executed in favour of *Punde Ramdatt Ram* (who is now represented by his brother the Appellant) the instrument of mortgage which is set out above. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the villages specified in the schedule to it, redeemable on the repayment, at a certain season of the year, of Rs. 36,000, the principal sum secured; the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, *viz. Panipur* and *Mubarakpur*, have in some way ceased to belong to the estate; the others have, in the record, been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under vari-

ous *birt* tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the *Rajah* of *Utraola*. The resistance of the birtias seems to have been in a great measure successful; and it must now be taken to have been found in the suit that the *birts* were valid and subsisting sub-tenures at the date of the mortgage; and that the rights of the birtias in the different villages comprised in the 1st, 3rd, 4th, and 6th of the seven classes or groups above referred to were purchased by the mortgagee some time in or before the year 1849. The *birt* right (if any in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of *Oudh*.

At the summary settlement, posterior to Lord *Canning's* proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thence-forward to have held them as a *talook*, subject of course to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

In December, 1870, and in the course of the regular settlement of the province, the Respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are what are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain *Forbes*, the settlement officer, in his proceeding of the 5th of November, 1873, found that at the time the mortgage deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called "*bhent*," and of certain market dues, to the occasional levy of a cess known as "*sharakatana*," and to a reversionary right in all lapsed *birt* estates, the title in which had been derived from the mortgagor's family; that the taxes thus levied were of the nature of feudal or manorial tribute, and though necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the *Rajah* of *Utraola* was competent to convey, and all that was conveyed under the mortgage deed.

This proceeding being under a remand, Captain *Forbes* was not competent to determine the case judicially; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem was the superior title as above described, subject to the *birt* interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th of June, 1874, decided that what was conveyed by the mortgage and was then redeemable by the mortgagor was, as between him and the mortgagee, the full and unrestricted proprietary title in the estates covered by the deed of mortgage. He treated the acquisition of the *birts* by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This Judgement was on appeal varied by the Judicial Commissioner, whose order of the 9th of February, 1875, was in the following terms:—

"The right of redeeming the mortgage 'on the estate of *Itwa Khera*, executed in 1253 Fusli by *Umrao Ali Khan*, ancester of Plaintiff, in favour of Defendant, is decreed in favour of Plaintiff on payment of Rs.36,000, and if the Plaintiff at the time of redemption pays to Defendant the further sum of Rs.3139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the Defendant, but if he fail to pay the further sum of Rs.3139 at the time of redeeming the mortgage, Defendant will be

entitled to retain the rights and interests of the birtia zemindars purchased by him in the estates of *Keera Dih*, *Bankata Ganesphur*, *Sanapar* and *Itwa*, and will retain these rights as an absolute under proprietary tenure in subordination to Plaintiff, paying to the plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent."

Against this order the present appeal is preferred. There is no cross appeal, and therefore the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase-money of the *birts*, plus the original mortgage money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interests of the birtia zemindars purchased by him as an absolute under proprietary tenure in subordination to the *talookdar*, and to have a sub-settlement on that basis.

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult one.

The Appellant originally insisted that what was mortgaged was the mere right to receive a *malikanah* allowance; and he still insists that the mortgage must be taken to have been made subject to the *birts*: that those *birts*, though held in some sense under the *Rajah* of *Utraola*, were distinct estates; that the Plaintiff is not entitled to redeem more than his ancestor mortgaged, and that the Appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the *birts* bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindary in lower *Bengal*, out of which a *putnee* tenure has been granted, or one within the ambit of which there is an ancient *mokurreree istimrari* tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that *putnee* or *mokurreree*. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the *putnee*, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the *mokurreree*.

Their Lordships nevertheless have come to the conclusion, though not without some doubt and difficulty, that the decision of the Judicial Commissioner was in the peculiar circumstances of this case correct, and ought to be affirmed.

The first point to be considered is, what is the true construction of the original contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognised *birts*, for it contains no reference to them. On the face of it it is a mortgage of the *ilaka* or *ilakas*, consisting of the thirty-five villages, one piece of land, and one *jote*, "including all the internal and external rights which had descended to the mortgagor from his ancestors." And it is expressed to be upon the following conditions, viz.: "That the said *Pande* is allowed to take possession of the said villages, and enter into engagement with the Government for the payment of revenue. I (the mortgagor) shall have nothing to do with the profits of the estate, or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum (the Rs. 36,000) in one lump to the *Pande* in the month of *Baisakh*, when there are no crops standing on the ground." "If any one appears to lay claim to the said estate, it will be my duty to defend the suit, with which the *Pande* shall have no-

thing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations, plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights privileges and powers of a zimindar as between him and the subtenants; that he was to take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the Defendant that the Plaintiff had no other right than that of redeeming a *malikanah* allowance, and have held that the subject of the mortgage was the talookdary interest, with all its incidents, whatever that might include.

The next point to be considered is, what was the nature of the *birt* tenure, and what the relations between the birtias and the superior zemindar. Upon this point their Lordships were referred by Mr. *Doyne* to the Settlement Circular of the 29th of January, 1861, being an official paper issued by the then Chief Commissioner of *Oudh* by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th, both inclusive.

The 18th says that *birts* were given for whole *mauzahs*, or patches of lands in *mauzahs*, and purposes in the first instance to deal with the latter. The 19th says, "These tenures, when granted by the *talookdar* for money received, will be maintained as representing the proprietary rights of the birtias, who by purchase have acquired the position of intermediate holders, and as constituting the portion of profits left them by the *talookdar*." And then, after distinguishing between *birts* given by *talookdars* and those given by mere *thekedars*, and treating the latter as not entitled to be maintained, it says, "*Birts* given by the original *zemindars* before the village was incorporated in the talookah will be upheld, unless the *talookdar* resumed them prior to 1262-63." The 21st paragraph says, "*Birts* of entire *mauzahs* are very common in *Gondah* and *Gorakpore*. They originated in purchases from needy *talookdars*, and sometimes in clearing leases of jungle land. In the *Utraola* and *Batui* pergunnahs of the *Gondah* districts, the birtias had been in many instances admitted to direct engagements with the Native Government for years previous to the annexation, and, of course, were settled with, and should have been so at the late summary settlement, on the principle that we are not bound to restore to the *talookdars* what they had lost before our rule commenced." The 22nd paragraph says, 'In other instances the birtias held under the *talookdar* on the terms of their *birt pattahs*. These generally were, that 10 per cent., or dyhak, as it was called, on the amount of the *pattahs*, should be returned to them; that while they held on their *pattahs*, the entire control of the village rested with them; and if they threw them up rather than accept enhanced terms, they were entitled to 10 per cent. on the collections. Sometimes the birtia's proprietary profits were shewn in holding a portion of the area '*nankar*.'" The 23rd paragraph says, "In other instances the birtias had been stripped of every vestige of proprietary right, for embarrassed *talookdars* would sell the *birt* of a village several times over, and nothing was more common than to see several claimants to the *birt* of a village, each with his *pattah* in correct form." Paragraph 24 says, "Where the birtia has lost possession there is no more to be said. We are not to restore it to him, but the Chief Commissioner is clearly of opinion that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their *pattahs* under the *talookdars*, must be maintained in the full enjoyment of their rights in subordination to the *talookdars*. It is no argument that the *talookdar* may not realize more than 10 per cent. above the Government demand.

Such *birt* tenures must be considered an intermediate interest between the *talookdar* and the *ryot*, and, as such, entitled to be maintained." The 25th paragraph says, "The meaning of the term '*birt*' is a 'cession.' It is the purchase of the proprietary rights subordinate to the *talookdars* on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power. In *Gorakpore* the birtias were generally admitted to direct engagements, though charged with a *malikhana* of 20 per cent. to the *talookdar*. Here he must deal with the superior party."

The result of what has been cited seems to be that, under the *nuwabi*, these *birt* tenures were presumably carved out of the *talookdar's* or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular *pattah* or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place *malikhana* was payable to the *talookdar;* that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the birtias, a relation which, in an unsettled state of society like that of *Oudh* under the *nuwabi*, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the zemindar advantages which would not be possessed by a stranger. On the other hand it is clear that *birts* still subsisting are tenures which would entitle their holders to subsettlement under the *Oudh Sub-settlement Act* of 1866.

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the *birts* in question. To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 F. (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the birtias had in former years been allowed to engage for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the birtias, including even those of *Itwa*, who are now said to have previously parted with all their *birt* interests.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talookdary title, and was only prevented from doing so by the resistance of the birtias, and the interposition, with or without jurisdiction, of the officer called the *nazim*. Here, then, the *talookdar de facto* was in open conflict with tenants of the estate claiming to be birtias. There is no proof of any regular trial and determination by a civil court of the disputed right. The *nazim* may have taken action merely as a matter of police, and to prevent disturbance. Then follow the purchases in 1256 F. and 1257 F., and the execution of the deeds by virtue of which the birtias, for very inconsiderable sums, conveyed their interests in the *birts* in question nominally to *Pande Ramdatt Ram*. There is, however, no evidence of the negotiations which led to these contracts; nothing which shews upon what basis they proceeded; how far, in making the purchases, the *Pande* was acting in the character and using the powers of *talookdar* or how far in doing so he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of

compromises, which the powers of *talookdar* were exerted to effect on favourable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a *talookdar* holding under an absolute as distinguished from a mortgage title, the tenures would, as a matter of course, have merged in the talook. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shewn to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation he never sought to engage for these villages as birtia, and on the summary settlement after Lord *Canning's* proclamation, he did in fact engage for them as *talookdar*, and as parcel of the talook. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he therefore not unnaturally dealt with the *birts* as merged in the talook, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases he would have resumed his position as *talookdar*, with the means of dealing on favourable terms with birtias who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of *talookdar de facto*, has so acquired the *birts* and allowed them to merge in the talooka. To allow him now to revive these *birts* for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to *malikanah*, and possibly rendering the talooka no longer worth redemption.

Their Lordships are therefore of opinion that the Judicial Commissioner had strong grounds for applying the principle, which he explains by his subsequent Minutes of the 26th of January and the 9th of February, 1875, he intended to affirm in his order of remand of the 26th of March, 1873. In his final judgment he says that his intention in sending the case back to the Commissioner's Court was to ascertain whether the Defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the Plaintiff in respect of his expenditure on this account.

There was some discussion at the Bar on the English decisions upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognise the general equity of the principle, and shew how it has been applied by the Courts of this country. It is therefore desirable shortly to notice the arguments on this point. It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer* (1) as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case which in its

(1) 2 P. Wms. 511.

circumstances comes nearest to the present is that of *Doe* v. *Pott and Others* (1), in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders. Some stress was laid upon the case of *Shaw* v. *Bunny* (2), in which Lord *Romilly*, Master of the Rolls, held that a second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. An opinion to the same effect had previously been expressed by Vice-Chancellor *Kindersley* in *Parkinson* v. *Hanbury* (3), though he decided that case against the second mortgagee on the ground of his having had actual notice of an irregularity in the sale. These authorities, however, do not seem to their Lordships to touch the present case. The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Young, Jackson, & Beard.*

Solicitors for the Respondent: *Watkins & Lattey.*

(1) 2 Doug. 709. (2) 33 Beav. 494. (3) 1 Drew. & Sm. 146.

15th and 18th March, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, The Right Hon. Sir Montague Edward Smith and the Right Hon Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

NARAYANRAO RAMCHANDRA PANT, (Defendant,) ... } *Appellant,*

and

RAMABAI, widow of RAMCHANDRA PANT, Plaintiff), ... } *Respondent.**

Maintenance—Limitation—Act XIV of 1859. Sec. 1, Cl. 13—Widow leaving ancestral house—Demand and refusal—Cause of action.

By the Hindu common law the right of a widow to maintenance is one accruing from time to time according to her want and exigencies. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

A Hindu, disposing of his estate by will, expressed his hopes that his wives and sons would all live amicably together after his death, and would all look upon his eldest son as the head of the family; he then bequeathed the whole of his property to his eldest son, directing him to provide for his (the testator's) widows, and for the other members and dependents of the family, and he declared that he made these provisions

6 Cowell's I. A., p. 114, 3 I. L. R. Bom. p. 415.

with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease.

In a suit brought more than sixteen years after the death of the testator by one of his widows against the eldest son to recover maintenance, it was pleaded for the defendant that the claim was barred by limitation under cl. 13, sec. 1, Act XIV of 1859, which provides that suits for the recovery of maintenance, when the right to receive such maintenance is a charge on the inheritance of any estate, must be brought within twelve years from the death of the person on whose estate the maintenance is alleged to be a charge It was also pleaded that, under the will of the deceased, it was a condition precedent to the plaintiff's right to maintenance, that she should live under the same roof and in joint family with the defendant. It was further pleaded that there having been no demand and refusal of maintenance, the plaintiff had no cause of action.

Held, 1st, that the testator had not created, by his will, a specific charge on the inheritance of his estate within the meaning of the provision of Act XIV of 1859, but had merely imposed upon the defendant an obligation, in case the will would interfere with the ordinary Hindu law, entitling his widows to maintenance, to make allowances for their support of a kind analogous to that which the law would have provided.

2nd, that there was no condition in the will making the plaintiff's right to maintenance dependent upon her living under the same roof with the defendant, and that she was, therefore, left in the ordinary position of a Hindu widow, in whose case separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and position.

3rd, that, although there was no evidence of a specific demand for maintenance, there was ground for believing that maintenance had been withheld under circumstances amounting to a refusal, giving rise to a cause of action.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH :—

This was a suit brought by *Ramabai*, the widow of *Ramchandra Pant*, against *Narayanrao Ramchandra Pant*, his eldest son, to recover arrears of maintenance. The claim states: "The liability to maintain me according to the dignity of my family rests, under the Hindu law, with the defendant." *Ramchandra Pant* was *subadar* in the service of the *Maharajah*, the *ex-Peishwa*. He died on the 22nd of July, 1855, leaving two wives, and children by each. The defendant was the step-son of the widow *Ramabai*, the Plaintiff. A great deal of litigation has taken place in this family, owing to disputes which arose immediately after *Ramchandra Pant's* death. He left a will which was disputed by his younger sons, and an action was brought, which ultimately came upon appeal to Her Majesty in Council. After considerable discussion of the evidence, which had been given at great length, the will was established. Another suit was brought by the widows to recover some jewels which they alleged to be their property under the will of the testator, in which the widows failed, it being decided that the jewels to which they might lay claim under the will were in their own possession. This antecedent litigation does not materially affect the question arising in the present suit, except so far as it shews the state of hostility in the family, and accounts for the withholding by the Defendant of the maintenance to which the Plaintiff was entitled. The present suit was brought on the 18th of October, 1871.

One point now raised is that the maintenance is barred by limitation; the other point is that the maintenance is payable under the will of *Ramchandra Pant*, and that it is a condition precedent to the right to obtain it that the widow should live under the same roof in joint family with the Defendant. Those are the two principal points which have been raised. A third point is that there has been no demand and refusal of the maintenance.

The case has been tried in the Courts below upon several issues which it is not necessary to mention in detail, in asmuch as the three points just indicated are those which alone are relied upon at the bar. The result of the suit in the Courts in *India* was that the Subordinate Judge awarded a sum of Rs. 300 *per mensem* to the Plaintiff for maintenance, and gave her arrears for six years amounting to Rs. 21,000. The High Court reduced the monthly allowance to Rs.200, and proportionately reduced the amount of arrears, giving the sum of Rs. 14,400.

To comprehend the argument on the points which alone remain for decision it is necessary to refer to the will of *Ramchandra Pant*. It is stated in the report

of the appeal to Her Majesty in 9 *Moore's* Indian Appeals, p. 101.* Mr. *Benjamin* read the will from this report. It is thus stated: "The effect of it, according to the English translation as made in the Zillah Court, was to declare that the testator was seventy-five years of age, that his eldest son had two sons and one daughter, and that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives and to pay them proper respect, and to provide also for his younger brothers and for the testator's dependents; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents of two villages mentioned in the will, and pay over the proceeds to his younger brothers as such proceeds were from time to time received, and he was further to pay to each the sum of Rs. 25,000. The testator then gave Rs. 13,000 for the benefit of his granddaughter, the daughter of the Appellant, on her marriage, and allotted Rs. 40,000 for what he calls the customary outlay in the first year after his death, including religious pilgrimages." The words of the will relating to the points in issue, according to one of the translations in the present record, to which attention was called by the learned counsel during the argument, were: "*Nana*, the eldest son, shall provide for both the mothers, treating them with great respect; and he shall regard each of his two younger brothers as a son, providing for them, and my old servants, in a manner befitting their several conditions in life."

* 1 P. C. J., p. 844.

The testator's property appears to have been self-acquired, and consisted of some villages and large sums of money in Government paper, and other personal property, and he refers in his will to an expected pension from the East India Company. It has been conceded at the bar that whatever was given by the testator to his wives in his lifetime was not given in lieu of maintenance; in fact, all that was given to them were some jewels, no doubt of considerable value. Nor has any question been made at the bar that if the Plaintiff is entitled to succeed, the amount awarded by the High Court is excessive. The only questions are those which have been already mentioned.

The first question arises upon the *Statute of Limitations*, and it is contended that this action is barred altogether, both for the maintenance and the arrears, by sub-sect. 13 of the 1st section of Act No. XIV. of 1859, which is in these terms: "To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate; the period of twelve years from the death of the persons from whom the property, alleged to be joint, is said to have descended, or on whose estate the maintenance is alleged to be a charge." It was contended that under the will of the testator the maintenance is made by the will a charge upon the estate. The effect of the will is, no doubt, to give the whole property of the deceased to the eldest son, mainly because he appears to have had more confidence in his eldest son than in the younger ones. But whilst giving the estate to the eldest son he recognises the claims by Hindu law of the younger brothers and the widows to maintenance He makes specific provisions with regard to the younger brothers, giving them the profits of particular villages, but he makes no specific arrangement for the widows. He merely requires that they should be maintained, and treated with proper respect. He creates no charge on any specific portion

of his property, but imposes an obligation upon the Defendant to make allowances for the support of the widows of a kind analogous to the maintenance to which widows by Hindu common law are entitled, supposing probably that by his will he might have interfered with that law. It is to be observed that in the former suit brought by the widows they claimed under the will and to take the benefit of it.

Assuming this to be the proper construction of the will, their Lordships think that the Subordinate Judge was right in his conclusion that it did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in the 13th sub-section of the statute.

The language of the Act is not very clear; and by two subsequent Statutes of Limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

The only authority cited by the Subordinate Judge is the case of *Timmappa Bhat* v. *Parmeshriamma* (1), which sustains his judgment, though the facts are not altogether the same as the facts of the case now under appeal. No decision was cited at the bar opposed to the construction which the Subordinate Judge has put upon the Act.

Their Lordships have observed with some surprise that no mention of this point, which is undoubtedly one of some importance, was made in the judgment of the High Court, and they think that when an Appellant comes to complain of the judgment of a Court upon a point which does not appear upon their judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear. It may be that this point was disposed of in the course of the argument. In the absence of explanation the High Court must be taken to have agreed with the Subordinate Judge.

The second point made was that the Plaintiff has disentitled herself to maintenance by separating from the son and living apart from him. It is argued that it was made a condition of the will to entitle her to maintenance that she should reside under the same roof and in joint family with him. Their Lordships, however, think that no such condition is to be found in the will, and that she was to be left in this respect in the ordinary position of a Hindu widow, in which case separation from the ancestral house would not generally disentitle her to maintenance suitable to her rank and condition.

It was then said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it.

These observations dispose of all the points which have been raised at the bar, and their Lordships think that this appeal fails, and they will humbly advise Her Majesty to affirm the decree of the Court below.

Solicitors for the Appellant: *Brooks, Jenkins, & Co.*

(1) 5 Bom. H. C. R. (A. C.) 130.

18th March, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

TIRU KRISHNAMA CHARIAR and others (Plaintiffs) ... } *Appellants*,

and

KRISHNASAWMI TATA CHARIAR and others (Defendants) ... } *Respondents*.*

Cause of action.—Money interest—Performance of religious services.

A claim to certain pecuniary benefits and payments in kind which a plaintiff alleges himself to be entitled to receive from the defendants in respect of the performance of certain religious services, is a claim which the Courts of Justice are bound to entertain; and if, in order to determine the plaintiff's right to such benefits, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and must decide that right.

This was an appeal brought under special leave from Her Majesty in Council, against a decretal order of the High Court of Judicature at Madras, dated the 16th February 1877, confirming an order of the District Judge of Chingleput of the 21st December 1876, whereby he rejected a plaint filed by the present appellants in a suit brought by them, on the ground that it disclosed no cause of action.

Mr. *J. D. Mayne* for the appellants, contended that the plaint disclosed a sufficient cause of action, and that the Courts below were wrong in rejecting it. He referred to one previous litigation between parties substantially the same, in the case of *Narasimmo Chárydr* v. *Sri Kristna Tata Chárydr*, (1) in which a similar suit was entertained. The same view had been taken in the case of *Archakam Srinivasa Dikshatulu* v. *Udayagiri Anantha Charlu*, (2) although in that case it was held that the claim made by the plaintiff was *res judicata*. See also *Kamalam* v. *Sadagopa Sámi* (3) in which *Chinna Ummayi* v. *Tegarai Chetti* (4) was distinguished. The present case differed from that of *Striman Sadagopa* v. *Kristna Tata Charyar* (5) in so far as the plaintiff in that case was not officially connected with the temple in respect of which his claim was brought. In the Bombay cases, *Shankara bin Marabasapa* v. *Hanma bin Bhima* (6) and *Sangapa bin Baslingapa* v. *Gangapa bin Nirajapa*, (7) the claims were rejected as brought to vindicate the plaintiff's right to a mere dignity unconnected with any fees, profits or emoluments.

The respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This is an appeal from a judgment of the High Court of Judicature at *Madras* rejecting a plaint under the 32nd section of the *Code of Civil Procedure* as containing no cause of action, a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the *Tenkalai* sect against other persons belonging to the *Vadakalai* sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated: It begins by declaring that the Plaintiffs have the exclusive right to the *Adhyapaka Mirasi* of reciting certain religious texts, hymns, or chants in a certain *pagoda* and its de-

* 6 Cowell's I. A., p. 120; I. L. R. 2 Mad. 62.

(1) 6 Mad. H. C. Rep., 419.

(2) 4 Mad. H. C. Rep., 349.

(3) I. L. R., 1 Mad., 356.

(4) I. L. R., 1 Mad., 168.

(5) 1 Mad. H. C. Rep., 361.

(6) I. L. R., 2 Bom., 470.

(7) I. L. R., 2 Bom., 476.

pendencies, and deny the right of the Defendants to recite them. Then comes an allegation which appears important: "The Plaintiffs and the Brahmins of the Plaintiffs' *Tenkalai* sect have been for a long time past and up to this day discharging all the duties appertaining to the said *Adhyapaka Mirass* right, and enjoying the incomes of the *Adhyapakam*, save those mentioned in Schedules B. and C." The plaint goes on to allege that the Defendants, holding the office of *Dharmakarta* of the *pagoda*, in combination with other persons in rivalry with the Plaintiffs, recited the *Vadakalai* invocations, chants, and other religious prayers, the exclusive right to recite which was incident to the Plaintiffs' *Adhyapaka Mirass;* that thereupon a complaint was preferred to the magistrate and a report made, and for a time the Defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the Plaintiffs and others to recite them; but there is no allegation that the Plaintiffs did not themselves perform or were prevented from performing these rights. On the contrary, the allegation is that they did perform them. Sect. 6 goes on to say: "The Defendants having withheld the payment to the Plaintiffs of some of the several incomes of the *Adhyapaka Mirass* due to the Plaintiffs in the said *Devaraja Swamis Pagoda*, as well as in all the *Sannidhis* attached to it, the Plaintiffs instituted suit No. 66 of 1865, on the file of the District Munsif's Court of *Conjeveram*, against the Defendants, and this litigation went up as far as the High Court, and continued until March, 1873, when a decision was passed in favour of the Plaintiffs." The plaint further alleges (and this is the present cause of action), "The Defendants have withheld the payment to the Plaintiffs and the others of the *Tenkalai* sect of the amount of income mentioned in Schedule C. for the six years from the date of the said suit No. 66 up to this day, to which the Plaintiffs and the others of the *Tenkalai* sect are entitled, as also of the incomes which are mentioned in Schedule B., and which were being enjoyed by the Plaintiffs and the others of the *Tenkalai* sect from the date of the said suit No. 66 until the final decree was passed by the High Court, save such as are now being enjoyed. They have also withheld from the Plaintiffs and the others of the *Tenkalai* sect the honours mentioned in Schedule A. from April, 1873." There follows a prayer that the Court will pass a decree directing the Defendants and others to abstain from reciting, and establishing the exclusive right of the Plaintiffs, and also seeking to recover the value of various items stated in the schedules. Schedule C., which is to be found at the end of the schedule attached to the plaint, is in these terms: "Amount due for six years from October, 1870, up to the current month at the annual rate of Rs. 57. 5*a*. 9*p*., as mentioned in the decree in the original suit No. 66 of 1865 on the file of the District Munsif's Court of *Conjeveram*, Rs. 344. 2*a* 6*p*." On reference to the record, this suit appears to have been brought by substantially the same Plaintiffs (with some changes) against substantially the same Defendants. The Munsif before whom the case was originally tried, affirmed the claim of the Plaintiffs to the *Adhyapakam Mirass*, and decreed that the sum of Rs. 57. 5*a*. 9*p*., as wages for the duty performed, should be paid to them by the Defendants, these "wages" being in fact the money value placed by the Court on certain payments in kind chiefly in the shape of food.

On appeal this decision of the Munsif was reversed by the District Judge, being the first Court of appeal, on the ground that no suit would lie in respect of the matter complained of His decision was reversed by the High Court of *Madras*, who remanded the case, observing, "The claim is for a specific pecuniary benefit to which Plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service con-

nected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point." In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of first appeal, which somewhat increased the amount that the Munsif had given. The High Court upon further appeal affirmed the judgment of the Munsif, re-establishing the amount by way of annual payment at Rs.57. 5*a*. 9*p*. It therefore appears that the Plaintiffs in the present suit, having recovered in the former suit up to the date of the commencement of that suit the sum of Rs. 57 for certain services performed, are now seeking to recover the amount of wages that have accrued due to them for six years since the date of that suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with, by the Defendants. So much with respect to Schedule C.

Schedule B. relates to another class of payments, as they are described in the schedule, in kind; that is, in the shape of rice and other food which are described as due to the Plaintiffs. The first item in the schedule is to this effect: "One *Poli* (circular cake made of wheat, flour, *Bengal* grain, sugar, and ghee) due to "*Adhyapakam* at the close of the *Tiruppavai*." Most of the other items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature as those comprised in Schedule C., which are now claimed by the Plaintiffs from the *Dharmakartas* of the temple, which the Defendants are, in respect of services performed. At the close, however, of this schedule their Lordships observe a statement of an approximate sum claimed for presents made annually to the *Adhyapakas* by the adjoining villagers for the *Tenkalai* people. It may be that no action will lie for the recovery of this last item, or in respect of the honours mentioned in Schedule A., and alleged to have been withheld from the Plaintiffs; but that circumstance would not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of Schedule C. and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms: "We think the plaint was properly rejected under the 32nd section of the *Code of Civil Procedure*. The allegations respecting the 'Mirass of reciting prayers,' and the exclusive right of recital in a stated form and order which the Plaintiffs ask the Court to establish and to protect from infringement by the Defendants, do not disclose a cause of action; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B. and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the Plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated they take a different view of the plaint and of the schedules which have been referred to. It appears to them that the schedules are more than a mere list of cakes and offerings to which a money value is assigned, that they disclose a claim, whether well founded or ill founded, as of right to certain dues for services performed: Schedule C. to an annual payment for wages which has been assessed in the previous suit, and adjudicated upon as due to them. Schedule B. to certain other

payments in kind, presumably capable of a money value, which had been made to them up to the judgment in the former suit, but which have been since withheld.

This being so, the action falls within the principle of the judgment by which the former suit was remanded, and of other cases to which their Lordships' attention has been called. They are therefore of opinion that the judgment should be reversed, and the case remanded for the purpose of trial, and that the Appellant is entitled to the costs of this appeal; and they will humbly advise Her Majesty to this effect.

Solicitors for the Appellants: *Burton, Yeates, & Hart.*

20th and 21st March 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.

STUART SKINNER *alias* NAWAB MIRZA (Plaintiff) ... } *Appellant*,

and

WILLIAM ORDE & others (Defendants) ... } *Respondents.**

Pauper petition—Payment of Court-fees by petitioner—Date of institution of suit—Limitation—Act VIII of 1859, s. 13—Transfer of suit.

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.

S. 13, Act VIII of 1859, enacts that where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quære.*—Whether Sudder Courts acting in concurrence have power to make such a transfer?

This was an appeal from a decision of the High Court of the North-Western Provinces, dated the 29th May, 1876 (1), affirming a decision of the Subordinate Judge of Meerut, dated the 6th July, 1875.

The question of law raised by the case was as to whether the claim of the appellant, who had originally applied for leave to sue *in formâ pauperis*, but had afterwards paid the institution fees, was barred by limitation.

The facts of the case are fully set forth in the judgment of their Lordships of the Privy Council.

Mr. *J. D. Mayne* (Mr *C. W. Arathoon* with him) for the appellant.—The question whether the appellant was a pauper was decided by the Deputy Commissioner of Delhi, who had jurisdiction to decide it, and whose decision on the point was, consequently, binding on the Meerut Court to which it was transferred. To enable him to decide the question of pauperism, the Deputy Commissioner did not require any special authority from the Chief Court of the Panjab. Had he found that the appellant was not a pauper, he would have had no occasion to apply to the Chief Court for leave to try the case. There would have been no suit to try. Ss. 11, 12, and 13 of Act VIII of 1859, which relate to suits where the property is situated in different districts, assume that all that is necessary has been done to bring the proceedings into the

* 6 Cowell's I. A., p. 126; I. L. R., 2, Alla., 241.

(1) The judgment of the High Court is printed at page 230, Vol. I. of I. L. R. Alla.

form of a *suit*. The petition of a person alleging himself to be a pauper does not become a *suit* until he is found to be a pauper and his application is admitted as a plaint. It is only proceedings *in* the suit which, under the sections referred to, require sanction from the Sudder Court. If, after finding the appellant to be a pauper, the Deputy Commissioner failed to cause the petition to be numbered and registered as a plaint, that was his fault, and cannot prejudice the appellant. He applies to the Chief Court of the Panjab for leave to try the suit. The order of the Chief Court treats the matter as having assumed the form of a suit. It directs the *plaint* to be returned to the *plaintiff*, with instructions to him to proceed in a Court of the North-Western Provinces. That order must have been passed with the concurrence of the High Court of the North-Western Provinces, otherwise the Chief Court could only have refused leave for the trial of the case by its own subordinate Court. The order passed implies a transference of the record or change of venue. When the case went back to the Court of the Subordinate Judge of Meerut, it went back as a suit in which the plaintiff's pauperism had been established, ripe for the settlement of issues and for trial on the merits.

If, however, the finding of the Deputy Commissioner of Delhi was not binding on the Meerut Court, and the latter Court had to try the whole matter *de novo*, still, as the plaintiff was in fact a pauper both when he first presented his petition and also afterwards when with the money of friends he paid the court-fees, his plaint when it was admitted should have been treated as filed on the date when it was originally presented as a petition. The appellant's application for leave to sue as a pauper being made *bonâ fide* and without fraud, it was inequitable and unjust that the mere payment by him of the court-fees should have the effect of putting him out of Court on the plea of limitation. S. 308 of Act VIII of 1859 enacts that where the pauper's application is granted, his petition is to be deemed a plaint, but it does not enact that the petition shall not be deemed a plaint, if, pending the inquiry into his pauperism, the petitioner finds means to pay the court-fees. The decision in *Seetaram Gowr* v. *Goluk Nath Datt* (1) was as applicable to a case like the present as to the case where leave is actually given to a petitioner to sue as a pauper; and the *Explanation* appended to s. 4, Act IX of 1871, was not inconsistent with the view that the appellant's plaint was filed from the date when it was presented as a petition. His application was in fact a plaint, *plus* a request for leave to sue as a pauper, and although it became unnecessary for him to obtain that leave, the plaint was not abandoned. If the Courts below were right in their view, a person who, after presenting a petition for leave to sue as a pauper within the period of limitation, happened to succeed to property, might find himself disabled from proceeding.

Mr. *Leith*, Q. C., and Mr. *Doyne*, for the respondents.—The appellant's argument assumes that the Delhi Court had authority to determine that the appellant could sue as a pauper not merely in the Delhi Court but in the Courts of another Province. It was clear, however, that when the case came before it, the Meerut Court was entitled and bound to ascertain whether the appellant was a pauper or not. He might have been a pauper when before the Delhi Court, and yet no pauper when he came to Meerut. The authority of the Chief Court of the Panjab is only over its own subordinate Courts. It may forbid these to try a suit relating to lands partly within the jurisdiction. But no order of the Chief Court of the Panjab is binding on a Court subordinate to the High Court of the North-Western Provinces. The suit could not therefore be transferred from Delhi to Meerut by any order of the Chief Court of the Panjab. It might have been different if the High Court of the North-Western Provinces had intervened and directed a transfer in concurrence with the Chief Court. The case not having been transferred, the appellant,

(1) Marshall's Reports, 174.

when he came back to the Meerut Court, must be taken to have commenced proceedings *de novo*, and as he withdrew his application for leave to sue as a pauper, that application could not become a plaint, since, under s. 308, Act VIII. of 1859, it could only become a plaint upon the claim to sue as a pauper being admitted. The case was governed by s. 310 of the Act, which permits a fresh suit to be instituted. [SIR MONTAGUE SMITH —The Courts have allowed the old plaint to stand, and yet say it is only to date from the payment of the stamp fees.] It is not a plaint until it is stamped. [SIR ROBERT COLLIER.—May it not be stamped *nunc pro tunc?* SIR MONTAGUE SMITH.—May not stamps be added as though it had been filed originally with too small a stamp?] A wholly unstamped plaint is not to be received.

Mr. *Mayne* in reply.—The suit was regularly transferred. If not, the Meerut Court had no jurisdiction to take it up without leave from the High Court of the North-Western Provinces. In that case the proceedings in the Meerut Court should be quashed as *coram non judice*, and the appellant allowed to begin again deducting the time occupied by the abortive proceedings. [SIR MONTAGUE SMITH.—It may be doubted whether, with reference to s. 13, Act VIII. of 1859, the High Court and the Chief Court together have power to transfer a suit. The Act omits to provide such a power.] The finding of the Delhi Court makes the question of pauperism *res judicata*. [SIR MONTAGUE SMITH.—Not if this is a new suit. The question of pauperism is not a point in the cause; it is a mere matter of procedure.] S. 310 of Act VIII. only applied where leave to sue had been refused. Here there was no refusal, and consequently no necessity to bring a fresh suit. The proceedings could properly be continued, on the stamp fees being paid. The appellant's original application bore an eight-anna stamp, and under s. 21 of Act VIII. of 1859 the stamp could be increased.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

The decision of this appeal is attended with considerable difficulty since it presents a case which is not provided for by the *Code of Civil Procedure*. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the *Statute of Limitations* is a bar to the claim of the Plaintiff. The original petition was filed in the Court of the Subordinate Judge of *Meerut* on the 20th of February, 1873. The claim of the Plaintiff was to a share of the property devised by the will of the late Colonel *Skinner*. His claim arose upon the death of his father, Major *Skinner*, which occurred on the 27th of April, 1861. The petition set out all the particulars required in a plaint, and prayed that the Plaintiff might be allowed to sue *in formâ pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the *North-West Provinces*, and partly within the jurisdiction of the Chief Court of the *Punjaub*. The Judge of *Meerut*, apparently of his own motion, rejected the petition, on the ground that the question of the Plaintiff's pauperism could be more conveniently tried in the *Punjaub*. The Plaintiff thereupon filed it in the Court of the Deputy Commissioner of *Delhi*, and on the 14th of April, 1873, an order was made by that Court, after examining witnesses, admitting the Plaintiff's suit *in formâ pauperis*. Before proceeding further with the suit the Deputy Commissioner applied to the High Court of the *Punjaub* for authority to proceed under clause 13 of the *Code of Civil Procedure*. That clause enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts the application shall be submitted to the Sudder Court to which the district in which the suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th of May, 1873,

the Chief Court of the *Punjaub*, presumably not without having consulted the High Court of *Allahabad*, directed that "the plaint should be returned to the Plaintiff, with instructions that he should present it to some Court in the *North-West Provinces*." Accordingly the Plaintiff took the proceedings back to the Court of *Meerut* from which he had been originally driven, and on the 19th of July, 1873, an order of the Subordinate Judge of *Meerut* was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of *Delhi* that the Plaintiff was a pauper can be imported into the suit when it found its way upon the file of the Court at *Meerut*, and that depends upon the construction to be given to clauses 11, 12, and 13 of the *Code of Civil Procedure*. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at *Delhi*, it would be convenient and proper when an application had been made by the Judge of the *Delhi* Court to the Chief Court of the *Punjaub*, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have the power to direct that the cause should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favour of the Appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this clause, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of *Meerut*, and whether the judgment of the High Court affirming that of the Subordinate Judge of *Meerut* is correct in holding that the suit is to be considered as instituted when the Plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point it will be necessary to refer to some of the proceedings. The order of the 19th of July, 1873, directing the case to be put on the file and numbered has been already adverted to. When that was done the Defendants put in written statements objecting that the Plaintiff ought to establish his position as a pauper in the *Meerut* Court, treating what had taken place at *Delhi* as irrelevant, and upon those statements, on the 10th of November, 1873, the Subordinate Judge of *Meerut* directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th of July, 1874, the High Court held that the time of the abortive proceedings at *Delhi* should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the Plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed was the 27th of November, 1874. On that day the Plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the

Plaintiff paid the proper stamps into Court. That having been done, the Defendants raised two objections; first, that the suit ought not to proceed, because the Plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the date the Court fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the Plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed in good faith. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added, "The Court then would allow the case to proceed on its present basis, but at the same time would suggest to the Defendant the advisability of appealing to the High Court to determine whether by the substitution of the institution fee the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in formâ pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision; first, "Can an 'application' to be allowed to sue in *formâ pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated?" the second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th of July, 1875, he gave judgment. Having referred to the dates of the application to sue *in formâ pauperis*, and to some of the other dates of the proceedings, he says, "The granting of the application then constitutes an essential ingredient to further progress as an ordinary suit, with the privilege of limitation counting from the day the petition to sue *in formâ pauperis* was presented, and not from the date when it was registered under sect. 308. But it will be seen that before the application to sue *in formâ pauperis* was granted, and whilst the question was still under inquiry and investigation, the Plaintiff converted the matter into a regular suit, the consequence of which is that he has by his own act given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the Plaintiff out of Court." No doubt, if the Judge is right, the Plaintiff would be barred by the *Statute of Limitations*, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under sect. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the *Court Fees Act*. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in formâ pauperis* contains all that a plaint is required to do. By sect. 300, "The petition shall contain the particulars required by sect. 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and plus these a prayer that the Plaintiff may be allowed to sue *in formâ pauperis*.

The Act provides what shall happen if the prayer of the petition be granted, by sect. 308. It also provides by sect. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the Plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the Plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The Defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there then anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the Plaintiff be compelled to commence *de novo?* Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical they should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th of July, 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by sect. 308 than that contemplated by sect. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the Plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the considerations which would determine the judgment would then have been different.

Their Lordships have only to advert to the *Statute of Limitations*, Act IX. of

1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in clause 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The Respondents must pay the costs of the appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondents *Orde* and *J. Skinner: Young, Jackson, & Beard.*

27th March, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Robert Joseph Phillimore, and the Right Hon'ble Sir Montague Edward Smith.

Two consolidated appeals.

On Appeal from the High Court of Judicature at Bombay.

SAYAD MIR UJMUDDIN KHAN VALID MIR KHAMRUDIN KHAN, (Plaintiff) ... } *Appellant,*

and

ZIA-UL-NISSA BEGAM & Others (Defendants)... } *Respondents.**

Mahomedan law — Wills — Succession — Emancipated slave — Act V of 1843.

Assuming that by the *Wills* rule of the Mahomedan law, the heirs of the master who emancipates a slave are entitled to the property of which the emancipated slave dies possessed to the exclusion of his natural heirs, the effect of section 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave," is to abrogate the rule of the Mahomedan law, and to secure the succession of the heirs of the emancipated slave, as if he had never been a slave.

The provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing.

The exclusion of the natural heirs of an emancipated slave in favour of the heirs of his emancipator, is a disability arising out of the *status* of slavery similar in its nature to the exclusion, under the Mahomedan law, of the natural heirs of an unemancipated slave by a master or his heirs; and since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in construing it, to give it the widest remedial application which its language permits, and can not, consequently, limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death, when the words of the statute allow of its being applied to the property of any one who had at any time been a slave.

THE suits, in which these appeals are preferred, were brought by one Fatma-ul-Nissa Begam suing as sole heiress of her brother Moinuddin Bakshi. The first suit was to recover certain immoveable and moveable estate of one Amir-ul-Nissa Begam, who died on the 10th November 1857 possessed thereof. The second suit was to recover a sum of money in cash and Company's paper which had remained in the hands of the Government agent at Surat after the death of the said Amir-ul-Nissa pending the settlement of a claim made by her, which was not finally disposed of until some years after her death.

Amir-ul-Nissa was the widow of Afzal-uddin Khan, titular Nawab of Surat, who died in 1842, and derived her right to the properties in suit as one of his widows. Moinuddin Bakshi was, at the time of Amir-ul-Nissa's death, the nearest male heir of Nawab Afzaluddin. The defendants in these suits, who are the respondents in the present appeals, were the grand-daughters of Amir-ul-Nissa, being the daughters of her deceased daughter Bakh-

* 6 Cowell's I. A., p. 137; I. L. R. 3 Bom., p. 422.

tiar-ul-Nissa Begam, and the plaintiff's contention was that as Amir-ul-Nissa prior to her marriage with the Nawab, which took place in the year 1825, had been his slave girl, and had been emancipated by him, not the respondents, who were the grand-daughters of an emancipated slave, but herself, as representing the next male heir of the emancipator, was entitled, according to the Mahomedan law, to succeed on the death of Amir-ul-Nissa to the properties in suit.

A number of questions arose in the trial of the suits in the Courts below, but of these it is enough to notice the two following as having been made the subject of argument in the present appeal:—

1. As to whether Amir-ul-Nissa was or was not an emancipated slave, and, assuming her to be so, what is the Mahomedan law governing the descent of her estate.

2. As to the effect of Act V. of 1843, entitled "An Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company," on the *status* of Amir-ul-Nissa and the descent of her estate, assuming her to have been an emancipated slave.

On these points the decision of the Judge of Surat was that Amir-ul-Nissa was not proved to have been a slave, and, assuming that she was, that the effect of Act V. of 1843 was to render the plaintiff's claim inadmissible. This last view was substantially confirmed by the High Court of Bombay, which, however, declined to give any opinion on the question as to whether Amir-ul-Nissa had been a slave. The material passages in the judgments of the Indian Courts and a statement of the facts of the case will be found in the judgment of their Lordships of the Privy Council.

The plaintiff's suit having been dismissed and she having died, the present appeal was brought by Sayad Mir Ujmuddin Khan, her legal personal representative.

Mr. *Scoble*, Q C. and Mr. *Doyne* for the appellant.—The High Court, having come to no finding on the question as to whether Amir-ul-Nissa was a slave or not, assume for the purposes of the argument that she was, and have held that the effect of Act V. of 1843 is to alter the Mahomedan law, which formerly governed the descent of the estate of an emancipated slave, and gave it to the emancipator, or the heirs of the emancipator, instead of to the heirs of the body of the slave, and to substitute for that law the ordinary Mahomedan law of descent applicable to the estate of one who had never been a slave. We contend that, under the Mahomedan law, the plaintiff was entitled to succeed to the property she claimed, and that in a matter of this nature the Act of 1843 in no way interferes with the operation of the Mahomedan law.

As to the emancipator's right, under the Mahomedan law, to the succession of his emancipated slave, see Hedaya (Hamilton's translation, Vol. III., pp. 436, 437, 438, 444), Book XXXIII 'Of *Willa*'; Baillie's Digest of Mahomedan Law (Hanifua), chap. vi 'Of *Wula*;' Shamachurn Sirkar in 'Tagore Law Lectures, 1873,' Vol. I., pp. 89-90.

As regards Act V of 1843, the intention and effect of that Act are not retrospective, but merely to remove personal disabilities arising from the condition of slavery from the date of the passing of that Act. The Act does not alter the Mahomedan law of succession applicable to the circumstances of this case. Where an emancipation has taken place prior to the passing of the Act, an interest is acquired by the emancipator and his heirs in the inheritance of the slave who is emancipated, which the Act can not touch. Under the Mahomedan law the rights of the heir can be defeated only in one way: *Khajooroonnissa* v. *Rowshan Johan*. (1)

[Sir ROBERT PHILLIMORE.—That case seems conclusive against there being a vested interest. The interest of the heir is one that may be defeated; not one that can not be interfered with.] The rights must be taken as they existed at the Nawab's death, and since Amir-ul-Nissa

(1) I. L. R. 2 Calc. 184 at p. 196. S. C. L. R. 3 Ind. 2. App. 291 at p. 307.

was not a slave at the time when the Act passed, she is not within its purview. The Act does not extend to cases where the slave had been emancipated. Emancipation, in the view of the Mahomedan law, is considered meritorious, and the master who gives up the advantage he derives from the earnings of his slave by emancipating him is entitled to compensation under the rule of inheritance which preserves the right of succession to the master. The Act was not meant to affect the general Mahomedan law of inheritance, but to deal with those persons only who lived and died slaves. [Sir MONTAGUE SMITH:—The Act applies to those who acquired property by inheritance. Do not the defendants acquire this property by inheritance?] Not under the Mahomedan law. Under that there is a preferable class of heirs. The emancipator and his male heir exclude them. The present case does not seem to have been provided for in the Act, and the rights of emancipated slaves probably were not in the minds of those who framed it. Macnaghten's Principles of Mahomedan Law, chap. 9, "Of Slavery," was also referred to.

Mr. *Leith*, Q. C., and Mr. *J. D. Mayne*, who appeared for the respondents, were not called.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The question in this appeal regards the succession to one *Amir-ul-Nissa Begam*, who died in 1857. The short history of the case is this: *Afzaluddin*, who was the last recognised Nawab of *Surat*, died on the 8th of August, 1842. He left two wives, *Amir-ul-Nissa Begam* and *Padsha Begam*. He also left a daughter, *Bakhtiar-ul-Nissa Begam*, whom we may take for the purpose of this decision to have been born on the 13th of March, 1821, some four years before the marriage of *Afzaluddin* with *Amir-ul-Nissa Begam*. *Bakhtiar-ul-Nissa Begam* had been married in her father's lifetime to *Mir Jafir Aly*, and the issue of that marriage was two daughters, the Respondents. Immediately after the death of the Nawab in 1842, there arose considerable discussion regarding the right of succession to him, and there was a contest before one of the Government officers, Mr. *Elliott*, on that subject. No final decision, however, appears to have been come to until after the passing of Act XVIII. of 1848, which placed the administration of the estate of the late Nawab at the disposal of the Governor of *Bombay* in Council, leaving to them to determine who were entitled to succeed. Their course of action under that Act was to refer the matters in dispute in the first instance to Mr. *Frere*, the then agent in *Surat*. A question as to the *status* of *Amir-ul-Nissa Begam* was raised before him, it being alleged that she had been a purchased slave of *Afzaluddin*; that while she was in that state the daughter *Bakhtiar-ul-Nissa Begam* was born, and that four years after the birth of *Bakhtiar-ul-Nissa* the Nawab, having shorly before the ceremony emancipated her, had married her. This case was then put forward in order to meet the question raised whether, according to Mahomedan law, *Bakhtiar-ul-Nissa Begam* could take any share in her father's estate. As the daughter of a concubine who was a slave girl, she would have been entitled to do so, whereas as the illegitimate daughter of the Nawab by a free woman she might not be. She, therefore, and her husband, who acted for her, were then interested in making out that *Amir-ul-Nissa Begam* had been a slave, whilst the residuaries, who are now represented by the Plaintiff and Appellant, were interested in maintaining the contrary. Mr. *Frere*, without deciding anything as to the *status* of *Amir-ul-Nissa Begam*, but proceeding very much upon the special power that belonged to the Nawab, and the acts of recognition on his part of *Bakhtiar-ul-Nissa Begam* as his daugter, and *Amir-ul-Nissa* as his wife, reported that the succession was to be divided as follows, viz.: that one sixteenth was to go to *Amir-ul-Nissa Begam*; another sixteenth, making up the eighth to which the widows are entitled under Mahomedan law, was to go to *Padsha Begam*, the other widow; that *Bakhtiar-ul-Nissa*

Begam was to take the share to which she would be entitled as legitimate daughter, namely, eight sixteenths, or one half; and that the remaining six sixteenths were to be divided between *Mir Moinooddin Khan* and his brother *Mir Kamrooddin*, two distant relatives of the Nawab, who filled the character of residuaries according to Mahomedan law. It is, of course, impossible to go behind the finding of Mr. *Frere*, which was adopted and confirmed by the Governor in Council, and must be assumed to have determined once and for all the succession of *Afzaluddin*. *Bakhtiar-ul-Nissa Begam* died in 1845, in her mother's lifetime. *Amir-ul-Nissa* did not die until 1857, and it is conceded that, but for the question that has been raised in this suit, the Respondents, her two grand-daughters, would be her only ascertainable heirs. *Kamrooddin* also died in the lifetime of *Amir-ul-Nissa Begam*.

In this state of things, and a good many years after the death of *Amir-ul-Nissa Begam*, the present suits were instituted by one *Fatma-ul-Nissa Begam*, who claimed to be the sister and heiress of *Moinooddin*, who, though he had survived *Amir-ul-Nissa Begam*, was then dead; and the title put forward was that according to the law of Willa, which has been very ably and clearly expounded at the Bar, the person entitled to succeed and take the property of which *Amir ul-Nissa Begam* died possessed, or to which she was entitled, was *Moinooddin*, as the male heir of *Afzaluddin*, who was the emancipator of *Amir-ul-Nissa Begam*, to the disherison of her own natural heirs.

A number of issues were settled in the suit, with many of which it is unnecessary to deal. The principal one, and that upon which both the Courts below have decided against the Plaintiff in the suit, and in favour of the Respondents, was that by Act V. of 1843 this right, which was the foundation of the claim of *Moinooddin*, or of his representative *Fatma*, was taken away, and it is to that question that their Lordships propose on the present occasion to address themselves. In order to try that question they must, of course, assume that the *status* of *Amir-ul-Nissa Begam* was that which the Plaintiff represented it to have been, namely, that having been originally a *Rajpoot* girl who had been converted to Mahomedanism, she was brought into the zenana of the Nawab as his purchased slave; that she was the mother, whilst still a slave, of *Bakhtiar-ul-Nissa* by him; and that on the day previous to the celebration of the nikah marriage, by which she became his wife, he had emancipated her. It must also be assumed, that the Willa rule of the Mahomedan law is such as Mr. *Scoble* has shewn it to be upon the authorities which he cited. The question now to be decided is, whether the Act in question prevents the application of that rule of law, and entitles those parties who but for it would have succeeded to their grandmother, as her natural heirs, to take the inheritance. Each of the Courts below has adopted a view of the operation of the Act favourable to the Respondents, though not precisely upon the same grounds. The Subordinate Judge says: "This Act was passed to declare and amend the law regarding the condition of slavery within the territories of the *East India Company*; and sect. 3 runs as follows:—'No person who may have acquired property by his own industry or by inheritance shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person or that the person from whom the property may have been derived was a slave.' Now in the present case the Plaintiff alleges that had *Amir-ul-Nissa* been a free woman the defendants would have been her heirs, but because she was a slave her property goes to her master's relatives. The section appears to me clearly to apply to such a contention." He then discusses Mr. *Baillie's* view of the effect of the statute, as expressed in Book IV. of his Digest of Mahomedan Law, and refers to the absence of any discussion on the subject before Mr. *Frere*, when indeed the question had not arisen, and ends by saying: "I think then that the plea that *Amir-ul-Nissa's* property must go to her husband's relations instead of to her own grandchildren because though subsequently

emancipated and married she was originally a slave is one which the Court cannot entertain, and that the claim is on this ground inadmissible."

The High Court say on this subject, "We think that Act V. of 1843 deprived the Plaintiff of any right to bring this suit. *Amir-ul-Nissa* died in 1857 when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the Plaintiff rests solely upon the alleged fact that *Amir-ul-Nissa* had been at one time the slave of the late Nawab. He is said by the Plaintiff to have enfranchised *Amir-ul-Nissa;* and on the authority of 1 *Baillie's* Digest, 386, 387, and 3 Hedaya, 444, 445, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir would be her heir, and that neither her daughter nor the Defendants who are that daughter's daughters are so. That right, if it ever existed, is in our opinion one arising out of an alleged property of the late Nawab in *Amir-ul-Nissa's* person and services before he enfranchised her, and as such is one of the rights which every Civil Court in *British India* is prohibited by sect. 2 of Act V. of 1843 from enforcing. We are not prepared to say whether this case would not also come within the prohibition in sect. 3 of the same enactment."

The High Court then proceeded mainly upon the 2nd section, and the Subordinate Judge upon the 3rd section of the Act. In their Lordships' opinion both sections point to the conclusion that it was the general intention of the Legislature in passing this Act to relieve all persons then subject thereto from all the disabilities arising out of the status of slavery; and without saying whether the 2nd section of the Act is sufficient of itself to dispose of the claim in this suit, they have come to the conclusion that the 3rd section at least has that effect.

The section runs thus: "And it is hereby declared and enacted, that no person who may have acquired property by 'inheritance' shall be dispossessed of such property or prevented from taking possession thereof, on the ground that such person from whom the property may have been derived was a slave." Various arguments have been addressed to their Lordships as to the non-applicability of this enactment to the present case. It was first said that to apply it to this case would be to give a retrospective effect to the Act, in violation of the well-known rule of construction. Their Lordships cannot accede to that argument. The Act was in force at the time of the death of *Amir-ul-Nissa;* and the question who is entitled to succeed to her property is determinable by the law as it stood when the succession opened. Their Lordships cannot recognize any vested interest said to have been acquired previous to the passing of the Act by the unascertained persons who might at her death be the then residuary heirs of her husband; or admit that her husband, by the act of emancipation, acquired a vested right which the statute could not except by express and retrospective words take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the Willa rule of law is treated as having been in *Moinooddin* when *Amir-ul-Nissa* died. If he too had died in her lifetime, the right could not have been asserted by his sister and heiress, the Plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the Respondents cannot claim the benefit of the statute, inasmuch as they are not persons "who may have acquired property by inheritance," and that the words are to be construed by the Mahomedan law, which gives the property to a preferable class of heirs, viz., the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any persons who would have acquired a title to property by right of inheritance, but

for some obstacle arising out of the status of slavery.

It was argued by Mr. *Doyne* that in all probability the Legislature had not its mind directed to this somewhat obscure branch of Mahomedan law, and that the section must be taken to apply only to cases in which the person from whom the property is inherited was at the time of his death a slave; but if the third section were to be taken subject to the old Mahomedan law, the master in such a case would be entitled to take the property of the slave; and the son of the slave, or the other natural heirs of the slave could not be said to be persons "who may have acquired property by inheritance." The clause upon this construction of it would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. *Doyne* that the operation of the status or of this particular section in it is to be confined to the property of persons who at the time of their death were slaves. They are of opinion that in construing this remedial statute they ought to give to it the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied, and falls within the language of the enactment. They find it impossible to say that this is not the case in the present instance.

They have already intimated their opinion that the general scope and object of the statute was to remove all the disabilities arising out of the status of slavery. The rule of Willa whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator of the emancipated was not less such a disability, than the rule of law whereby the natural heirs of an unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the section has been already dealt with; but a further argument has been founded upon the words "that the person from whom the property may be derived was a slave." The words are not "was a slave at the time of his or her death," and the term may well be taken to apply to any person who had at any time been a slave. Putting this interpretation upon the statute, their Lordships think that it is sufficient to dispose of this appeal without going into any of the other questions raised either of law or of fact, and they will therefore humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal with costs.

Solicitors for Appellant: *West, King, Adams, & Co.*

Solicitors for Respondents: *Gregory, Rowcliffes, & Rawle.*

6th, 8th, 10th, 13th, 14th; May, and 14th June, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court at Madras.

RAMASAWMI AIYAN & others (Defendants) } *Appellants*,

and

VENCATARAMAIYAN (Plaintiff) ... } *Respondent.**

Hindu law—Adoption by widow—Agreement by natural father restricting son's interest in the inheritance of his adoptive father.

The natural father of a boy whom the widow of a deceased Hindu proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father: *Held*, that the agreement was not void, but was at least capable of ratification when the adopted son became of age.

Chitko Raghunath Rajadiksh v. Janaki and others (1), referred to.

This was an appeal against a decree of the High Court of Judicature at Madras, dated the 24th January 1877, reversing a

* 6 Cowell's I. A., 196, I. L. R. 2 Mad. 91.
(1) 11 Bom. H. C. R, 199.

decree of the District Court of Trichinopoly, dated 15th January 1875. The defendants were the appellants, and the respondent the plaintiff in the original suit. The plaintiff sued as heir of one *Rangasawmi*, by virtue of an adoption made by *Rangasawmi's* widow after his death, to set aside various dispositions of the property made by the widow before the adoption. The defendants were the widow and various persons who claimed under the disputed transactions.

Neither the adoption nor the transactions in dispute were denied. The defence set up was that the plaintiff had been adopted by the widow upon the faith of an express written agreement by his natural father that none of the transactions now sought to be set aside were to be disputed, and that this agreement had been ratified in writing by the plaintiff himself nine years after his adoption and two years after he came of age.

The District Judge of Trichinopoly dismissed the suit, holding that the plaintiff was estopped by the ratification executed by him after he came of age. The High Court reversed the decree of the District Judge on the ground that the agreement entered into by the plaintiff's father on giving him in adoption was inoperative, and that the plaintiff was not bound by his own ratification since it was given without a full knowledge of the circumstances. The facts of the case are fully stated in their Lordships' judgment.

Mr. *Leith*, Q.C., and Mr. *J. D. Mayne* who appeared for the appellants contended that the plaintiff's natural father was competent to deal on behalf of his son and to enter into a valid agreement restricting the interest which his son would take upon his adoption in the inheritance of his adoptive father. There was nothing in Hindu law to invalidate such an agreement. The adoption had taken place on the terms of that agreement. If the agreement were set aside it would be impossible to restore the parties to the position in which they were before the adoption. It was a fallacy to argue that at the time of the agreement the plaintiff had rights out of which his father contracted him. What rights he got, he got under his father's agreement. Possibly, if he had thereby been deprived of all benefit under the adoption, the agreement might not have been valid. The effect of the agreement was to stipulate that the acts of the widow, whether regular or not, should not be questioned. The agreement had in fact been ratified by the plaintiff after he came of age.

Mr. *Cowie*, Q.C., and Mr. *Graham* for the respondent, contended that under the circumstances of the case the plaintiff's father was not competent to renounce the rights of the son whom he was giving in adoption; and that the alleged ratification by the plaintiff was made shortly after he came of age and in ignorance of facts which were fraudulently concealed from him.

Mr. *Leith* replied.

The following cases were referred to in the course of the argument:—*Chitko Raghunath Rajadiksh* v. *Janaki and others* (1); *Vinayak Narayan Jog* v. *Govindra Chintaman Jog* (2) *Bamundoss Mookerjea* v. *Mussammut Tarinee* (3); *Radhamonee Debea* v. *Jadubnarain Roy* (4); *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (5); *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (6) *Chowdhry Pudum Singh* v. *Kooer Ooday Singh* (7).

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

The facts of this case material to its decision are as follows:—

Rangasawmi Aiyan was the youngest of three brothers of a joint Hindu family. The eldest brother died in the year 1858, leaving a widow named *Thyammal*. On his death the two remaining brothers made a partition of the property to which they

(1) 11 Bom. H. C. R., 199.
(2) 6 Bom. H. C. R., 224.
(3) 7 Moo. I. A., 169.
(4) S. D. A. (Bengal), 1855, p. 139.
(5) 24 W. R., 183.
(6) L. R. 4 Ind. Ap., 1.
(7) 12 Moo. I. A., 350.

were entitled. The second brother died in 1860, leaving a widow named *Lakshmi Ammal*. *Rangasawmi* had a wife, the daughter of *Ramasawmi*, who was his cousin, and the brother of *Thyammal*. *Rangasawmi* having no children executed on the 19th of January, 1861, the following document:—

"Agreement executed on the 19th of January, 1861, by me, *Rangasamiaiyan*, son of *Subbaiyan*, residing at *Minakshipuram*, in the *Trichinopoly* talook, while in the possession of sound mind, in favour of *Ramasamiaiyan*, son of *Anantakrishnaiyan*, residing at *Kulumani* in the said talook, to wit:—

"In the villages of *Minakshipuram* aforesaid, *Gouripuram*, *Tirupulatturai*, *Analai*, *Rangachchipuram*, *Elumanur*, *Antamallur*, *Ammangudi*, *Kulumani*, *Mulangudi*, *Tachchangudi*, and *Kottattai*, I hold some property. Besides, in respect of the moveable and immoveable property standing in the names of *Lakshmi Ammal*, the widow of *Visvanadhaiyan*, my elder brother, and others, I brought a suit in No. 5 of 1860 on the file of the Civil Court, which is now pending in appeal before the Sadar Court in No.—of 1860. My present state of health is however too bad to permit me to manage and take care of the said (last-mentioned) property, as well as the said (first-mentioned) house ground, houses, cattle, &c. Besides, I have no issue and have consequently adopted your son *Krishnasami* this day according to law. You shall therefore yourself manage the affairs of all the moveable and immoveable property, &c., except three cheis of land constituting two shares in the village of *Kulumani*, which I have given away to my elder sister *Tangammal*, as manjakani (land granted for expenses), pay the Government revenue, &c., assessed thereon, render the necessary assistance in the interests of the said suit, and maintain my adopted son aforesaid. Besides, you should deliver up to the two persons aforesaid so soon as my said adopted son attained his age, all the said moveable and immoveable property, and all the other property save such as might have been legitimately expended till then. Furthermore, you should administer the charity of distributing boiled rice, &c., at my house in the village of *Minakshipuram*, and by applying therefore the incomes derivable from the wet and dry lands of that village left after paying the expenses, Government revenue, &c., keep an account of the receipts and disbursements in that matter, and you should get *Krishnasawmi*, my adopted son aforesaid, after he attained his age, and *Lokambal*, my wife, these two to administer these charities in perpetuity, and in a manner allowing no scope for any shortcomings.

"You should also, while thus acting and until my son attained his age, look after the duties of the office of manager, which I hold in my name with respect to the *Tiruppulatturai* pagoda.

"To this effect, I, *Rangasawmi Aiyan*, execute the agreement in favour of *Ramasawmi Aiyan*."

In pursuance of this instrument the child therein mentioned was adopted, and *Rangasawmi* undertook the management of the estate.

On the 9th of February, 1861, *Rangasawmi* executed the following instrument, which is termed in the record a muktiarnama.

"Muktiarnama (general power of attorney) executed on the 9th of February, 1861, by *Rangasawmi Aiyan*, son of *Subbaiyan*, residing at *Minakshipuram*, in the *Trichinopoly* talook, in favour of *Ramasawmi Aiyan*, son of *Anantakrisnaiyan*, residing in the village of *Kulumani*, in the said talook, to wit:—At present the state of my health is not satisfactory, and I have no issue. Besides, for the management of my own immoveable property which I am in the enjoyment of, for the conduct of the suit which I brought in No. 5 of 1860 on the file of the Civil Court against *Lakshmi Ammal*, the widow of *Visvanadhaiyan*, my elder brother, touching certain property, and which I have now brought on appeal in No. 25 of the same year, on the file of the Sadar Court, and for the looking after of my adopted son, *Krishnasawmi*, minor, my wife and myself, I have no friend to look up to but yourself. You should therefore look after us

as mentioned above, and hold all my property according to your pleasure and manage the same. If the said Sadar Appeal No. 25 should also terminate against me, you should take upon yourself and manage the dry and wet land forming the eleven pangus (shares) in the village of *Minakshipuram*, the four pangus (shares) in *Analai*, one pangu (share) in *Tiruppilatturai*, and one pangu (share) in *Tachchangudi*, one house-ground in *Kulumani*, out of the property in my possession and, without concern in the profit or loss therefrom arising, make the same over to my adopted son after he attained his majority. Besides, as I have consented to *Thyammal*, the widow of my elder brother, *Venkataramaiyan*, making an adoption, which she is attempting to do in accordance with the authority given by my elder brother aforesaid, you should get my wife to give up out of our property to the said ammal (lady) the one-third share of my elder brother aforesaid, a dwelling-house, one *Machchupatti* house-ground, cattle, ploughs, &c., all in a group, with liberty to alienate the same by sale and to appropriate the same according to her own pleasure. The remaining lands you should get my wife to dispose of by sale, &c., in satisfaction of the debts contracted by me for the family expenses and for the costs of the said suit, and clear off my debts in full. You are at liberty yourself to demand and recover the sundry debts due to me. All prior documents of any kind whatsoever referring to the above subject shall become null. I have thus with my full consent executed to you this muktiarnama (general power of attorney)."

The High Court of *Madras*, of whose judgment some notes, obviously very imperfect, are to be found in the record, appear to have treated this document, which was not registered, as open to much suspicion. It may be, but inasmuch as it has been found to be genuine by the Lower Court, before which some of the attesting witnesses were called, while no evidence directly impeaching it was produced, their Lordships find no sufficient grounds for disbelieving its execution, or setting it aside as invalid.

Rangasawmi died in 1861, not long after the execution of this document, but the precise date of his death does not appear.

On the 10th of June, 1862, the widow of *Rangasawmi*, *Lokambal*, assuming to act under the directions of the muktiarnama, executed a release to *Thyammal* of what may be described in general terms as one-third of the family property.

On the 23rd of June, 1862, *Lokambal*, assuming to act under the same authority, executed three deeds of sale, to one *Vamanaiyan*, of what may be described in general terms as another one-third of the property for advances alleged to have been made to her for the payment of her husband's debts.

It appears that the property conveyed to *Thyammal* found its way, after some interval, into the hands of her brother, *Ramasawmi*, and that by the last three deeds *Lokambal* in effect conveyed the property to which they refer to *Ramasawmi*, her father, who admits the sale of the nominal purchaser to have been *benamee* for him, alleging that he paid the consideration-money, and that it was appropriated to the payment of the debts of *Rangasawmi*. Almost immediately after the execution of these deeds the adopted son died.

Thereupon the widow proceeded to make a new adoption under authority from her husband (as is now conceded), and with this object entered into the following agreement with one *Mutturamaian* for the adoption of his son, who is the Plaintiff in this suit.

"Agreement executed on the 23rd *Ani* of *Dundhubhi*, corresponding to the 5th of July, 1862, by *Mutturamaiyan*, son of *Venkaiyan*, residing at *Dikshasamudram*, otherwise known as *Mullakudi* in the *Trivadi* talook, in the *Combaconum* district, in favour of *Lokambal Ammal*, the widow of *Rangasawmi Aiyan*, residing at *Minakshiammalpuram*, in the *Trichinopoly* talook, in the *Trichinopoly* district, and *Ramasawmi Aiyan*, the authorized agent of the said *Rangasawmi Aiyan*, to wit:—

"After entering into a partition, the

said *Rangasawmi Aiyan* adopted *Krishnasawmi*, a minor, and died some time afterwards; and, some time after this, *Krishnasawmi* also died. Thereupon, with a view to the fulfilment of the said *Rangasawmi Aiyan's* wish to make an adoption, I gave my son, *Chidambaram alias Venkataraman*, in adoption to the said *Lokambal Ammal* according to law with my full consent. Excluding the sales of property made to third parties in satisfaction of the dates contracted by the same *Rangasawmi Aiyan*, and the absolute disposition of property made in favour of *Thyammal*, the widow of *Venkataramaiyan*, his elder brother, for her share, all of which took place so far back as during the lifetime of the said minor, *Krishnasawmi*, the said *Lokambal Ammal* is now possessed and in the enjoyment of eleven pangus (shares) of wet land and the wet and dry samudayams appertaining thereto in *Minakshiammalpuram* aforesaid, setting aside the house-ground of *Muttulinga Medeliar* and the patti manai lying to the west of it, of one pangu (share) of wet lands and the samudayams thereto appertaining in *Tirupilattorai*, setting aside the house-ground of *Pannai Seturaiyar*, of one of the house grounds which fell to his share in the agraharam of the village of *Kulumani*, of one pangu (share) in the village of *Tachchangudi*, and of four pangus (shares) in the village of *Analai*, with the samudayams thereto appertaining. Beyond this property which is in her possession, the said ammal (lady) has no property. Agreeing, therefore, to my begotten son, *Chidambaram alias Venkataraman*, who is the minor adopted son above mentioned, being put in possession of the said property, which now remains, after he attained his majority, I have, with my full consent, given my said son in adoption. I have therefore executed to you this agreement to shew that you alone, who are henceforth entitled to all sorts of rights until the adopted son aforesaid should attain his age, and competent to solemnize his wedding, and other auspicious ceremonies, should look after the said adopted son and the said property; that, whether or not there is more property, neither I nor my begotten son, who is the adopted son above mentioned, have any sort of claim or title to the same, or to their enjoyment.

"(Signed) *Mutturamaiyan.*

It is in evidence that *Mutturamaiyan* was informed that two-thirds of the property had been alienated, and was shewn the muktiarnama and the four deeds which have been referred to. Thus, if not distinctly informed of the true nature of the transactions, he was at the least put upon inquiry respecting them; it is not alleged, much less proved, that any fraud was practised upon him, and on his being called as a witness by both parties no question was put to him suggesting that he had been induced to make this agreement by any misrepresentation or concealment. Their Lordships, therefore, feel themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late *Rangasawmi's* property, being aware or not caring to inquire how the remaining two-thirds had been disposed of. The legal effect of this proceeding will be dealt with hereafter. The Plaintiff, shortly after he became of age, which time is found by both Courts to have been in 1869, executed a lease (dated 4th October, 1869), to *Naganadien*, a son of *Ramasawmi*, of all or almost all the lands to which he was entitled, for thirteen years, at a "swaunbegam" rent of Rs. 150 per annum; the lessee further undertaking to maintain the Plaintiff and his adoptive mother.

This lease, which put him entirely in the power of *Ramasawmi's* son, or, in other words, of *Ramasawmi* himself, and which he certainly ought not to have been induced or even allowed to execute, he some time afterwards very naturally desired to set aside, and, his adoptive family insisting on maintaining it, he left his adoptive mother's house, married, and went to live at the house of his wife's father. Although he returned once or more to his adoptive mother's house, it was when he was living in the house of

his wife's father and surrounded by her relations that he executed, on the 19th of August, 1871, the agreement, on the validity of which the case chiefly depends.

This agreement is as follows :—

"Agreement executed on the 19th of August, 1871, corresponding to the 5th Avani of Prajotpatti, to *Lokambal Ammal*, the widow of *Rangasawmi Aiyan*, cultivator, residing in the village of *Minakshipuram*, in the *Trichinopoly* talook, by *Chidambaram, alias Venkataramaiyan*, the adopted son of the said lady, cultivator, residing at the said place, to wit:—

"Out of the wet and dry lands, topes, house-grounds, purchases, and other landed property which came to the share of your said husband on partition as his own property in the village of *Minakshipuram*, *Gouripuram*, *Analai*, *Rangachchipuram*, *Tiruppilatturai*, *Andanallur*, *Ammangudi*, *Kulumani*, *Mulangudi*, *Tuchchangudi*, and *Kottattai*, the following being excluded, *i. e.*, the landed property which, by virtue of a muktiarnamah granted by your said husband in the name of your father, *Ramasawmi Aiyan*, on the 4th of February, 1861, before ever I was adopted by you, and of an agreement granted in conformity therewith to you and your father, *Ramasawmi Aiyan*, by my natural father, *Ramuvaiyan*, on the 5th of July, 1862, you gave away on the 10th and 23rd of June, 1862, in obedience to the orders of your said husband, *Rangasawmi Aiyan*, deceased, partly under an agreement to *Thyammal*, the widow of his elder brother, *Venkataramaiyan*, with power to sell, and partly under deeds of absolute sale, in favour of *Kulumani Vamanaiyan* in satisfaction of the debts contracted by your husband, *Rangasawmi Aiyan*, and which your father *Ramasawmi Aiyan* had cleared with his own funds; there still remain 8 pangus in the village of *Minakshipuram*, after deducting the 3 pangus lost owing to the railway out of the 11 pangus had there, 4 pangus in *Analai*, 1 pangu in *Tiruppilatturai*, 1 pangu in *Tuchchangudi*, and 30 feet of a house-ground to the east of *Chelamaiyan's* house-ground in the northern row in the suryavastu agraharam of *Kulumani*, which you have continued to hold in full right. These I, having attained my majority, got from you, and took charge of the said property just as they were in accordance with the above said arrangements; and in 1869 I leased the said lands to *Naganadhaiyan* for a swamibhogam ready money rent, and got the registry transferred accordingly. Of these lands I gave your father, *Ramasawmi Aiyan*, 6 pangus in the village of *Minakshipuram*, measuring acres 10 and dec. 8, and one pangu in the village of *Tuchchangudi*, measuring acres 3 and dec. 35; in all, measuring acres 13 and dec. 43 of land, together with the dry and wet lands and all other samudayams thereto appertaining, and a house-ground in the village of *Kulumani*, as per the descriptive statement of lands contained in the additional paper hereto annexed, and got in exchange acres 14 and dec. 30 of land, comprised in the $5\frac{8}{16}$ pangus purchased by the said *Ramasawmi Aiyan* from the said *Thyammal* and *Vamanaiyan* under a deed and an agreement, *i. e.*, $2\frac{13}{16}$ pangus in the village of *Analai*, and $2\frac{3}{8}$ pangus in the village of *Rangachchipuram*, including *Pudutiruttukattalia*, together with the wet and dry lands and all other samudayams appertaining thereto, as also 32 feet of a house-ground where *Pannai Setuvaiyan* resides, and which belongs to the said *Ramasawmi Aiyan*, in the suryavasaka agraharam of the village of *Tiruppalatturai*, and 24 feet of a house-ground purchased under a deed by the said *Ramasawmi Aiyan* from *Manamettu Chetti* in the western row of the agraharam, running north to south, in the garudavasakam of the said village, as per the descriptive statement of lands contained in the additional paper hereto annexed. Notwithstanding all this, I have given you for your maintenance for life, in consideration of your feeling it disagreeable to live with me, the $2\frac{3}{8}$ pangus which I got in exchange as aforesaid in the said village of *Rangachchipuram*, and 2 of the pangus in the village of *Minakshipuram*, making in all $4\frac{3}{8}$ pangus, together with the wet and dry lands and all other samudayams

thereto appertaining. You shall therefore enjoy the said lands for your life, paying the Government revenue assessed thereon, and defraying the expenses of your maintenance, vows and other ceremonies, with the aid of the incomes thereof. The said lands should revert to me upon your death. You should not subject the said lands, which have been allowed to you, to hypothecation, mortgage, or sale, or otherwise encumber or alienate them. For myself, I agree that, inasmuch as the lands which I enjoy were derived from you, I shall not without your written consent subject them to hypothecation or sale, or otherwise encumber or alienate them. As regards any property other than what has come to you and me under this document, and the landed property passed by you under sale and agreement in obedience to the orders of your husband, I have no claim, interest, or title. As regards the 2 pangus I am entitled to enjoy by reversion on your death in the village of *Minakshipuram*, I shall take the share of Mettupadugai dry land appertaining thereto, out of the tract lying to the west of the Mattupadai (cattle pass). Thus I have executed this agreement.

"The lands, &c., of the village of *Elumanur* are included in the deed of sale you executed in favour of the said *Vamanaiyan*."

"(Signed) *Chidambaram, alias Venkataramaiyan*."

A schedule is appended, specifying in detail the properties to which the mother and son are respectively entitled.

In the year 1873 the Plaintiff instituted a suit against the present Defendants, which was by a lamentable miscarriage of justice dismissed on the ground that he declared himself to be seventeen years old, and ought until he was eighteen to have sued by his guardian.

Whereupon he instituted the present suit by his guardian, at first *in formâ pauperis*, but was not allowed to retain that character in his appeal to the High Court.

The suit is against *Lokambal, Ramasawmi Naganadha* (the son of *Ramasawmi*, and the lessee under the deed of October, 1869), *Thyammal* and *Manaiyan, alias Vailialingaian*, who was made a Defendant at his own request.

The plaint, which is informal and obscure, in substance seeks to set aside all the alienations of the adoptive father's property which have been described, and claims all the property; from the whole of which, even so much as the Defendants admit the plaintiff to have been entitled to, he declares himself to have been ousted. The Defendants maintain the genuineness and validity of the transactions which have been described, insist on the deed of the 19th of August, 1871, being binding on the Plaintiff as a family settlement, and deny his dispossession of so much as he was entitled to under it.

The Subordinate Judge dismissed the suit, on the ground that the agreement of August, 1871, which he treats as a final adjustment of the family disputes, was executed by the Plaintiff two years after he became of age, was not obtained by fraud or coercion and was consequently binding on him.

This judgment was reversed by the High Court, on grounds which do not very distinctly appear. That Court appears to have considered the agreement of the Plaintiff's natural father at his adoption to have been void in law in as far as it relinquished on behalf of the Plaintiff his right to any part of the property which had been his adoptive father's, that he was entitled to set aside the alienations made before his adoption as having been fraudulent and void against him, and that the agreement of August, 1871, was not binding on him, having been executed by him without a full explanation having been given to him of his rights. They appear also to have treated his allegation, of which he himself gave some evidence, of his dispossession from the whole of the property as established, and decreed to him all the property claimed in the schedule to his plaint, that is, all his adoptive father's property, together with (as is asserted by the Appellants) more property which he claimed by a supplemental

schedule which he was allowed to file. The present appeal is from this judgment.

Some of the circumstances of this case are peculiar. The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety, on which their Lordships give no opinion. How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh and Others* v *Janaki*, in the 11th volume of the *Bombay* High Court Reports, p. 199, certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age. The main question in the cause is therefore reduced to this, whether the son did or did not validly ratify it. Unquestionably the manner in which *Ramasawmi* contrived to get into his hands two-thirds of the property of *Rangasawmi*, partly through his daughter and partly through his sister, raises a very strong suspicion, to say the least, of unfair dealing against him; and if it had been shewn that the instrument of 1871 had been executed by the Plaintiff under his influence (as probably the lease of October, 1869, was), it would be properly set aside. It must be borne in mind, however, that the Plaintiff when he executed it had been of age two years, that he was sufficiently alive to his rights to be aware that the lease of 1869 was injurious to him, and to desire to set it aside, that he was residing with his wife's family, strangers it would appear to that of his adoptive mother, and that before executing the instrument he consulted members of his wife's family, upon whose advice he acted. It may be further observed that in a subsequent suit the Plaintiff, about twelve months after, stated that he enjoyed the property of his adoptive father under this agreement.

Such being the evidence, and the Subordinate Judge, who had the advantage of hearing the witnesses, having found in favour of the validity of this document, their Lordships have come to the conclusion that there are no sufficient grounds for setting it aside.

The main question being thus disposed of, two subsidiary questions remain to be noticed.

It was the Plaintiff's case, supported by some evidence, that he had never been allowed to take possession of any part of his adoptive father's property, while there was evidence on the other side that he had taken and kept possession of so much of it as he was entitled to under the deed of the 19th of August, 1871. There is no issue and no express finding on this question in the Court below, but it may be assumed that the Judge adopted the contention of the Defendants. The judgment of the High Court, however, assumes the Plaintiff to have been wholly dispossessed, and that by all the Defendants. Under these circumstances, it seems to their Lordships that the case cannot be satisfactorily disposed of without a re-trial of this question, if, indeed, it has been tried at all, and that an express finding should be come to whether the Plaintiff has been dispossessed, or kept out of possession, of all or any of the property to which he was entitled by the last-mentioned deed, and, if so, by which of the Defendants.

It further appears that compensation money was paid to *Lokambal* by the railway department for lands taken from the one-third portion of the lands of *Rangasawmi* to which, under the deed of adoption of the 5th of July, 1862, the Plaintiff was entitled; the sum is stated by the Plaintiff to be Rs. 2500, by the Defendant to be Rs. 1700.

Their Lordships do not consider that, by the deed of the 19th of August, 1871, the main object of which seems to have been to ratify the disposition which had been made of the specified properties mentioned in it as "having been excluded," and to assign to the widow a specific portion of the remaining land in lieu of maintenance, the Plaintiff can be taken to have relinquished his claim to this money. An issue on this question was framed in the Court below, but it is not alluded to in the judgment. Their Lordships are of opinion that the question should be tried to how much of this sum the Plaintiff is entitled; it will, of course, be open to the Defendants to prove that the money received has been properly expended on the land, as they have alleged it to have been in their answer. On the legal effect of the Plaintiff's covenant against alienation their Lordships do not think it necessary to give an opinion.

In accordance with the views which they have expressed, their Lordships will humbly advise Her Majesty that the judgments and decrees of both the Lower Courts be reversed, and that it be declared that the parties are bound by the deed of the 19th of August, 1871. That the High Court be directed to remand the case to the District Court of *Trichinopoly* for the trial of the following issues, viz.:—

1. Whether the Plaintiff has been ousted or kept out of possession of all or any of the lands to which he was entitled under the said deed; if so, by which of the Defendants.
2. To how much, if any, of the said compensation money paid by the Railway Department he is entitled.

That the said District Court do return the findings on those issues to the High Court in accordance with the direction of the *Code of Civil Procedure*, and that the High Court do thereupon finally determine the case.

That each party do bear his own costs of this appeal, and that all the costs of the parties in the Lower Courts do abide the event of the final decision of the suit.

Solicitors for the Appellants: *Burton, Yeates, & Hart.*

Solicitors for the Respondent: *Gregory, Rowcliffes, & Co.*

7th and 8th May 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

RAMASAWMI CHETTI (Defendant,) ... } *Appellant,*

and

THE COLLECTOR OF MADURA (Plaintiff) ... } *Respondent.*

Registration—Puttah—Section 2, Act XV. of 1866—Sections 3, 8, 9 and 11, Madras Act VIII. of 1865.

The puttahs and muchilkas mentioned in Section 3, Madras Act VIII. of 1865, must be understood to embrace those written agreements only which are mutually interchanged by a landlord and those of his tenants who are actually engaged in the cultivation of the lands to which they relate, since the remedies which the Act provides in Sections 8 and 9, can only be made available where the relation of landlord and tenant, or a holding of some sort, already exists upon such a basis that the landlord or the tenant, as the case may be, can come into Court and claim to have a writing granted to him.

Semble, if a lease granted by a zemindar to an intermediate holder could be considered a puttah within the meaning of Section 3 of the Madras Act VIII. of 1865, it would, under the proviso to Section 11 of that Act, be liable to be set aside by the successor of the grantor if granted at a lower rate than that generally payable on such lands, and not for the purposes mentioned in the said proviso.

This was an appeal from a decree of the High Court of Madras, dated the 5th January 1877, which affirmed the judgment and decree of the District Judge of

* 6 Cowell's I. A., p. 170; I. L. R. 2 Mad. 67.

Madura, dated the 30th May 1876, made in favour of the respondent.

The chief question of law raised by the appeal was as to whether a lease of lands alleged to have been granted to the appellant's father by the father of the respondent on the 15th April 1867, but which had not been registered, was admissible in evidence and could have effect given to it, as falling within the provision of Section 2, Act XX of 1866, which exempts from registration "*puttahs*" and "*muchilkas*" as defined in Section 3, Madras Act No. VIII. of 1865. Another question arising in the case was as to whether, assuming the lease to be a puttah within the meaning of the said Act VIII. of 1865, it would be binding as against the respondent who is the successor of the grantor, having been granted at a lower rate than that usually paid for lands of a similar character, and not for the purposes expressed in Section 11 of the said Act

The facts of the case, which were not disputed, will be found set forth in their Lordships' judgment.

Mr. *J. D. Mayne*, for the appellant, contended that the instrument in question was a puttah within the meaning of the 3rd section of the Madras Act VIII. of 1865, and so exempt from registration under Section 2, Act XX. of 1866. It was a written agreement for the payment of rent passing between a landholder and a tenant and contained all the particulars which under Act VIII. of the Madras Code a puttah should contain. The fact of the land having been leased at a rate lower than its actual value did not bring the case within the proviso of Section 11 of Act VIII., since that proviso was not of a general character, but intended only to apply to suits brought under Sections 8, 9 and 10 of the Act. It was unlikely that a proviso, incidentally introduced, should be intended to alter the general law of leases. The Act purported to be a consolidation Act, and it was nowhere provided by the old law that a son was not to be bound by his father's puttah if granted at a low rate. The Madras Regulations No. XXX. of 1802, Sections 9, 13 and 15, and No. IV. of 1822, showed that when these laws were passed the Government had no intention to put any such limit on the rights of landholders and tenants. The case of *Muttu Viran Chetti* v. *Ranee Kattama Natchiyar* (1), in which a permanent lease made by a zemindar at a low fixed rent was held binding on his successor, shows that before the passing of Act VIII. of 1865, there was no limitation of the landholder's right to lease. As to the manner in which the exemption provided under Section 2, Act XX. of 1866, has been applied in the case of a puttah, see *Vakaty Ramareddy* v. *Duvvuru Ayapareddy* (2).

Mr. *Cowie*, Q. C. and Mr. *Graham* for the respondent:—The Registration Act No. XX. of 1866 alters the previous Registration law, and makes all instruments which being required by the Act to be registered, are not registered, inoperative. Under that Act an unregistered lease is inoperative when it is not a puttah within the meaning of Section 3 of the Madras Act No. VIII. of 1865. In the Act last named *tenants* are defined to be all persons bound to pay rent, and it is provided that landholders shall be bound to enter into written agreements with all persons bound to pay them rent. The Act consequently applies only where there is an existing relation of landlord and tenant. But the case here was not of that nature. The appellant's father was a banker not previously connected with the lands of which he obtained this lease, but who had lent money to the father of the respondent. A banker lending money to a zemindar cannot sue the zemindar to grant him a puttah; but the puttah mentioned in Section 3 of Act VIII. of 1865, can be demanded as a right. In the present case the previously existing relation of landlord and tenant contemplated by the Act was not found. There was no occupation, and no binding contract to grant a lease. The relation of landlord and tenant begins only with the lease itself. To hold that lease exempt from registration would be equivalent to saying that no lease made in the Madras Presidency need

(1) 4 Mad. H. C. Rep. 463.
(2) 7 Mad. H. C. Rep 234.

be registered, and would frustrate the whole policy of Act XX. of 1866. Further, the contention that the proviso of Section 11, Madras Act VIII. of 1865 applies only to suits under Sections 8, 9 and 10 of that Act, is not supported by the language used in Section 11, which does not so limit its application. That section applies generally to all suits and is a substantive enactment. The authorities cited do not touch the case.

Mr. *Mayne*, in reply: The respondent's contention that Act VIII. does not apply where the lease is to a stranger is incorrect. It provides that a puttah may be demanded for waste lands, in respect of which there can be no anterior relationship of landlord and tenant. It is also incorrect to say that assuming the appellant's contention that the instrument in dispute is a puttah under Act VIII. and so exempted from registration to be true, it would follow that no lease in Madras would require registration. All leases granted by persons other than landholders would still have to be registered.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This was a suit brought by the Collector of *Madura*, acting for the Court of Wards, on behalf of the minor zemindar of *Ramnad*, against the Defendant, to recover possession of the village of *Selugai*, and also to set aside a lease of that village granted by the late zemindar of *Ramnad*, the minor's father, in the year 1870. The learned counsel on the part of the Appellant, the Defendant below, has not sought to impeach the judgments of the Courts below so far as they set aside the lease of 1870, but his contention has been directed to establish a former puttah which had been granted by the late zemindar to the Appellant's father in the year 1867. It does not appear that the question which has been argued at the Bar was the subject of decision in the High Court. The judgment of the District Judge of *Madura* proceeded upon the footing that the document of 1867 was inadmissible in evidence. It is an unregistered document made before the birth of the present Plaintiff. The District Judge also held that the lease of 1870, which was registered, did not bind the minor Plaintiff, inasmuch as it was granted after his birth, and upon considerations which did not support it against his inchoate title. Their Lordships feel regret and some surprise that the Judges of the High Court have given no reasons for their judgment; none have been reported to their Lordships.

The sole question which is now before their Lordships is whether the document of 1867, in consequence of its not having been registered, is admissible in evidence and affects the estate; the point for decision being whether it is a document that falls within the General Registration Act, No. XX. of 1866.

The argument having turned entirely upon the effect of this Registration Act, which refers to a *Madras* Act, and upon the construction of those two Acts as applicable to the instrument, it is unnecessary to go into the previous history of the case. It is sufficient to say that the late zemindar of *Ramnad* was adopted by the widow of a former zemindar; that his adoption was disputed, and great litigation was the consequence of that dispute. The case ultimately came before this tribunal upon appeal, and a decision was given, in May, 1868, in favor of the adoption. Considerable expenses were necessarily incurred, and the Defendant's father, *Arunachalam Chettiar*, and his partners, who appear to have been merchants and bankers, made very large advances to the zemindar and his agents for carrying on the legal proceedings. In 1867, when the document in question was granted, the advances amounted to about a lac and a half of rupees; and at the end of the litigation the further advances and accumulated interest amounted to very nearly four lacs of rupees. The merchants who advanced the money took security for their advances, and in the end they received the whole of their money with compound interest, and several large sums by way of presents in addition to the interest.

The document on which the question arises is dated the 15th of April, 1867, and professes to be a lease from the late zemindar to *Arunachalam Chettiar*. Its terms are these: "In consideration of the assistance you have rendered to this samastanam (zemindary), you requested that the kasba (chief) village of *Selugai*, in *Selugai* division in *Rajah-Singamangalam Firka*, should be leased to you for forty years, fixing a favourable poruppu." "The aforesaid *Selugai* village"—describing it—"has been accordingly leased to you for forty years from this Fusli 1276 up to Fusli 1315, fixing the poruppu at Rs. 400 per annum." It may be stated, in passing, that it is found that the value of this village was Rs. 1700 per annum, so that it was obviously a favourable lease, which was intended to confer a valuable interest on the lessee. "You shall, therefore, raise the required crop and enjoy; and, agreeably to the kararnama (agreement) you have given, you shall continue to pay the fixed poruppu according to the instalments of kist year after year."

This lease was not registered. It is the document upon which the Defendant now relies to resist the claim to possession of the village made on the part of the minor zemindar; for, as has been already stated, it is not now contended that the judgments below with regard to the lease of 1870 can be impeached.

It is necessary to refer shortly to Act No. XX. of 1866, though the main question arises upon the *Madras Act* VIII. of 1865, to which reference is made in it. By the 17th section of Act No. XX. "leases of immoveable property for any term exceeding one year" are required to be registered. The interpretation clause (clause 2) says of the word "lease," "'Lease' includes a counterpart, a kabulyat, an undertaking to cultivate or occupy, and an agreement to lease, but not a puttah or muchilka as respectively defined in sect. 3 of Act No. VIII., of 1865, of the Governor of *Fort St. George* in Council executed in the *Madras* Presidency." It is contended on the part of the Defendant that this document is a puttah as defined in sect. 3 of this Act.

The preamble of the *Madras Act* is as follows: "Whereas it is expedient to consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent." Sect. 3 seems to be confined to the relation of tenants who are cultivating the land, and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be, by sect. 3 and the sections which specifically refer to it, to regulate the relation of landlords and tenants of that description. This 3rd section, which is the one under which this document must be brought, if it is to escape the obligation of registration, is as follows: "Zemindars, shrotriemdars, inamdars, and persons farming lands from the above persons, or farming the land revenue under Government, shall enter into written agreements with their tenants, the engagements of the landholders being termed puttah, and those of the tenants being termed muchilka." It is said that this description embraces all cases where there is a landlord and a tenant. If that were the construction of the 3rd section as applied to the *Registration Act*, the consequence would be that in *Madras* all leases would be excluded from the beneficial operation of that Act. However large the premiums that may have been given on such leases, however small the rent, if there be a rent at all, according to the contention on the part of the Appellant, the lease would fall within this 3rd section, and therefore need not be registered. One class of those who are described as landlords as distinguished from tenants are persons farming lands from zemindars and others who are previously mentioned; but if the wide construction were to prevail, every lease from a zemindar to any such person intermediate between the zemindar and the ryots, would be a lease which need not be registered; and the mischief against which the *Registration Act* was intended to provide a remedy would exist in the case of all the valuable leases which are granted by zemindars to intermediate holders.

The reference in the *Registration Act* is to a "puttah or muchilka as respectively defined in sect. 3." This section of the *Madras Act* does not strictly contain a definition, but a description only. It appears to provide for what shall be done where there is an existing relation of landlord and tenant, and requires that the landlord shall in that case enter into a written engagement with his tenant. Following the provisions of the Act, the remedies which are given in sects. 8 and 9 can only be available where the relation of landlord and tenant, or a holding of some sort, already subsists, upon the basis of which the landlord or the tenant, as the case may be, may come into Court and claim to have a lease granted. Sect. 8 is, "When any of the landholders specified in sect. 3 shall for three months after demand refuse to grant such a puttah as his tenant was entitled to receive, it shall be lawful for the latter to proceed by filing a summary suit before the collector, who shall try the case and direct a proper puttah to be granted." Under sect. 9, the landlord may in like manner compel the tenant to accept a proper puttah. These provisions are made upon the assumption that there is an existing relation which would warrant the application by either party for a written puttah. It cannot, of course, be contended that in this case the zemindar was bound to grant the lease of 1867, or any lease to *Arnachellum Chetti*. The other provisions of the Act are consistent with this construction of sect. 3. Sects. 5, 10, 11, and 12, refer specifically to the class of landlords described in sect. 3; whilst sect. 13 refers to other classes, shewing that sect. 3 was not intended to apply to all cases of persons holding under others, but to a particular class of landlords and tenants only.

A further question was raised in the first instance before the District Judge, viz., whether, supposing the document of 1867 to be a puttah within the meaning of the *Madras Act* VIII. of 1865, the proviso which is found at the end of sect. 11 would not nullify its effect as regards the Respondent, the "successor" of the grantor? There seems to be ground for the contention that this proviso is not limited to cases where suits are brought under the 8th, 9th, and 10th sections, although the commencement of the 11th section refers to such suits. The commencement is: "In the decision of suits involving disputes regarding rates of rent which may be brought before collectors under sects. 8, 9, and 10, the following rules shall be observed," and then come four rules. Three of them appear to apply to such suits, but it may be doubtful whether clause 4, which relates to waste lands, is so confined. Then the proviso referred to is, "Provided also, no puttahs which may have been granted by any such landholder at rates lower than the rates payable upon such lands, or upon neighbouring lands of similar quality and description, shall be binding upon his successor, unless such puttah shall have been *bonâ fide* granted for the erection of dwelling-houses, factories, or other permanent buildings, or for the other purposes mentioned in the proviso." It is difficult to suppose that the operation of this proviso was intended to be confined to cases in which suits are brought under sects. 8 or 9; and it may be that it was intended to apply to all puttahs which come within the 3rd section. If so, the Appellant, assuming the Respondent to be a successor within the meaning of the proviso, would be placed in the difficulty which induced his advocates at the first hearing before the District Judge at *Madura* to take the opposite view from that which his counsel has taken to-day, and to contend that this document was not a puttah within the meaning of the *Madras Act*, a view which was upheld by the Judge. It is not however necessary to decide this point.

On the whole therefore their Lordships are of opinion that this appeal fails, and they will humbly advise Her Majesty to affirm the decrees of the Court below, with costs.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*

Solicitor for the Respondent: *H. Measure, India Office.*

27th May, 1870.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

CHIDAMBARAM CHETTIAR & others (Defendants) } *Appellants*,

and

GOURI NACHIAR (Plaintiff) ... ... } *Respondent.*

Partition under the Hindu Law—Declaratory order—Separation in estate—death of Plaintiff before final decree.

In a suit brought by the younger of two Hindu brothers against his elder brother for the partition of lands belonging to an ancestral joint estate, and against other defendants, claiming as encumbrancers or as absolute owners of portions of the said lands under titles derived from the plaintiff's father and elder brother, for the recovery of the plaintiff's share of the said lands freed from the interests claimed by these defendants, except in so far as such interests might be valid as against the plaintiff under the Hindu law, the Court passed an order to the effect that the property claimed was partible, and that the plaintiff was entitled to a moiety, but directed that with a view to ascertain how far the moiety awarded to the plaintiff was affected by the acts of the plaintiff's father and elder brother, a Commissioner should be appointed to investigate accounts and report thereon to the Court. Before the inquiry thus directed to be made was completed, and before a final decree was passed for the division of the property, the plaintiff died *Held*, that the order passed by the Court was tantamount to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from its date, if they had not previously become so; and, consequently that the plaintiff's interest in the property in suit would not pass to the defendant, his elder brother, as joint estate by survivorship, but to his own representatives as separate estate.

Appoovier v. Rama Subba Aiyan (1) referred to and followed.

This was an appeal against a decree of the High Court of Judicature at Madras, dated the 19th March 1875, substantially affirming a decree and judgment of the District Court of Madura, dated the 2nd April 1872.

The question raised by the appeal was as to whether the plaintiff's suit which was brought against his elder brother for a partition of lands belonging to the estate of their father, and against other defendants, who alleged title to these lands under sales and mortgages to them by the father and elder brother of the plaintiff, for possession, should not upon the plaintiff's death without issue, before a final decree had been pronounced in the suit, have been dismissed by reason that at that date the proceedings in the suit had not effected such a severance of interest between the brothers, as would prevent the share of the younger passing to the elder by right of survivorship.

The appeal was brought by certain of the defendants who claimed as alienees or mortgagees of portions of the lands in suit.

Mr. *Cowie*, Q. C., and Mr. *J. D. Mayne*, for the appellants, contended that the suit abated on the death of the plaintiff, prior to which there had been no decree for partition, or none which bound the appellants. The decree for partition which had been made in the suit was not made till after the plaintiff's death. There was nothing in the present case to bring it within the law laid down in *Joynarain Giri* v. *Gresh Chunder Myti* (2). Apart from the decree finally passed, the plaintiff could have taken no measures to enforce his claim against the appellants.

Mr. *Leith*, Q.C., and Mr. *F. H. Bowring* who appeared for the respondent were not called on.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

This appeal arises out of a suit brought by the younger son of one *Gouri Vallabha Tevar*, the late zemindar of a dependent

* 6 Cowell's I. A., p. 177; I. L. R. 2 Mad p. 83.

(1) 11 Moo. I. A, 75; 2 P. C. J. 218.

(2) L. R., 5 Ind. Ap. 228, at p. 232; s. c. I. L. R., 4 Calc., 434, at pp. 437-438; 3 P. C. J. 571.

zemindary carved out of the great *Sivagunga* estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the zemindary under titles derived from either the father or the elder brother of the Plaintiff. The general nature of the suit was for a partition between the brothers, and for the recovery of the Plaintiff's share freed from the interests claimed by the other Defendants, except to the extent to which the alienations were valid against him under Hindu law. The litigation has now been reduced to the question whether and upon what terms the Plaintiff's representatives are entitled to recover his moiety of the village *Pattanam* from the third Defendant *Ramasami Chetti*, and his moiety of the village *Minnittangudi* from the fourth Defendant *Ramanadhan Chetti*. These two Defendants are the present Appellants.

The facts were very clearly and candidly stated by Mr. *Cowie* in his opening, and it is unnecessary to recapitulate them, because it is admitted that the decree impeached must stand, unless the Appellants can succeed upon one ground. That ground is, that the Plaintiff having died on the 28th of March, 1872, without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to effect that severance of interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question: In August 1871, the first of the issues settled in the cause, viz., "whether the property sued for constituted a zemindary, and if so, whether it is partible or impartible, and whether it is liable to all the incidents of private property," was tried separately, and was determined by the Civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause and disposed of them by his judgment and decree of the 2nd of April, 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd of April of that year. On that petition the Judge made the following order: "The case has been heard; oral judgment pronounced at the close of the hearing except in regard to details; and this day the Court delivered its written judgment; petition dismissed." The present Appellants appealed against the decree of the 2nd of April, 1872, and the second of their grounds of appeal is the following: "The Plaintiff died after the suit was brought, but before the decree was written or signed or judgment delivered, and that under these circumstances the suit ought to have been dismissed, as no partition could be made."

On the 6th of January, 1873, the High Court, before disposing of the appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the Plaintiff died, and when it became so; and also another issue. In his finding upon the first issue dated the 14th of April, 1873, the Judge said, "I am of opinion that the partition was complete, *i.e.*, that the brothers became divided in interest, at least on the 24th of August, 1871, if not before. I regard that order as equivalent to a decree for dissolution of partnership and for an account. The shares were ascertained, and all that remained to be done was to see what charges, if any, on any particular properties, were good as against Plaintiff. This was a question between the Plaintiff and the alienees alone, and first Defendant had nothing to do with it." The present Appellants appealed against that finding, but the High Court in its judgment of the 5th of January, 1874, expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that in the month of February, 1872, and before the written judgment of the 2nd of April of that year was delivered, there had been an oral judgment which

would have effected a partition, or at least a severance of interest between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th of August, 1871, on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear that the estate was in its nature partible, that the facts were incontestible, and stated that the Defendants' vakils had given in their adhesion to the finding of the Court upon that issue. The judgment then proceeded as follows: "That being so, it is also not disputed that Plaintiff is entitled to a moiety of the property left by his father at his death, whatever that moiety may be, subject to all charges then subsisting, and to such charges as have been incurred subsequently, as are of such a character as are recognised under Hindu law to be valid charges upon the estate, but to enable the Court to arrive at a correct conclusion it is necessary to appoint a Commissioner with power to investigate the accounts, and the result will be submitted for the Court's consideration." It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the Defendants, other than the Plaintiff's brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgage property. It then adds, "In accordance with these observations an order will be prepared." No formal order or decree drawn up upon that judgment is to be found in the Record, but their Lordships are by no means satisfied that there may not have been one. At all events they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think appears from the 11th and 19th paragraphs of the judgment of the 2nd of April, 1872. In the former he says, "The Court in its proceedings of the 24th of August, 1871, held that the estate in question was partible and subject to all the incidents annexed to property among Hindus, and that the Plaintiff was entitled to a moiety of the property left by his father at his death, whatever that moiety might be, subject to all charges then subsisting and to such charges as have been incurred subsequently as are of such a character as are recognised under Hindu law to be valid charges upon the estate." In paragraph 19 he says, "This suit has now come before me in another form, and the points I have to determine are the conditions under which Plaintiff is entitled to recover a moiety of his ancestral property." He does not in any part of this judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the Plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be observed that there was no appeal against the judgment of the 24th of August, 1871, or its finding on the first issue; and that the first Defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th of August, 1871, must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual divison of the property was not complete, falls within the principle of *Appovier* v. *Rama Subba Aiyan* (1), and there is no ground for the contention that upon the death of the Plaintiff his interest passed

(1) 11 Moore's Ind. App. 75; 2 P. C. J. 218.

to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree under appeal and to dismiss this appeal with costs.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondent: *Talbot & Tasker.*

28th May, 26th July, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

ASHUTOSH DUTT (Defendant)... ... } *Appellant,*

and

DOORGA CHURN CHATTERJEE, and another (Plaintiffs) ... } *Respondents.**

Trust for Religious uses—Beneficial Interest in Surplus—Construction of Will.

A Hindu lady left by will to her sons lands belonging to her to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies, with a provision, that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family.

Held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable, and could not be presumed to be valueless.

Held also, that directions given by the testatrix in her will to the effect, that her heirs should have no power of gift or sale over the property bequeathed, and that it should not be attached or sold on account of their debts, being inconsistent with the interest actually given, were wholly beyond her power, and must be rejected as having no operation.

26th July 1879.

The judgment of their Lordships was delivered by.

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The principal question to be determined in this appeal is, whether or not the Respondent, *Doorga Churn Chatterjee* had any right, title, or interest in a certain talook called *Lot Panchgatchia*, in Zillah *Hooghly*, liable to be attached and sold in execution of a money decree against him. The question arose in this manner. The Appellant sued him in the High Court, Original Jurisdiction, and on the 16th of November, 1864, obtained a decree against him for Rs.3500, with interest and costs. In execution of that decree an attachment was issued. The attachment is not on the record, but it appears from the plaint that under it a one-third share of the talook was attached, and thereupon *Doorga Churn* (the debtor) and his brother *Shama Churn*, who are the Respondents in this appeal, intervened and put in a claim to the property, alleging that it was not liable to attachment, inasmuch as they held it in trust for an idol, Raj Rajeswar, by virtue of a will executed by their mother *Saraswati*. The Judge of *Hooghly* having investigated the claim, distrusted the genuineness and *bonâ fides* of the will, he stated that he did not believe that the property was held in trust for the idol, and, under the provisions of sect. 246 of Act VIII. of 1859, disallowed the claim of the Respondents, and ordered the execution to proceed. The present suit was consequently brought by the Respondents against the Appellant under the same section to set aside the order of the Judge, and prayed that the will executed by their late mother should be confirmed, that the share of the talook which had been attached and ordered to be sold should be declared *dewuttur* property, or property dedicated to religious uses, and not liable to be attached or sold for a private debt of *Doorga Churn*.

* 6 Cowell's I. A. 182, I. L. R. 5 Cal. 433.

A written statement was put in on behalf of the Defendant, and several issues were raised, and amongst them the third, fourth, and fifth, which were the material one son the merits. The third was, whether the will set up by the Plaintiffs was a genuine document, and whether the mother, *Saraswati*, endowed the property in suit for the sole benefit of the idol, and whether the profits of the disputed estate had been appropriated to the idol alone. Fourth, whether the Plaintiffs were entitled to a declaration that the estate was not liable to be attached and sold in execution of the decree obtained against one of them personally. Fifth, whether the Plaintiffs were the beneficial owners of the property. The Subordinate Judge found in substance that the will was genuine, that it was not colourable or fraudulent, and that it was intended to be acted upon, and thereupon he held that the property was *dewuttur*, and not liable to be attached or sold for a private debt, and ordered it to be released from attachment. Each party was ordered to bear his own costs.

Upon appeal to the High Court it was contended that the Lower Court was wrong in finding that the will was a *bonâ fide* instrument, and that the Court ought to have found upon the evidence on the record and the probabilities of the case that the will did not create a *bonâ fide* endowment, but was a mere device to secure the property from sale in execution of a decree; that the endowment to the household idol was a mere colourable device to give a show of legality to a transaction which was in reality a perpetuity and to preserve the property in the hands of the family, and that, as such, it was void and illegal.

Further, it was contended that under any view of the nature and effect of the will the debtor, *Doorga Churn*, had a considerable beneficial interest in the property.

The High Court affirmed the decision of the Lower Court. They said: "We have no doubt that the will made by *Srimati Saraswati Debi* is a valid disposition of her property, and that the effect of it was to create an endowment substantially for religious uses. That being so, it is clear that the attachment issued against a share of this property at the instance of the execution creditor, and the order made by the Judge of *Hooghly* that the execution should proceed, ought both to be set aside; and it is impossible to say that the Subordinate Judge was wrong in confirming the will, and declaring the subject of it to be *dewuttur* property. It may be that, under that clause of the instrument which disposes of the surplus proceeds of the estate, the 'shansar,' or members of the family establishment, may hereafter become entitled to some beneficial interest in such surplus; but this interest is of such a fluctuating and uncertain character that it could never form the subject of attachment or sale."

The Lower Court having found that the will was genuine and *bonâ fide*, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bonâ fide* intended to operate; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following:—

"This will is executed by *Srimati Saraswati Debi*. I am always sick; hence I execute this will to the following effect:—I dedicate the auction-purchased property, No 3496, *Lot Panchgatchia*, Pergunnah *Baligori*, *Zillah Hooghly*, standing in my name, to the Thakur Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed, from the proceeds of the said property if there be a surplus in the profits then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son *Doorga Churn Chuttopadhya* and the second son *Sama Churn Chuttopadhya* to be the executors of this will When my

youngest son *Bhogobati Churn Chuttopadhya*, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes, charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges; and will defary from the aforesaid profits the expenses of the daily worship of the said Thakur, the expenses of the *parbans*, *i e.*, the *Dolejattra*, the *Rashjattra*, &c. on his account, [the expenses of] the *Doorga Pooja*, the *Shama Pooja*, and the *Jagadhatri Pooja*, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate. And from the proceeds thereof you will meet the expenses described above; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death, he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb* and the ceremonies and *poojas*, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts. To this effect, of my own accord and in full possession of my senses, I execute this will. The 2nd of Cheyt, 1274.

"*Saraswati Dabi.*"

According to the construction which their Lordships put upon the will, it cannot be said that the property was wholly *dewuttur*. They consider that it created a charge upon the property for the expenses of the daily worship of the idol, as it was performed at the time of the death of the testatrix, and of the *poojas*, *shradhs*, and religious ceremonies for which provision is made by the will. For the purpose of this decision the charge may be termed generally a charge for such religious acts and ceremonies. So far the case falls within the class of which that of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (1) may be referred to as an example.

The next question that arises is, who are entitled to the beneficial interest in the talook, subject to the religious and ceremonial trust. The testatrix has certainly attempted to dispose of this, and, if she has done so effectually, it cannot be held, as has been held in some cases, to have passed to her sons in their character of heirs-at-law as property undisposed of. Her disposition is contained in the words, "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom."

Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further declares "this property of mine will not be liable for the debts of any person. None will be able to transfer it, none will have the right of gift and sale." But these directions, being inconsistent with the interest given, were wholly beyond her power, and must be rejected as having no operation. This being so, it follows that *Doorga Churn* took a share of the property in question, which, after satisfying the expenses actually incurred in the worship of the idol, cannot be assumed to be valueless, and might be considerable, and which, in their Lordships' opinion, was subject to be taken in execution by his creditor. Inasmuch as their Lordships are not precisely informed of the state of the family on the death of the testatrix, they are unable to specify what that share was, and there being no *constat* as to what is required for the performance of the religious trust, the interest acquired by a purchaser at any such execution sale would have to be ascertained and realised in some other further proceeding. In these circum-

(1) 8 Moore's Ind. App. Ca. 66.

stances, their Lordships are of opinion that the attachment should be allowed to stand; but that the summary order of the Judge of *Hooghly*, which would apparently authorize the sale of one-third of the talook, as if unaffected by the will of the testatrix, is erroneous, and should be set aside.

They will therefore humbly advise Her Majesty that the decrees of both the Lower Courts be reversed. That it be declared that the will of *Saraswati* was a genuine will and *bonâ fide* intended to operate, and that the effect of the will was to charge the property in the hands of the executors thereby appointed with the payment of such sums as might be necessary to defray the expenses which might from time to time be incurred in the daily worship of the idol therein mentioned, in the manner in which such service was performed at the time of the death of the testatrix, and with the expenses of the *parbans* and of the *poojas* and other religious acts and ceremonies in the said will mentioned; that, after defraying such expenses, the surplus belonged to the members of the joint family, of whom *Doorga Churn* was one, and that his interest in the talook, under the said will, was liable to be attached and sold in execution of the decree of the High Court of the 16th of November, 1864; and to order that the summary order of the Judge of *Hooghly* be set aside, but that the Appellant be at liberty to proceed to a sale in execution of the right, title, and interest of *Doorga Churn* in the said talook under the said will, and that each party do bear their own costs of the suit in both the Courts below.

The Appellant having failed in his attempt to impeach the genuineness and *bonâ fides* of the will, their Lordships are of opinion that he is not entitled to the costs of this appeal.

Solicitors for the Appellant: *Robert Oldershaw & Son.*

10th, 11th, June 1879.

PRESENT:

Members of the *Judicial Committee*:
The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KALI KISHEN TAGORE (Defendant) ... } *Appellant,*

and

JODOO LAL MULLICK (Plaintiff) ... } *Respondent.**

Riparian Proprietors—Flow of Water—Encroachment.

There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

The Plaintiff and Defendant were proprietors of land and gardens on opposite sides, just at the mouth of a *khal*, in which the tide in the River Hooghly flowed and reflowed; the sides being protected by walls erected one on each side of the *khal*. The Defendant upon the wall on his side becoming somewhat delapidated constructed a fresh one, to some degree altering the direction of the wall, a portion of which was built further in towards Defendant's land and another small portion a little further out, encroaching a triangular piece whose altitude and base were five and ten feet respectively.

The Plaintiff, thereupon, brought a suit which was stated to be one for possession of land by demolishing a brick built retaining wall, basing his cause of action upon the averments—that injury had accrued to the retaining wall of the Defendant's garden, that inconvenience had been caused to the passage of boats to the Defendant's screw-house through the *khal*, and that apprehensions had been created of the screw house falling down eventually.

The *solum* on which the Defendant built his wall was found to be vested in the Government and the Defendant's act, though an encroachment, was by the first appellate court held not to entitle the Plaintiff to have the wall removed, as no damage to Plaintiff's property was established.

On special appeal, the High Court apparently on the authority of *Bickett* v. *Morris* reversed the decision of the first two Courts and ordered a removal of a portion of the wall.

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* 6 Cowell's I. A., 190.

Held, reversing the decision of the High Court, that the case of *Bickett* v. *Morris* did not govern the present case, as the Plaintiff did not state his cause of action in the manner in which it was stated in *Bickett* v. *Morris*, claiming as a riparian proprietor, a right to the flow of the water as it had been accustomed to flow, alleging that the flow was seriously and sensibly directed so as to be an injury to his rights; and that as all that had been found against the Defendant, was that he encroached on the bed of the *khal*, the soil of Government, without causing any injury to the Plaintiff, there was neither *damnum* nor *injuria* and therefore no action could be maintained.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case the Plaintiff and Defendant were proprietors of land and gardens on opposite sides of a Khal in which the tide in the River *Hooghly* flowed and re-flowed, and by which the surface water of certain lands was carried in a direction from the east to the west into the *Hooghly*. The Plaintiff was the proprietor on the north side, the Defendant on the south side just at the mouth of the khal. It seems that it is a tidal creek which is daily subject to the flow of the river; that for the protection of the banks on each side of the khal, walls had been erected, one at each side of the khal, and that the Defendant, upon the wall on his side becoming somewhat dilapidated, constructed a fresh one, and employed a skilled person to do so, who to some degree altered the direction of the wall; a portion of it he built further in towards the Defendant's land than it had been before, and another small portion he built a little further out. We have the precise extent to which it was built further out, which was five feet, making what may be called in one sense an encroachment, consisting of a triangle whose altitude was five feet, and whose base was about double that length. The Plaintiff, it appears, first applied to Mr. *Whitfield*, the Government engineer, desiring Mr. *Whitfield* to interfere, on the ground that the Defendant's wall was an obstruction to the public navigation in the khal which belonged to the Government. Mr. *Whitfield* declined, however, to interfere, on many grounds, one of which was that the khal was not navigable, and another that there was in his opinion no obstruction.

The Plaintiff thereupon brought this action. It is stated to be a suit "for possession of land by demolishing a brick-built retaining wall." He goes on to aver:—"By the said act of the Defendant, injury having accrued to the retaining wall of my garden, and inconvenience having been caused to the passage of boats to my screw-house through the said khal, and apprehensions being created as to the screw-house falling down eventually, a cause of action has arisen. Therefore my prayer is that a decree be given directing the removal of everything built by the Defendant that stands on the disputed land mentioned below, and awarding me possession of the land and khal in question." His case was that he was entitled to the *solum* on which the Defendant had built his wall; that his navigation was obstructed, and that there was a danger of his screw-house falling down. It is true that he subsequently presented a petition in which he prayed that if he was not entitled to possession of the disputed land, still, if it was found that the retaining wall ought to be removed, there should be a decree granting that remedy. The petition was however rejected.

The case came before two subordinate Courts. The Court of the moonsiff found that the Plaintiff had no right to the bed of the khal or any part of it, but that the Defendant had a right *ad medium filum*. He further found that the khal was not navigable, and that no injury had been caused to the Plaintiff, and that the flow of the water had not been in any way sensibly obstructed.

On appeal to the Subordinate Judge, he affirmed the findings, with an exception which constitutes the chief difference between the decrees, that neither the Plaintiff nor the Defendant had any right to the bed of the khal, which it would appear is vested in the Government in right of their zemindary of the Twenty-four Pergunnahs. The finding of the Subordinate Judge is in these terms:

"The conclusion, therefore, at which I arrive is that the Defendant has in fact committed an encroachment, though not upon the Plaintiff's property; but that it is not established that damage to the Plaintiff's property must necessarily result from the encroachment. Plaintiff, therefore, is not entitled to have the wall removed."

The case came on special appeal before the High Court; and the High Court, having remanded the case for the purpose of ascertaining the precise extent of the encroachment, considered themselves bound to reverse the decisions of both the Courts, and to order the removal of a portion of the Defendant's wall, apparently on the authority of the case of *Bickett* v. *Morris et Ux.*, which is reported in Law Rep. 1 H. L., Sc p. 47. The effect of that case may be stated thus: A riparian proprietor on one side of a stream complained of the riparian proprietor on the other side, who had built into the *solum* of the stream beyond a line which had been agreed upon between the parties, and had thereby obstructed and changed the flow of the water so that the Plaintiff's right to have the water flow in its accustomed manner was injured. It was held that such an obstruction was such an injury to the Plaintiff's rights as enabled him to support the action without proof of actual damage immediate or even probable. The *ratio decidendi* is illustrated by the remark of the Lord Chancellor. "It was asked in argument whether a proprietor on the banks of a river might not built a boat-house upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted."

Their Lordships observe that in a subsequent case in the House of Lords of *Orr Ewing* v. *Colquhoun*, reported in 2 App. Cas. p. 839, not in itself having much bearing on the present, inasmuch as it related to the obstruction of a navigable stream, Lord *Blackburn* explains the previous case in this manner: "The Defender had without any right built an encroachment on his side of the river which necessarily caused more water to flow on the Pursuer's side, and though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietary right of the Pursuer, but he was not able to qualify present damage."

Their Lordships are of opinion that the case of *Bickett* v. *Morris* (1) does not govern the present. In the first place, the Plaintiff does not state his cause of action in the manner in which it was stated in *Bickett* v. *Morris* (1). The Plaintiff does not state that he, as a riparian proprietor, was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights; but he puts his case on the ground that he is the owner of the soil on which the wall was built, an issue which is found against him. It is true that he sought to enlarge his plaint, and avail himself of any ground he might have for obtaining the removal of this wall; but their Lordships do not find that he has either claimed or proved such an easement as that which has been described in the case of *Bickett* v. *Morris* (1), and which was there interfered with, or that any issue was raised as to such a right of easement. It appears that the Plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad Mideum filum*. It may be that this khal being in possession of the Government, the Government may be able to do what they like with it; and if the Plaintiff would have no right to complain as against them of any interference with the flow, it does not seem clear what right he could have against a riparian proprietor on the other side. But further it has not been found in this case—indeed the evidence on the whole points

(1) Law Rep. 1 H. L., Sc. 47.

in the other direction—that the Defendant, by what he has done; has to use the words of Lord *Blackburn* sensibly altered the flow of water. Without establishing this, the Plaintiff has failed to shew any such injury to his right as would support an action. All that has been found is that the Defendant encroached on the bed of the khal, which is the soil of the Government, without causing any sensible injury to the Plaintiff. There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

Under these circumstances their Lordships are of opinion that the High Court was wrong in reversing the decision of the Lower Courts and ordering, as they did, the wall to be removed; and their Lordships are of opinion that the decision of the Subordinate Judge was right.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court be reversed; that the judgment of the Subordinate Judge be affirmed; and that the Appellant have the costs of the appeal in the High Court and also the costs of this appeal.

Solicitors for the Appellant: *Wrentmore & Swinhoe.*

24th and 25th June, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

• *On Appeal from the High Court of Judicature at Fort William in Bengal.*

RAGHOOBUR DYAL SAHOO and others (Plaintiffs) ... } *Appellants,*

and

MAHARAJAH KISHEN PERTAB SAHEK (Defendant) ... } *Respondent.**

Accretion by Gradual Accession—Riparian Proprietors—Effect of Sudden Change of the Course of a Boundary River—Regulation XI. of 1825, sect. 4, cl. 1, 2; sect. 2.

The lands in dispute were in 1837 settled with the predecessors of the Plaintiffs. In 1847 the settlement was renewed and the predecessors of the Plaintiffs continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1857. Prior to the renewal of that settlement in 1857, the river Gunduck which was to the south of the Plaintiff's zemindary (in district Tirhoot) and to the north of the Defendant's (in district Sarun), had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it. A question arose as to whether the Plaintiffs were entitled to a renewal of the settlement in 1857 or whether the Defendat was entitled to it.

Held, upon the construction of Regulation XI. of 1825, sec 4, cl. 1 and 2, that in the absence of evidence of a clear and definite usage that the river Gonduck was to be the boundary, not only between the two districts, but between the zemindaries on either side the lands still belonged to the Plaintiffs.

Appeal from a decree of the High Court (May 1, 1876) reversing a decree of the Subordinate Judge of *Sarun* (Nov. 16, 1874). These decrees were made after the suit had been remitted for trial

* 6 Cowell's I. A., p. 211.

on two additional issues by an order of Her Majesty in Council (Aug. 4, 1873), which reversed in a former appeal a previous decree of the same High Court (May 22, 1873). The original suit, which was in the nature of an action of ejectment, was brought on the 31st of January, 1860, by the above-named Appellants as zemindars and proprietors by purchase of mouzah *Sohagpoor*, in *Tirhoot*, against the father of the Respondent, whose ancestral estate, including a village called *Doomree*, was situate in the District of *Sarun*, and against seven other parties no longer parties to the suit.

The circumstances of the case and the proceedings in the suit prior to the remand are set forth in the judgment of their Lordships (Aug. 1, 1873), which is as follows:—

"Their Lordships regret to find that they are not at present in a condition to recommend to Her Majesty to make an order which will finally determine the long litigation between the parties to this appeal.

"The Defendant, the Maharajah of *Hutwah*, is the owner of a large estate in zillah *Sarun*, which comprises a village named *Doomree*, and for the purposes of this appeal may be called the *Doomree* estate. The Plaintiffs are zemindars in *Tirhoot*. Their estates comprise a mouzah called *Sohagpoor*, and may be designated by that name. The two zillahs are divided by the River *Gunduck*, which at that part of its course has a northern and a southern channel; and it is proved beyond a doubt that during the dry months the main body of the stream has run sometimes in the northern and sometimes in the southern channel.

"In 1790-91, when the two estates were permanently settled, the *Gunduck* ran in the northern channel; which their Lordships think must be taken to have been at that time the boundary of the two zillahs, and also of the two estates—*Tirhoot* and *Sohagpoor* lying on the northern, *Sarun* and *Doomree* on the southern bank of the stream.

"In the year 1837 the river, whether by gradual recession or sudden shifting is not very clear, had got into the southern channel; and a quantity of chur land to the north of that channel was then resumed by Government: and after an investigation which will be hereafter more particularly considered, a temporary settlement of it for the term of seven years was made by the Collector of *Tirhcot* with the zemindars of *Sohagpoor*. This was confirmed by the Commissioner of Revenue on the 23rd of April, 1838; and in August, 1846, a second settlement of this land for a term beginning on the 1st of May, 1846, and ending on the 1st of May, 1856, was made by the same authority with the then zemindars of *Sohagpoor*. Under the two settlements these zemindars appear to have been in undisturbed possession until 1848, when the river having returned to the northern channel, the deara land so settled was claimed by the Defendant's father, and other proprietors on the southern or *Sarun* side of the river. This led to disputes, and to an Act IV. of 1840 suit, which on the 16th of April, 1849, the magistrate of *Sarun* decided in favour of the zemindars of *Sohagpoor*, and his decision was confirmed on appeal by the Zillah Judge of *Sarun* on the 5th of October, 1849. It appears from these proceedings that, on that occasion, the jurisdiction over the lands in question was admitted to have passed, on the change in the channel of the river, from the *Tirhoot* to the *Sarun* authorities. Both the magistrate and the Judge, however, maintained the possession of the zemindars of *Sohagpoor* under the subsisting settlement; leaving the *Sarun* claimants to establish their title by regular suit. Some such suit, as to part of the land, appears to have been brought; but the final determination in it of the question of title was prevented by the proceedings which are next to be mentioned.

"On the 1st of May, 1856, the last temporary settlement with the zemindars of *Sohagpoor* expired, and the question

then arose with whom the Government should engage for the revenue of the deara land. On the 7th of January, 1857, the Collector of *Tirhoot* (Mr. *Lautour*) entertaining, in consequence of the change in the course of the river, doubts as to his jurisdiction to make a new settlement, though the revenue assessed under the previous settlements had always been paid into his treasury, brought the question before the Commissioner of *Patna*, Mr. *Tayler* That officer held a proceeding on the 3rd of March (both parties being represented before him), and came to the following conclusion:—

"'In this suit I have no doubt in the matter which the Collector has referred to me for my opinion, because from the purport of the report of the Collector, it is evident that the lands appertaining to the deara settled, were, without any dispute, in possession of the proprietors of *Sohagpoor*, and the revenue has been paid by them to the Collectorate of zillah *Tirhoot*; under these circumstances, the stream of the river having been changed, the rights and interests of the proprietors cannot be prejudiced thereby. Neither can the boundary be altered, as, for instance, there is much land on this side the *Ganges* which still belong to *Patna*; therefore,

"'Ordered—

"'That an answer to the letter of the Collector of zillah *Tirhoot* be forwarded to him, and he should act according to the directions in the said letter'

"And, on the 15th of March, 1857, he wrote a letter to the same effect to the Collector of *Tirhoot*, who resettled the deara with the zemindars of *Sohagpoor*, by a proceeding dated the 15th of April, 1857. The Appellant, however, appealed against this settlement to the Commissioner, and, through him, to the Board of Revenue; and the decision of the latter body was given on the 4th of September, 1857, in a letter from their Secretary, of which the following are the material paragraphs:—

"'2nd. At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the *Gunduck* should be the constant boundary between the two districts of *Sarun* and *Tirhoot*, and between the zemindaries on each bank divided by the river.

"'3rd. In accordance with this usage, the chur, the object of the present dispute, has been twice temporarily settled with the Maliks of mouzah *Sohagpoor* on the *Tirhoot* side, on which estate it was an increment, the main channel of the *Gunduck* being to the westward of the chur. On the expiry of the last lease, when the chur became open to settlement as if it had been a new formation, *Maharajah Chuttardharee Sahai* claimed the settlement to be made with him, as the lands by a change in the main channel of the river had become separated from *Sohagpoor*, and formed then an increment on his estate within the district of *Sarun*.

"'4th. Local inquiries by the proper officers verified this fact, but on reference to him, Mr. *Tayler*, the Commissioner, directed the settlement to be again made by the Collector of *Tirhoot* with the Maliks of *Sohagpoor*, as they were in possession, and the lands of the chur, not having been washed away, were fully capable of identification.

"'5th. But the lessee's right of occupancy, the Board are of opinion, ceased with his lease, and Mr. *Tayler's* decision is not only opposed to established usage, and to Section 2. Regulation XI. of 1825, but also to the principle laid down in the Sudder Court's decision in the case of *Rajah Greesh Chund*, Appellant, v *Maharajah Tej Chand*, Respondent (1), in which the Court disallowed the Plaintiff's claim to alluvial lands which had originally formed in his estate, and had afterwards become united to the Defendant's estate by the return of the river to its former course.

"'6th. The Board would particularly refer to the note in this case, as shewing the distinction between the separation by change in the course of a river of an alluvial increment not incorporated with an original estate by permanent settle-

(1) 1 Sec. Rep. 274; new ed, 366.

ment, and the separation from the same cause of a portion of original land from its parent estate, provided for in clause 2, section 4, Regulation XI of 1825. In the advertisement to this volume of the Reports, the notes are stated to have been written or approved of by the Judges who decided the cases, and they are consequently entitled to weight.

"'7th. Under these circumstances, the Board have reversed Mr. *Tayler's* orders appealed against, and they will be obliged if you will direct, in case the lands remain in their present state, that the papers and proceeding may be made over to the Collector of *Sarun*, within whose jurisdiction the chur now lies, in order that he may form a settlement of it with the Petitioner *Maharajah Chuttardharee Sahai*.'

"In conformity with the directions contained in this letter, a summary settlement of the deara lands, which are the subject of this appeal, was made with the Maharajah of *Hatwa*, who obtained possession of them.

"The present suit was brought on the 31st of January, 1860, by the zemindars of *Sohagpoor*, to impeach the ruling of the Board of Revenue, and the settlement made under it, and to recover possession of the lands in dispute.

"This being the object of the suit, it is desirable to observe what were the principles laid down by the Board of Revenue, upon which the settlement with the Plaintiff was set aside, the new settlement made, and the possession of the property changed. They are:—

"1. That a clear and distinct usage that the main channel of *Gunduck* should be the constant boundary not only between the two districts of *Sarun* and *Tirhoot*, but between the zemindaries on each bank divided by the river, existed at the time of the permanent settlement, and had since continued to exist.

"2. That the chur land, when twice settled with the Maliks of *Sohagpoor*, had been so settled with them on the ground that the river then ran in what has alone been called the southern channel, thereby making it an increment for the time being to their estate within the district of *Tirhoot*.

"3. That by reason of the change in the main channel of the river, the land, of which they do not dispute the identity, had become an increment of the Maharajah's estate within the district of *Sarun*, and accordingly ought to be settled with him.

"4. That the right of occupancy of the Maliks of *Sohagpoor*, who are called lessees, ceased on the expiration of their so-called lease.

"The two principles then upon which the determination of the Board and therefore the title of the Defendant rests, are the existence of the alleged usage and the inference that by reason of that usage the antecedent interest of the Plaintiffs and their predecessors in the land was only of a limited temporary and conditional character.

"Their Lordships do not propose to go at length into the pleadings in the suit, which appear to them to have sufficiently put in issue the propositions of the Board of Revenue. They must remark, however, that the trial of the cause has been unfortunate, inasmuch as it has failed to determine these substantial questions. The suit came originally before a Principal Sudder Ameen who dismissed it first on a technical question of parties; and secondly, on the ground that the orders of the Board of Revenue were conclusive and binding on the Civil Courts. On appeal, both these objections were overruled by a divisional Bench of the High Court, which remanded the case for trial on the merits, but in doing so unfortunately intimated an opinion that the question to be tried was "whether (with reference especially to clause 2 of sect. 4 of Regulation XI. of 1825) the lands were the property of the Plaintiffs; the Defendants alleging (with reference to clauses 1 and 3 of the same section) that the lands were their property, having been acquired by gradual accretion to their estates." The opinion thus intimated clearly implies that the principal if not only questions between the parties were, whether the change in the course

of the river having been sudden, and the lands being capable of identification, the case fell within the second clause; or, whether the recession of the stream having been gradual it had taken from the *Tirhoot* estate what had once belonged to it and given what it so took to the *Sarun* estate by accretion in the proper sense of the term. The High Court seems to have assumed that the Plaintiffs may once have had the permanent and proprietary interest in the lands; and altogether to have ignored the existence of the alleged usage as an element in the case.

"This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlements with the Maliks of *Sohagpoor* as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure; he omitted to try the issue whether the usage existed in fact. And the greater part of the judgment is devoted to the consideration of the questions whether the change in the course of the river had been sudden or gradual, and whether the land in dispute was capable of identification as the land formerly held by the Plaintiffs, or had formed by gradual accretion on the Defendant's estate. Deciding these questions in the Defendant's favour, he dismissed the suit. The cause then came again before a Divisional Bench of the High Court, which pronounced the decree now under appeal. The learned Judges differed from the findings of the Principal Sudder Ameen as to the gradual recession of the river, and the formation of the land in dispute. They held that the latter had been shewn to be identical with that which was formerly held under the temporary settlements by the Maliks of *Sohagpoor*, and had been the subject of adjudication in the Act IV., Case of 1849; and that it had been separated from *Sohagpoor* by the *Gunduck* causing a sudden disruption of the Plaintiffs' land. Their judgment assumes that the Plaintiffs had a permanent proprietary interest in the deara land settled with their predecessors in title; and does not in any way deal with the question of usage.

"On the argument of the appeal, the contention between the parties finally assumed the following form:—

"The case of the Plaintiffs—who, coming to disturb the Defendant's possession, must establish their title to do so—was, 1st, that the deara land settled with them in 1837 was so settled with their predecessors in title as the proprietors of the alluvium which had formed on their estate, subject to the right of the Government to assess revenue thereon; and that, though from its nature it continued to be subject to a fluctuating revenue, it thereupon became an integral part of their estate; and, 2ndly, that this land having been separated from the rest of their estate by a sudden change in the course of the river, and remaining capable of identification, continued to be their property.

"On the other hand, the case of the Defendant was, first, that the deara land had not been settled with the Maliks of *Sohagpoor* in 1837 as proprietors of the alluvium, but in conformity with the usage which made the main channel of the river the boundary of the two estates; that such land had not been shewn to have been formed by gradual accretion on the *Sohagpoor* estate, which could alone give the Maliks of that estate a right to claim it as proprietors; and that, by virtue of the alleged usage when the northern channel became, in 1847, again the main channel of the river, the deara land ceased to belong to *Sohagpoor*, and became part of the estate of *Doomree*, the temporary settlements having given to the Maliks of *Sohagpoor* at most only a right of occupancy during their subsistence. The Defendant moreover as their Lordships understood, did not abandon the defence founded on the findings of the Principal Sudder Ameen to the effect that the return of the river from the southern to the northern channel had been gradual and not sudden; that the lands in dispute were incapable of being indentifide as those settled with the Maliks of *Sohag-*

poor, but had been formed by gradual accretion on the estate of *Doomree*, and were therefore an increment to that estate under the general law of alluvium.

"Of this latter part of the Defendant's defence their Lordships propose, finally, to dispose.

"Upon a full consideration of the evidence they are of opinion that the High Court was right in holding that the land in dispute has been shewn to be identical with that which was the subject of the Act IV., Case of 1849, and therefore with that which was the subject of the settlements of 1837 and 1846; and to have been separated from *Sohagpoor* by a sudden change in the course of the main stream of the river. They agree with the High Court in thinking that, on this latter point, the conclusion of the magistrate, formed when the change was recent, is to be preferred to that of the Principal Sudder Ameen.

"The necessary consequence of this finding of their Lordships is that the Plaintiffs are entitled to follow their lands across the stream, under the 2nd clause of the 4th section of Regulation XI. of 1825, unless they are prevented from doing so by force of the alleged usage, being a clear and definite usage within the meaning of the 2nd section of the Regulation; or by reason of their never having had the proprietary right in the soil. Upon the latter point it was argued for the Defendant that the proprietary right in the soil may all along have remained in the Government; which, though it made the two temporary settlements with the Maliks of *Sohagpoor*, may have retained and lawfully exercised the power of settling with the propietors of *Doomree* on the expiration of the last of those settlements. Their Lordships, however, are unable to find in the settlement proceedings, or in the rest of the Record, any evidence that the Government ever asserted a title to the land as a chur thrown up in a navigable river, or as being wholly or in part the bed of the river. The first settlement certainly purports to have been made with the then Maliks of *Sohagpoor* in the character of "proprietors" of the alluvial land settled; but, in their Lordships' opinion, it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the deara land was supposed to have been formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the 1st or of the latter part of the 3rd clause of sect. 4 of Regulation XI. of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favour it; though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen.

"From what has been said above it plainly appears that the material thing to be determined in this case was the existence of the alleged usage. Yet the issue upon that point has never been tried. Their Lordships may observe that the admitted or proved existence of such an usage was the basis of the decision cited from the 1 Sudder Dewanny Adawlut decisions in the letter of the Board of Revenue; a case which, remarkably like the present in many of its circumstances, was decided many years before the passing of Regulation XI. of 1825 upon the principles afterwards embodied in that statute.

"Again, from what has been said above, it also appears that, in their Lordships' opinion, some further inquiry is necessary touching the settlements of 1837 and 1846; the grounds upon which the Maliks of *Sohagpoor* were treated as the persons entitled to settle; and the nature of the proprietary interest in the alluvium then recognised in them. If it should clearly appear that the revenue officers then dealt with them as persons who had acquired a proprietary interest in the accretions under the provisions of clauses 1 or 3 of section 4 of the Regulation, their Lordships are of opinion that this should be held to be sufficient evidence of their pro-

prietary title. Their Lordships do not think that it would be right to cast upon them the burden of proving at this distance of time that the lands settled had, in fact, been formed by gradual accretion. If on the other hand it should appear that the alleged usage exists, and that the settlements were made on the basis of it, or that for any other reason the interests of the Maliks of *Sohagpoor* in the same land was of a limited and temporary character, and had expired, that would be fatal to the Plaintiffs' suit. But these are questions for the determination of which their Lordships have not now before them the necessary materials.

"Upon the whole then, their Lordships have reluctantly come to the conclusion that it is their duty to advise Her Majesty to reverse the decree under appeal, and to remit the cause to the High Court with instructions to cause the following issues to be tried; and to pronounce a decree according to the findings upon such issues in the manner provided by section 354 of the Code of Civil procedure. The issues are—

"1st. Whether the land in dispute was settled in 1837 with the then Maliks of mouzah *Sohagpoor* as the proprietors of alluvium which had become an increment to their estate by gradual accretion; or upon what other grounds was such settlement made. The burden of proving the affirmative of the first part of this issue to be on the Plaintiffs.

"2ndly. Whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River *Gunduck* should be the constant boundary not only between the districts of *Sarun* and *Tirhoot*, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to lie on the Defendant (the Appellant) Each party is to be at liberty to produce such further evidence on these issue as he may think necessary; and their Lordships will also recommend that the costs of this appeal on both sides to be taxed, and the amount thereof certified to the High Court; and that it be part of the order that such costs be costs in the cause."

Doyne, for the Appellants.

Leith, Q. C., and Cowie, Q. C., (C. W. Arathoon with them) for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The facts of this case are very clearly stated in the judgment of their Lordships upon the remand in the year 1873. It is clear that in 1837 a settlement of the lands in dispute was made with the predecessors of the Plaintiffs. That settlement was made at a revenue of Rs 84,200 3*a*. In 1847 the settlement was renewed, and the predecessors of the Plaintiffs continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1847. Prior to the renewal of that settlement in 1857 the River *Gunduck*, which was to the south of the Plaintiffs' zemindary and to the north of the Defendant's, had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it.

A question arose as to the renewal of the settlement of 1847, and the lands being then on the south side of the river, which was the acknowledged boundary between the districts of *Sarun* and *Tirhoot*, were then in the district of *Sarun*. Mr. *Lautour*, who was the Collector of *Tirhoot*, and who had formerly settled the lands when they were on the north side of the river, and were then in his district, had some doubt whether he had jurisdiction to re-settle them. The question was referred to the Commissioner, Mr. *Tayler*, who decided in favour of Mr. *Lautour's* jurisdiction, and directed him to renew the settlement with the owners of the Plaintiffs' zemindary, *Sohagpoor*, upon which an appeal was presented to the Board of Revenue, and they ordered the settlement not to be made with the owners of the Plaintiffs' zemindary but with the owners of that of the Defendant on the southern side of the river.

It is in consequence of that order that differences have arisen between the parties as to whether the Plaintiffs were entitled to a renewal of the settlement in 1857 or whether the Defendant was entitled to it.

The rule under the first clause of the fourth section of Regulation XI. of 1825 is that land gained by gradual accession, whether from the recess of a river or of the sea, is to be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, "whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure by any description of under-tenant whatever." The Plaintiffs claimed that the lands in dispute were formerly an increment to their estate by gradual accession, and that they had been settled with the owners of *Sohagpoor* upon that basis. By the second clause of the fourth section the rule before mentioned was not to be considered applicable to cases in which a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment, or by the violence of its stream separates a considerable piece of land from one estate and joins it to another estate without destroying the identity and preventing the recognition of the land so removed. The change of the course of the River *Gunduck* on the last occasion was a sudden change, and the land which had originally been settled with the Plaintiffs on the north side of the river was capable of being identified on the south side of the river. Therefore this land which had been in the possession of the Plaintiffs for twenty years and had been brought into cultivation by them, did not, according to the 4th section of Regulation XI. of 1825, belong to the owner of the zemindary on the south side of the river as having been gained by gradual accession. But a question arose whether in consequence of an established usage the river, however its course might be changed, was not to be considered as the boundary between the two zemindaries as it was between the two districts. The second section of the Regulation of 1825 was relied upon by the Defendant. By that section it was enacted that, "Whenever any clear and definite usage of *Shekust pywust* respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates, divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage." The Sudder Board of Revenue thought that there was a clear and definite usage that under all circumstances the river should be the boundary between the zemindaries on the one side and those on the other. They say, "At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the *Gunduck* should be the constant boundary between the two districts of *Sarun* and *Tirhoot*, and between the zemindaries on each bank divided by the river." They accordingly ordered a settlement to be made with the Defendant, and in conformity with those directions a summary settlement of the lands, which are the subject of this appeal, was made with the Defendant, the Maharajah of *Hutwa*, who obtained possession of the lands. Thereupon the Plaintiffs, in January, 1860, commenced this suit. They contended that the lands having been settled as an accretion to their zemindary on the north side of the river were theirs by virtue of proprietorship; and that being capable of identification, notwithstanding the change of the river, the lands belonged to them under clause 2, sect. 4, of the Regulation of 1825, and not to the Defendant; and then the question arose whether there was such a custom as that which the Board of Revenue stated, namely, a custom that the river

should be the boundary, not only of the districts, but of the zemindaries on either side.

The Principal Sudder Ameen tried the case, and he dismissed the Plaintiffs' suit upon some technical objections, and also upon the ground that the decision of the Board of Revenue that the settlement should be made with the Plaintiff was final and conclusive. Upon appeal to the High Court they reversed that decision, and remanded the case to the Principal Sudder Ameen for re-trial.

The case afterwards came before this Board upon appeal, and their Lordships in their judgment of remand, alluding to the trial of the case by the Principal Sudder Ameen after the remand by the High Court, say: "The opinion thus intimated clearly implies that the principal if not the only questions between the parties were whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause, or whether the recession of the stream having been gradual, it had taken from the *Tirhoot* estate what had once belonged to it, and given what it so took to the *Sarun* estate by accretion in the proper sense of the term. The High Court seems to have assumed that the Plaintiffs may once have had the permanent and proprietary interest in the lands, and altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlements with the Maliks of *Sohagpoor*"—that is, the Maliks of the zemindary on the north side of the river—"as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact." Their Lordships afterwards went on to say: "The first settlement certainly purports to have been made with the then Maliks of *Sohagpoor* in the character of proprietors of the alluvial land settled; but in their Lordships' opinion it is doubtful whether they were treated as proprietors by reasons of the alleged usage, or because the Diara land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the third clause of sect. 4 of Regulation XI. of 1825. Their Lordships have not before them the whole settlement proceedings, and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favour it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried." Their Lordships finally remanded the case in order that two new issues should be tried; first, whether the land in dispute was settled in 1837 with the then Maliks of mouzah *Sohagpoor* as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to be on the Plaintiffs. Secondly, whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River *Gunduck* should be the constant boundary, not only between the district of *Sarun* and *Tirhoot*, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to be on the Defendant."

The case then went down and was retried upon those issues, and further evidence was given on the part of the Defendant to shew that there was such a usage. The Subordinate Judge, upon the evidence, found that no such usage had been proved; and he also found on the

first issue that the settlement in 1837 was not made upon the ground of the alleged usage under section 2, Regulation XI. of 1825, but on the ground of their proprietary title under the provisions of clause 1, section 4 of that Regulation, that is to say, that the land was settled in 1837 with the owners of *Sohagpoor* as the proprietors of alluvion which had become an increment to their estate by gradual accretion. An appeal was preferred from that judgment to the High Court, and that Court overruled the decision of the Lower Court upon the finding on the first issue, and they abstained from coming to any conclusion upon the second issue. There certainly is no sufficient evidence to justify their Lordships in finding that there was such a clear and definite usage as that stated in the second issue, and in overruling the decision of the Lower Court upon that issue upon which the High Court have expressed no opinion.

Mr. Justice *Kemp*, one of the learned Judges of the High Court who decided the case upon appeal, held that the Subordinate Judge was wrong in finding that the lands had been settled with the owners of *Sohagpoor* in 1837 upon the ground of their proprietary title under clause 1, section 4 of the before-mentioned regulation. In his judgment he does not quite accurately state what the issue really was. Speaking of their Lordships' judgment on remand, he says: "They then remark, 'that if it should appear that the alleged usage, that is, the usage set up by the Defendants, namely, that the River *Gunduck* is the boundary between the two zillahs of *Sarum* and *Tirhoot*, exists, and that the settlements were made on the basis of that usage, or (and these observations are very important) 'for any other reason the interest of the Maliks of *Sohagpoor* in the land in dispute was of a limited and temporary character and had expired, that would be fatal to the Plaintiff's suit.'" There was no doubt that the river was the boundary between the two zillahs of *Sarun* and *Tirhoot*; but the real question was whether there was a clear and established usage that that river should be the constant boundary between the zemindaries on either side. That was the question as to usage which their Lordships intended to be decided.

On reversing the decision of the Lower Court upon the first issue, Mr. Justice *Kemp* says: "Then comes the document, which is a proceeding of the Deputy Collector of *Tirhoot*, Mr. *Edward De Rozario*, dated the 28th of November, 1837. He says that, 'Having held a local inquiry and examination I effected a temporary settlement for seven years from 1245 to 1251 Fusli, with *Jugdeo Narain*, the proprietor of the bureri lands above mentioned,' that is, the lands of *Sohagpoor*." That does not affect the case at all. He merely says that he had made a temporary settlement with the owners of *Sohagpoor*. Mr. Justice *Kemp* proceeds, "Then follows a copy of the report of the same officer, viz., Mr. *Edward De Rozario*, the Deputy Collector of *Tirhoot*, to his immediate superior, Mr. *Campbell*. Before referring to this report we notice a passage in the settlement proceeding of Mr. *De Rozario*, where he says 'The proprietors of mouzah *Bhukain*, &c., pergunnah *Goa*, zillah *Sarun*, were given to understand that a settlement of the land that has accreted from the *Gunduck* cannot be made contrary to the line of demarcation, namely, the River *Gunduck*.' Returning to the report of Mr. *De Rozario*, submitting his proceeding to his immediate superior, we find that the petition of the Maliks of *Bhukain*, in which they had claimed for an exception to the established usage of the recognised boundary of the main channel of the *Gunduck* to be made in their favour, was opposed to all regulation and was inadmissible." Those two documents are set out in the present record, in the first of which Mr. *Rozario* says, "Therefore the proprietors of mouzah *Bhukain*, &c., pergunnah *Gon*, zillah *Sirun*, were given to understand that a settlement of the land that has accreted from the *Gunduck* cannot be made contrary to the line of demarcation, namely, the River *Gunduck*." He does not say that a clear and definite usage existed that the River *Gunduck* was to be the boundary between the two zemindaries.

'The other document to which the learned Judge refers is contained in a letter to Mr. *Campbell*, who was the Deputy Collector in charge of *Khas* and resumed mehals in *Tirhoot*. That letter was dated the 16th of February, 1838, and contains the passage to which the learned Judge refers: "The petition of the Maliks of *Bhukain*, &c., zillah *Sarun*, for exception to the established boundary of the main channel of the *Gunduck* in opposition to all regulation was inadmissible, and their unfounded officiousness pointing out the permanently assessed land as portion of the alluvion from a puerile motive.' To say the least of it, it is very ambiguous what was meant by that statement. But in the last paragraph of that letter, he says: "These lands established as an alluvion of the estate registered in the name of *Futtek Sing*, descending on his demise to his sons *Gunga Persad* and *Jugdeo Narain Sing*, with the latter as the surviving proprietor, I have, under Regulation XI, of 1825, effected a temporary settlement for seven years, from 1245 to 1251 Fusli inclusive, on the Sudder-jumma of Sicca Rupees 789-9, or Company's Rupees 842. 3*a*. 2*p*., which I now have the honour to submit to your approval." If Mr *De Rozario* had relied upon a clear and established usage that the river was, under all circumstances, to be the boundary between the two zemindaries, it was unnecessary to say that it had been established that the lands were an alluvion of the estate, &c. It would have been sufficient to say they are to the north of the river, and consequently, according to the established usage, are part of the zemindary on the northern side of it. It appears, therefore, to their Lordships that the lands were settled with the predecessors of the Plaintiffs as an alluvion of their estate, and that, as far as the statements in the letters go, they do not establish that it was made with the Plaintiffs upon the ground of there being an ancient and established usage that under all circumstances the River *Gunduck* should be treated as the boundary between the two zemindaries. Having referred to those documents, Mr. Justice *Kemp* proceeds to say that the settlements were merely temporary. He says, "These are all the proceedings of any importance with reference to the first temporary settlement made with the Plaintiffs, by the revenue authorities. The second settlement was made for ten years with the Plaintiffs, from 1846 to 1856, by Mr. Deputy Collector. At page 45 will be found the proceeding of that officer with reference to this second temporary settlement made with the Plaintiffs. That proceeding was before their Lordships of the Privy Council." It does not appear that the second settlement at all affected the case; it was merely a renewal of the settlement of 1837, and if the settlement of 1837 had been made on the principle of established usage, the second settlement followed upon the ground of that usage. If, on the contrary, it was made with the Plaintiff as the proprietor of an estate to which the lands had become an accretion by gradual accession, then the second settlement was made upon the same principle. Mr. Justice *Kemp* proceeds, "The next proceeding is at page 55. This was not before the Privy Council, but was subsequently filed after the remand by the Plaintiffs. It is merely a letter of the Collector forwarding the proceedings connected with the temporary settlement concluded with the Plaintiffs. But a passage has been referred to in it by the pleader for the Plaintiffs in which the Collector says that a settlement has been concluded for a period of ten years with the heirs of *Gunga persad* and *Jugdeo Narain* as Maliks of the *Kurrari Mehal*" That shews that the settlement was made with them, not in consequence of any known and established usage, but upon the ground of the ordinary rule under Regulation XI. of 1825. Then he says "Having reviewed the documents filed by the Plaintiffs both before and after remand, we come to the decision upon the first issue laid down by their Lordships of the Privy Council; and as after a careful consideration we have come to a conclusion different to that which the Subordinate Judge has arrived at, we shall confine our decision to the finding on the first issue laid down,

inasmuch as we consider it unnecessary to enter into the second issue laid down by their Lordships of the Privy Council. We are of opinion that the settlements made with the Plaintiffs were temporary settlements, and were made on the basis that the *Gunduck* was the boundary line, not only of the two zillahs *Sarun* and *Tirhoot*, but of the estates appertaining to those districts; that the land in dispute was settled with the Plaintiffs on temporary leases, and that those settlements were of a limited and temporary character. Such being the case, to use the words of their Lordships, this finding is fatal to the Plaintiffs' suit."

With reference to the settlements being of a temporary character, we must consider what the law is upon the subject. If this accretion belonged to the Plaintiffs by virtue of the first clause of sect. 4 of Regulation XI. of 1825 as lands which had been gained by gradual accession to their estate, then by virtue of the first clause of that section it became an increment to the Plaintiff's estate, and the property became his property. The words are: "When land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landowner, or as a subordinate tenure of any description of under-tenant whatever; provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation XI., 1819, or of any other regulation in force." Assume it to be a case within this section, the land became the property of the predecessors of the Plaintiffs liable to be assessed by the Government for revenue; but there was no obligation on the part of the Government to assess it permanently, nor would it have been proper to do so, because at the time when it was first annexed it was more sandy soil scarcely culturable, and was so reported by Mr. *De Rozario*. In his report he says: "At first he"— that is, *Jugdeo Narain sing*, the Plaintiffs' predecessor—"raised a number of pleas as to his inability to pay the rent,"—that is, the revenue—and that the diara will not remain in existence, owing to the force of the River *Gunduck*. Upon this he was made to understand that the whole of the land is somewhat like a sandy desert, and, of course, after the lapse of some time it will become culturable, and yield a great profit." Then he assented to take it at the revenue, which the Government fixed at the time, of Company's Rs.842, and began to cultivate it; but the Government only assessed temporarily that which was his permanent property. A temporary assessment did not reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the Plaintiffs in the accretion, which was permanent, as being an increment to an estate which was permanent, but it merely fixed the period during which the increment should be subject to the revenue of Rs.832, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land. At the expiration of the settlement of 1837 they renewed the settlement at a revenue of Rs.1500. The land had then become improved. The Plaintiffs remained in possession of the land under temporary settlements from the year 1837, for a period of nearly twenty years, down to the year 1857, and during the whole of that time they paid revenue to Government, partly during the time when the land was little better than a sandy desert. The Plaintiffs and their predecessors cultivated the land, and so improved it that in 1847 it was assessed at Rs.1500. The plaintiffs were during twenty years in occupation of the land, when at the expiration of the settlement

of 1847, in consequence of a sudden turn of the River *Gunduck*, it was on the southern side of the river capable of being identified, and still belonged to the Plaintiffs, unless there was a clear and definite usage that the River *Gunduck* was to be the boundary, not only between the two districts, but between the zemindaries on either side.

Such a custom has not been proved ever to have existed. The Subordinate Judge has found that there was no such usage. The High Court has not considered the evidence or reversed the finding of the Subordinate Judge upon the second issue, and their Lordships are of opinion that the alleged usage was not made out. The usage not having been proved, their Lordships are of opinion that there was no sufficient evidence to justify the finding of the High Court that the revenue settlements were made on the basis that the River *Gunduck* was the boundary line not only of the two zillahs, *Sarun* and *Tirhoot*, but of the estates appertaining to those districts; on the contrary, they are of opinion that the settlements, though temporary, were made with the predecessors of the Plaintiffs as an alluvion to the estate of *Sohagpoor*, which in 1837 was registered in the name of *Futteh Sing*, and upon the ground that the predecessors of the Plaintiffs were the Maliks and proprietors of the estate, and consequently that the finding of the Lower Court upon the first issue under the remand from this Board was a correct finding, and that the reversal of that finding by the High Court was erroneous.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that it be declared that the Plaintiffs are entitled to the lands in dispute, and to have a settlement made with them, and that it be ordered that the Plaintiffs do recover possession of the said lands, with mesne profits from such date of the institution of the suit mesne profits to be assessed in execution of the decree; and that the Respondent do pay the Plaintiffs the costs in all the Lower Courts and the costs of the former appeal to Her Majesty in Council already taxed as part of the costs in the cause; and their Lordships order that the Respondent do pay the cost of this appeal.

Agents for the Appellants: *Henderson* & Co.

Agent for the Respondent: *J. L. Wilson.*

9th and 15th July, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BISSESSUR LALL SAHOO (Plaintiff) ... } *Appellant.*

and

MAHARAJAH LUCHMESSUR SINGH (Defendant) ... } *Respondent.**

A MINOR UNDER THE COURT OF WORDS.

Execution proceedings,—Joint family,—Hindu Law.

When a member of a joint Hindu family makes a purchase of an immoveable property, the presumption would be that the purchase was made on account of the joint family.

The Substance of the decree is to be looked to in determining the question as to whether it was in respect of a Joint debt of the family and against the representative of the family, and as such could be properly executed against the joint family property.

Execution proceedings are not to be set aside upon mere technical grounds when they are substantially right.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

The points to be decided in this case arise in this way: One *Nath Dass* died in the year 1853 leaving a son, *Ramnath Dass*, who died in the year 1855; and *Ramnath Dass* left two sons, *Mosaheb* and *Chooman*. The Rajah of *Ramnugger*,

* 6, Cowell's Indian Appeals, p. 233.

as he has been called in the argument,—that is to say, the guardian of the infant Rajah of *Ramnugger*—brought three suits in the year 1862 in respect of rent due from members of the family of *Mosaheb* and *Chooman*. In the first suit the judgment was given on the 22nd of March, 1862, and it seems that the Plaintiff in that suit sued the widow of *Nath Dass* and the widow of *Ramnath Dass* as guardians of two young men who are assumed to be *Mosaheb* and *Chooman* under other names. The claim was for the recovery of rent, about Rs. 3000 odd, which amounted to about Rs. 8000 with interest and costs, and the statement is that *Nath Dass* and *Ramnath Dass* took a lease of a certain mouzah *Rudarpore*, and that the rent accrued in respect of that mouzah. Then it is ordered "that this decree will not be executed against the person and self-acquired property of the judgment-debtors, but it will be executed against the property left by the deceased leaseholders."

Upon this judgment execution was issued against a certain mouzah *Muddunpore*, which appears to have been bought in the year 1847 in the name of *Ramnath Dass*. Whether it was bought by *Ramnath Dass* for himself and separately, or as a member of the joint family, is a question to be hereafter discussed.

There were two other judgments, the nature of which will be subsequently referred to, dated respectively the 9th of April, 1862, and the 16th of April, 1862, whereby large sums were decreed beyond the Rs. 8000 which was obtained by the first decree; and an order was obtained by the Plaintiff empowering him to put up mouzah *Muddunpore* for sale in satisfaction of all three decrees. This was done, and it was bought in by the Plaintiff at, in round numbers, Rs. 35,000. *Mosaheb* and *Chooman* made no objection to this proceeding at the time, or indeed at all; but some three years afterwards they sold to the Plaintiff in this suit their right to recover the difference between the Rs. 8000, the sum obtained by the first decree, and the Rs. 35,000 for which *Muddunpore* was sold; that is to say, they claimed to recover the sum which mouzah *Muddunpore* was charged with in execution of the last two decrees; and whatever rights they had the Plaintiff has, neither more nor less.

It is necessary in the first place to advert to what was the main contention in the case. It was contended on the part of the Plaintiff that the family of *Nath* and *Ramnath* became separate about the year 1839. It was alleged that at that time there was a quarrel between *Ramnath Dass* and his father, and that they ceased to be joint in food. But on the part of the Plaintiff there was scarcely any evidence of separation of estate; in fact, on his own case, there was some evidence that there was no separation in estate, and that *Ramnath Dass* acquired no separate property. The first Court held that the separation had been proved, and that mouzah *Muddunpore* was bought by *Ramnath Dass* for himself and with his own property, although it certainly does not appear, according to the evidence of the Plaintiff, how he could have obtained the funds for purchasing it. The High Court reversed the decision on this point of the Lower Court, and came to the conclusion that the family was joint and had never separated; and their Lordships agree with the High Court.

This being so, the consequence follows, as has been laid down before in the very well-known case of *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1), that the purchase of *Muddunpore* by *Ramnath Dass* would be assumed to be a purchase, not on his own account, but for the joint family, and that *Muddunpore* would be joint family property.

It now becomes necessary to examine the two decrees subsequent to that of the 22nd of March, 1862, with respect to which there is no dispute. The next decree is dated the 9th of April, 1862, and in that suit *Mosaheb Dass* is sued as the heir of *Nath Dass*, and the decree is for the recovery of Rs. 39,000 on account of the rents of a certain mouzah *Ramnugger*, and it is stated that *Nath Dass* had

(1) 6 Moore's Ind. Ap. Ca 53.

taken a lease of that from 1847 to 1854. Then it is further ordered that this decree is not to be executed against the person and self-acquired property of the Defendant, but against the property left by the deceased leaseholder *Baboo Nath Dass* only.

It appears to their Lordships that acting on the principle which follows from their finding that this family was joint, it must be assumed that *Mosaheb Dass* is sued as a representative of the family, and that it must further be assumed that *Nath Dass* in taking the lease of the mouzah here referred to—*Ramnugger*, in respect of which the rent was due—must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is that the decree is not to be executed against the self-acquired property of *Mosaheb*, but against the family property which is there described as that left by *Nath Dass* for the purpose of distinguishing it from the separate property which may have belonged to *Mosaheb*. The only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that *Muddunpore* was a part of that joint property.

The same reasoning applies to the third decree, although curiously enough the action seems to have been brought against the widow as the guardian of *Mosaheb*. Here there is the same direction with reference to the property, but substantially the same observations apply which have been applied to the former decrees.

Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property. Their Lordships have therefore come to the conclusion that the High Court has been right in dismissing the appeal from the Lower Court.

This being their Lordsihps' view of the case, they do not think it necessary to go into the questions which were touched upon but not decided by the High Court, whether the vendors of the Plaintiff, or either of them, were bound to dispute the sale of mouzah *Muddunpore* in the execution proceeding, and whether the Plaintiff was in consequence debarred from bringing this suit.

Two cases have been referred to, *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (1), *The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (2), the effect of which may be stated thus: that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

Under these circumstances their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

Agent for Appellant: *T. L. Wilson.*
Agent for Respondent: *H. Treasure.*

(1) Marsh. Rep. 614.
(2) 14 Moore's Ind. Ap. Ca. 605.

18th July, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir Montague Edward Smith, The Right Hon'ble Sir Robert Porrett Collier, and The Right Hon'ble Sir Henry Singer Keating.

On Appeal from the Court of the Judicial Commissioner of Ajmere, Central Provinces.

SAMEER MULL, AND CHUNDUN MULL (Plaintiffs) ... } *Appellants.*

and

CHOGALALL (Defendant) *Respondent.**

Trade Custom of Beawar—Payments made by 'Arathdars.'

By a custom of Beawar, a merchant coming there from another district is allowed to trade, only in the name and on the credit of some local *arath*, or banking firm, which guarantees his dealings, and to which, on the conclusion of transactions, a '*panri*,' or memorandum thereof is sent by the stranger merchant.

C, coming to Beawar, made several purchases in accordance with the above custom, using the firm of *S* and *M* as his *arath*. On leaving Beawar, he sent *S* and *M* a *panri*, in which all his purchases, except the last and largest, under which he had taken no delivery and had made no payment, were entered.

On application by the vendors in the last transaction to *S* and *M* as guarantors of *C* to make good the purchase-money, they at first refused on the ground that the transaction was not entered in the *panri* sent them, but afterwards they consented to pay the vendors the amount of the loss occasioned by *C's* failure to pay and take delivery.

In a suit by *S* and *M* against *C* to recover the amount so paid—

Held, that if the plaintiffs were cognizant of, and allowed their name to be used in, the last transaction, as was shown to have been the case in previous transactions, they were, according to the custom, liable to the vendors, and consequently entitled to recover over from the defendant what they had paid: and that, even if there was no actual authority given at the time of the transaction, still, as the defendant had used the name of the Plaintiffs as his guarantors, and had held them out as liable to pay on his behalf for the goods he purchased, they were thereby authorized, if they thought fit, to make the subsequent payment which they did on behalf of the defendant, or (in other words), to ratify the use which the defendant had made of their name, and were not deprived of their right to do so by their having for a time repudiated liability.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

Although this case has undergone several lengthened investigations, it appears to their Lordships that the facts material to its decision lie in a small compass. The Plaintiffs are bankers carrying on business at *Ajmere*, and also at a place called *Beawar*, which is also at times called by another name, *Nyanuggur*. The Defendant is a merchant at *Nusserabad*, and the transaction out of which this appeal arises is a purchase of a quantity of cotton at *Beawar*. It appears that at *Beawar* there is a custom which seems to their Lordships to be fairly stated in the case of the Respondents. That case says: "There is an admitted custom prevailing at *Nyanuggur*, according to which a merchant coming from any other district is only allowed to trade in the name and upon the credit of a *Nyanuggur* firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of a *Nyanuggur* merchant is given, and his name is entered as the principal in the transaction. Credit is given to him, and the final settlement of the transaction is effected with him. He is known as the arath or agent. At the conclusion of such transaction a memorandum of it is sent to the arath by the person who makes use of his credit. This memorandum is known by the term 'panri.'" It appears that towards the end of August 1870, about the 24th or 25th, the Defendant came to *Beawar* for the purpose of extensively dealing in cotton. He remained there ten days, and during nine days he effected a number of purchases according to this custom, which he may be assumed to have been fully acquainted with, and used the Plaintiffs as his "araths" in the sense in which that term has been used in the description of the custom given in the Respondent's case.

* 6 Cowell's I. Ap., 238; I. L. R., 5 Cal., 421.

These transactions, extending over nine days, amounted to as much as 6,025 maunds of cotton; and with reference to all of these purchases, the Defendant being on the spot vouched the Plaintiffs, who were also on the spot, and they must be taken to have perfectly well known that he represented them as his "araths" according to the custom.

There is no dispute with respect to these previous transactions, which form a continuous series of dealings, but the dispute arises with respect to the last transaction in which the Defendant was engaged. On the night of the tenth day of his sojourn at *Beawar* the Defendant entered into another transaction of a similar character, but larger in amount, whereby he purchased of various persons in the market as much as 14,000 maunds of cotton, employing the same brokers as before, and referring again to the Plaintiffs as his araths or guarantors. It further appears that the Plaintiffs, or at all events their agents, were at the time in the bazar, and one of the Commissioners who made investigations into this subject observes that from the evidence recorded he is inclined to believe that they were cognizant of the proceedings or took part in them. The Defendant suddenly left *Beawar* on the next morning; he sent a "panri," which has been described as a memorandum of the transaction,—it does not exactly appear when, but probably very soon after,—to the Plaintiffs, in which he acknowledged his liability as far as the 6,025 maunds were concerned, but in which he took no notice of this last transaction. Thereupon the sellers applied to the Plaintiffs, as guarantors, to make good the purchase-money, and the Plaintiffs undoubtedly at that time said that as they had not had a panri they could not hold themselves responsible. It appears that a dispute arose, and subsequently the matter was referred to a punchait, and this punchait determined that the Plaintiffs ought to pay to the vendors of the cotton the sum of one rupee per maund, amounting to 14,000 rupees, being the loss sustained by the vendors in consequence of the fall of the price of cotton, and for that sum they bring this action against the Defendant.

The case has come before three commissioners, the Deputy Commissioner, the Commissioner, and the Judicial Commissioner. The first commissioner found in favour of the Defendant, the second in favour of the Plaintiffs, the third in favour of the Defendant; and from the last judgment the appeal is preferred.

It appears to their Lordships that the result of the evidence and of the findings which have been come to by the Assistant Commissioners who were deputed to investigate the case is, that the Defendant in the contract for the purchase of the 14,000 maunds used the name of the Plaintiffs, and that the vendors sold to him on the credit of that name; and further, that the Defendant had the authority of the Plaintiffs to use their name. The Plaintiffs' name had been used with their full concurrence in a number of transactions during nine successive days; they were present, or some of their agents, when this further transaction of the same kind was entered into, and it appears to their Lordships a fair inference that they were cognizant of and allowed their name to be so used in the last transaction, as they had in the others. If so, they were undoubtedly liable, according to the custom, to the vendors, and they would be entitled to recover over what they paid against the Defendant.

But it further appears to their Lordships that if there was no actual authority at the time, still that the Defendant having used the name of the Plaintiffs as his guarantors, and treated them and held them out as liable to pay on his behalf the price of this cotton, thereby authorized them, if they thought fit, subsequently to make that payment on his behalf. They may not unnaturally have at first hesitated to undertake the responsibility and endeavoured to avail themselves of the absence of a panri, still when they subsequently made the payment, not indeed of the whole amount, but such as had been arrived at upon a reference to a kind of arbitration, they were entitled to treat the use of their name by the Defendant as an authority to make that payment

on his behalf, and the Defendant cannot dispute their right to do so. In other words, they had a right to ratify the use which he had made of their name, and they have not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.

Under these circumstances their Lordships are of opinion that the judgment of the Judicial Commissioner was erroneous, and they will humbly advise Her Majesty that that judgment be reversed, and that the judgment of the Commissioner of *Ajmere* be affirmed with the costs of this appeal.

Agent for the Appellants: *T. L. Wilson.*

Agents for the Respondents: *Burton, Yeates, & Hart.*

5th, 6th, 7th November, and 13th December, 1879.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

RAJAH VENKATA NARA SIMGHA RAU (Plaintiff) } *Appellant,*

and

THE COURT OF WARDS, acting on behalf of the minor sons of RAJAH NARYYA RAU, deceased, and others (Defendants) ... } *Respondents.**

Zamindari—Partibility—New Zamindari—Heirs.

In 1793 the ancient zamindari of Nuzvid, which decended to a single heir, having been before British rule a raj, or principality, held on the tenure of military service was resumed by the Government for arrears of revenue.

In 1802 the Government formed two zemindaris out of it and granted one of them, since called Nuzvid, to the second son of the Rajah, under a "Sanad-i milkiat istemrari," which described the zamindari lands, comprised in it, as "the six pargannas of Nuzvid in the "Kondapalli Circar." The provisions of the sanad did not differ from those of an ordinary grant under the Permanent Settlement. On the question whether this zamindari was, or was not, subject to the same rule of impartibility as that to which the ancient and entire zamindari of Nuzvid had been subject before 1793. Held that the six pargannas, granted in 1802, were a new zamindari, in general; and the word "heirs" used in the sanad, construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu Law.

The Hansapur case, *Bir Pertah Sahi* v *Maharajah Rajender Pertah Sahi* (1) distinguish.

13th December, 1879.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK.

This is an appeal from a judgment and decree of the High Court of Judicature at Madras, affirming a judgment and decree of the Acting District Judge of Gantur, in a suit in which the appellant was the plaintiff, and the deceased respondent, Rajah Narayya Appa Rau, was one and the principal one, of the defendants.

The suit was brought to recover, amongst other things, a sixth part or share of the zamindari of the six pargannas of Nuzvid, in the Kondapalli Circar, to which the plaintiff claimed to be entitled by inheritance, as one of the six sons of Rajah Shobhanadri.

It was not disputed that the zamindari, prior to the year 1802, formed part of an ancient and much larger estate which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jaghir held on the tenure of military service, and in the nature of a raj or principality.

It is unnecessary to trace the succession to the ancient zamindari farther back than to the year 1772. It is found by the Judge of the First Court that in that year, Vankatadri, who had succeeded to the estate, died, and was succeeded by his son Narayya, who was proclaimed a rebel, and made a State prisoner in 1783. The entire estate was confiscated and resumed

* I. L. R. 2, Madras, p. 128; Cowell's I. A. 38.

by Government, and in the year 1784 was restored to Venkata Narasimha, the eldest son of Narayya, the rebel. It may be assumed that the estate, which was restored in its entirety, was restored as it existed prior to the confiscation, and that the rule as to impartibility and descent continued as before. See the *Hunsapore Case*, 12 moore Ind. Appeals, p. 1.

Narayya, the rebel, had three sons, Venkata Narasimha, the eldest, to whom the estate was restored, Ramachandra, and Narasimha.

In 1793 the estate was again resumed by Government for arrears of revenue, and in 1802 two new zamindaris were carved out of it, of which the zamindari of Nuzvid, now the subject of dispute, was granted to the second son, Ramachandra, and the other, Nidadavol, which was of much greater extent, to the eldest son Venkata Narasimha.

Upon the death of Ramachandra, he was succeeded by his only son Shobhanadri. In 1816 the third brother, Narasimha, brought a suit against his eldest brother, the Zamindar of Nidadavol, and against the guardian of the minor Zamindar of Nuzvid, in which he claimed one third of the whole property as being joint and divisible family property. He obtained a decree in his favor in the original Court. This was reversed on appeal by the Sadar Court, and his suit was dismissed. The ground of the decision was that the act of the Government in creating the two zamindaris was an act of State, and that the Zamindars held by a title which the Courts could not question. No appeal was preferred against the decree of the Sadar Court, which became final. The unsuccessful plaintiff died some time after the decree, and an arrangement was made by which the two Zamindars settled an annual sum upon his family for their maintenance. This was afterwards commuted into a grant of land in full of all claims past and future. Whatever, therefore, might have been the rights of the third brother, Narasimha, they have been extinguished.

On the 7th December 1864 the eldest of the said three brothers, the Zamindar of Nidadavol, died, leaving two childless widows, and a will, in which he expressed a wish that his estates should be divided equally between his widows. The Collector, in reporting the facts to the Board of Revenue, expressed his opinion that the elder wife should be recognized as successor, and that no division of the estates should be allowed, as they were of ancient origin.

Shobhanadri, the second holder of the newly-created Nuzvid Zamindari, had six sons. In 1866 his extravagance and mismanagement of the estate had caused quarrels between himself and his eldest son, Narayya, the principal defendant and the original first respondent, for the settlement of which the assistance of the Collector and the Government was invoked. In consequence of these disputes, Shobhanadri presented a petition to Government in November 1866, praying that orders might be issued for the division of his estate among his sons. On the 7th January 1867 the Government replied, referring him to the Collector, to whom instructions had been communicated on the subject of his petition. What those instructions were does not appear. From what follows, however, it is evident, as stated by the respondents in their case, that his request for a division was refused.

Shobhanadri died on the 28th October 1868, leaving six sons, of whom the plaintiff was one. The eldest, Narayya, was placed in possession of the zamindari by the Collector, and on the 19th December was registered under the orders of the Board of Revenue as Zamindar of Nuzvid.

On the 30th November 1868 Venkata Narasimha, the plaintiff and present appellant, petitioned Government praying for a division of the zamindari, and was informed in reply that the estate was not divisible. He repeated his application on the 26th January 1869, referring to the wish expressed by his father that the zamindari should be divided among his sons. To this petition the Government again replied that the zamindari could not be divided, except under the provisions of Regulation XXV of 1802, or in conformity with a decree of a competent Court.

On the 20th October 1871 the plaintiff commenced his suit against the deceased respondent, Narayya, as the principal defendant, and joined his four other brothers as co-defendants.

The first defendant, Narayya, put in a written statement, and contended that the disputed zamindari was an ancient zamindari and of the nature of an impartible raj. The other defendants upheld the plaintiff's right to a division of the zamindari, but stated that the plaintiff had no cause of action against them.

On the 8th July, the First Court framed, amongst others, the following issue, viz., "Whether the real property constituting the zamindari of Nuzvid is divisible or not," and having found that issue against the plaintiff dismissed his suit, so far as it related to the zamindari in dispute.

The High Court, upon appeal, affirmed the decision of the First Court, whereupon the plaintiff appealed to Her Majesty in Council against the judgment and decree of the High Court.

Pending the appeal, the first and principal defendant, Rajah Narayya, who was the first respondent, died, and by order of revivor the Court of Wards were made respondents in his place.

The case has been fully argued on both sides, and the only question to be considered is whether when the ancient zamindari was divided into two, the newly constituted zamindari of Nuzvid now in dispute was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zamindari was subject.

The sanad under which the zamindari of Nuzvid was granted to Ramachandra is dated the 8th December 1802. It is directed to Ramachandra, describing him as the Zamindar of the six parganas of Nuzvid in the Kondapalli Circar, and, after reciting the benefits to be derived from a permanent settlement of the revenue, it was declared, in the 2nd paragraph, that the Government had resolved to grant to Zamindars and other landholders and their heirs and successors a permanent property in their lands in all time to come, and to fix for ever a moderate assessment of public revenue on such lands.

By Clause 4 the settlement was fixed at a certain amount. By Clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government, or of any other authority to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole, or in any part of your zamindari; such transfers of your land shall be valid and recognized by the Courts and officers of Government, provided they shall not be repugnant to the Mahomedan or the Hindu laws, or to the regulations of the British Government." And, finally, after annexing to the grant certain stipulations, the 15th Article declared that "continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named the zamindari of . The name of the zamindari is not inserted, but at the end of the sanad there was added a list headed 'A list of the villages in the zamindari of the six parganas of Nuzvid, in the Kondapalli Circar.'"

The name of the zamindari in dispute appears, therefore, to be in strictness, "The zamindari of the six parganas of Nuzvid, in the Kondapalli Circar," but for convenience it is treated as the zamindari of Nuzvid.

The provisions of the sanad differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end; the six parganas to which the sanad related became a new zamindari, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon Zamindars.

It is stated in the 11th para. of this written statement of the first defendant, "that under the empire of the Mahomedans the ancient zamindari of Nuzvid was extensive, and was governed by its chiefs with absolute power and independence;

but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peishkash paying zamindari."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the government of a chieftain, and was in the nature of a raj or principality; but when the ancient zamindari was resumed and two new estates were created out of it, of which the Zamindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary Zamindars, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates.

There was no State policy which required that the new state of Nuzvid should be indivisible, otherwise Clause 7 would not have been inserted in the sanad. If Ramachandra had transferred by gift, sale, or otherwise any portion of his zamindari such portion would not have been impartible or descendible, according to the rule of primogeniture to a single heir of the transferree, if a Hindu or Mahomedan. Indeed it was expressly stipulated in the sanad that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindu or Mahomedan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindu or Mahomedan transferree. There was no reason why the new zamindari should have been made impartible or limited to Rajah Ramachandra and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in para. 15 of the sanad was to his heirs, by which, according to their Lordships' interpretation, his heirs according to the ordinary rule of Hindu law were intended. Ramachandra did not at the date of the sanad hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation to his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferrees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindu law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of Venkata's new zamindari of Nidadavol, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sadar Court in Narasimha's case any bearing upon the construction of the sanad of 1802, or upon the rights of the parties to the suit. In the Hunsapore case, *Bir Pertab Sahi* v. *Maharaja Rajender Pertab Sahi* (1) the zamindari was an impartible raj, which by family usage and custom descended to the oldest male heir, according to the rule of primogeniture, subject to the obligation of making babuana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rajah, who was expelled by force of arms. The government, having kept possession until 1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rajah. There was no fresh sanad, and the only question raised was, what was the nature of the estate granted; whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj, to be held as an ordinary zamindari.

(1) 12 Moor's I. A. p. 1.

In that case, the estate whilst in the hands of the Government had never been broken up, and it was held that it was the intention of the Government to restore the zamindari as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zamindaris, and a new sanad granted allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir

The word heirs used in the sanad must, in their Lordships' opinion, be construed to mean the heirs of the grantee according to the ordinary rules of inheritance of the Hindu law.

With reference to the effect of the sanad of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between Venkata Narasimha and his brother Rajah Ramachandra, date 17th July 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sanad of the 8th December 1802 reference may be had to the letter of Mr. John Read, the Collector of Masulipatam, to the Secretary of the Land Revenue Settlement Commission dated 25th July 1802, in which he submitted a plan for the division of the ancient zamindari of Nuzvid, and offered an opinion as to the respective claims of Venkata Narasimha and of Ramachandra, preparatory to the introduction of the permanent settlement. In that letter, of which their Lordships are of opinion that the official copy of the copy filed with the Board of Revenue (which was an official record) was under the circumstances admissible in evidence, Mr. Read says:—

"A perusal of the late Collector's correspondence will show that Ramachandra Rau's claim to participate in the zamindari has been long and steadily maintained, so late, indeed, as the 17th July 1795. The views of Venkata Narasimha Appa Rau and Ramachandra Rau underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects, and zamindari of their deceased father, conformable to the usage in such cases.

"No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder Appa Rau pretends to state that the document was forcibly taken, and has presented what he terms a corrected plan for the division of the zamindari. The charge of forcible exchange I believe to be incorrect and the agreement, to which Venkata Narasimha Appa Rau appeals, is no more than a loose memorandum in the handwriting of the Rajahmundry Peishkar."

But even without that letter their Lordships have no doubt whatever as to the proper construction of the sunnud of 1802, and that the zamindari thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindu law.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgments and decrees of both the Lower Courts, and to order that the appellant do recover one sixth part or share of the villages included in the zamindari of the six pargannas of Nuzvid, in the Kondapalli Circar, together with his costs in both the Lower Courts in proportion to the value of that property.

It was found by the First Court that the Kamatam lands and gardens in various villages to a total value of Rupees 58,500, of which a garden valued at Rupees 300 is in the plaintiff's possession, and also the forts, houses, granaries, stables, &c., valued at Rupees 1,23,500, form part of the zamindari, and were, therefore, indivisible under the first issue, and no appeal was perferred against that finding.

Their Lordships will, therefore, further humbly advise Her Majesty that the said Kamatam lands and gardens, forts, houses, granaries, stables, &c., above mention-

ed, be declared to be part of the zamindari above mentioned, and that the appellant is entitled to recover one-sixth part or share thereof, with the exception of the said garden valued at Rupees 300 in the plaintiff's possession.

Their Lordships will further recommend to Her Majesty that the amount of mesne profit from the date of dispossession of the share of the property ordered to be recovered to the date of restoration thereof be assessed in execution.

The costs of this appeal must be paid out of the estate of Rajah Narayya Appa Rau, deceased, the original defendant and respondent.

Solicitors for Appellant: Messrs. *Frank, Richardson* and *Sadler*.

Solicitor for Respondent: Mr. *H. Treasure*.

13th and 14th November, 1879.

PRESENT;

Members of the *Judicial Committee*;—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DEWAN MANWAR ALI (Plaintiff) ... } *Appellant,*

and

ANNODAPROSAD RAI (Defendant) ... } *Respondent.**

Limitation Act (IX of 1871), sched ii. art. 145.

The plaintiff and two other members of his family, *M.* and *S.*, held a zamindari in the following shares, *viz.*:—the plaintiff ten annas, *M.* two annas, and *S.* four annas. Having first held the land ijmali, or joint, they agreed, in the year 1839, to effect a batwara, or private partition, and of this the result was, that parcels of land representing his ten-annas share were allotted to the plaintiff, and other parcels representing their shares, which together made six annas, were allotted to *M.* and *S.*, who held jointly. *M.* died in 1842, and his share came to the plaintiff. The four annas share of *S.* was sold in execution of a decree against him in 1856, and the purchaser of it, not accepting the fact of partition, sued both *S* and the plaintiff in 1858, to have it declared that there had been no partition, and for a declaration of his right to possession of a four-anna share of the whole estate. A decree was made to that effect in 1860; and in 1863, an appeal by *S.* alone, against this decree, was dismissed by the High Court. The purchaser's heirs, he having died, obtained possession of land representing the four annas share under the decree of 1860. *S.* then set up a title to hold part of the lands, allotted under the batwara of 1839, to the six annas share, on the ground that they were lakhiraj lands, and distinct from the revenue-paying villages in which his interest had passed under the execution-sale

The Plaintiff sued, in September 1873, the defendant who had purchased this last alleged interest of *S.* at another sale in execution of a decree against him, claiming that the partition having been set aside and a four-annas share of the whole estate obtained by the purchasers under the decree of 1860, a right accrued to him to have his share, now twelve annas, declared upon the lands which had fallen within the six annas share. He also claimed to have it declared that the parcels alleged to be lakhiraj were not so.

On the question of limitation it was held, that the 145th article of the second schedule of Act IX of 1871 was applicable; and that even if, technically, the lands now in question remained in the possession of *S.* pending the appeal against the decree of 1860, there was no possession adverse to the plaintiff, rendering it necessary for him to assert his right untill the dismissal of the appeal in 1863.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The facts of this case are complicated, but when fully stated and explained, they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal, is, whether the plaintiff's right to sue has been barred by the Statute of Limitation. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided, they can see no ground whatever for doubting the correctness of the decision of the lower Court, which, upon the other material issue

* I. L. R. 5, Cal. 644; Cowell's I. A., 1.

in the suit, held that there was no pretence for saying that the lands in dispute were not *khalisha* lands, that is, lands appertaining to the zamindari, but lakhiraj lands held under some title other than that of the zamindars.

The facts are shortly these: The estate in question, which is a fractional part of Parganna Surail, was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions; the plaintiff, who was one of those sons, had a ten-anna share, his father had a two-anna share, and his brother, or half-brother Samdal, had a four-anna share. Their enjoyment of the property was, up to the year 1839, what has been termed ijmali, or joint, that is, they divided the rents of each village in proportion to their above-mentioned shares in the estate. In 1839 the family arrangement, which has been called a batwara, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided,—the plaintiff taking solely certain specified villages as his ten annas share, and his father and Samdal taking jointly certain other villages, which were allotted to them as representing a six-anna share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856, Samdal being in embarrassed circumstances, an execution issued against his four annas of the estate at the suit of one Nasiruddin. It should be mentioned, however, that before this, Masnad Ali, the father, had died in February 1842, and that, in different ways, his two annas had come to be vested in the plaintiff, so that, at the time of the execution, the elder brother, the plaintiff, had a twelve-anna share, and Samdal only a four-anna share in the zamindari. There seems to have been the usual resistance to execution on the part of Samdal, and a suit was brought by Nasiruddin, who was execution-purchaser as well as judgment-creditor, in the year 1858, to enforce his rights. The first judgment in that suit was pronounced on the 3rd of December 1860. It was a judgment of a somewhat peculiar character. Nasiruddin had brought the suit, not only against Samdal and certain persons in whom Samdal alleged his four annas had become vested prior to the execution, but also against the present plaintiff, the owner of the twelve annas share; and it was decided not only that the four annas share had continued to be the property of Samdal at the date of the execution, and had passed under the sale in execution, but further, that the family arrangement, or batwara, which had been acted on so long, and had been pleaded by the plaintiff, had not been proved against, and was not binding upon, Nasiruddin, and that he was accordingly entitled to hold the four annas of Samdal, purchased by him in ijmali enjoyment with the plaintiff. The High Court has held that the right of the plaintiff to assert the rights which he has asserted in this suit accrued to him at the date of this decree, and that therefore the decree having been passed in 1860, the present suit, which was instituted on the 17th of September 1873, is out of time.

It appears that Samdal, but not the plaintiff, appealed against this decree, and that his appeal was not finally disposed of until the 19th June 1863. Execution was then taken out by Nasiruddin against Samdal, but there were fresh delays, and the heirs of Nasiruddin, who had died in the meantime, did not obtain constructive possession of Samdal's four annas until July 1864. Samdal then set up a title to hold as lakhiraj the lands in question in this suit, which had formed part of the villages allotted by the batwara, as the six annas share, treating them as no part of the *khalisha* lands, his interest wherein had passed under the execution.

It appears to their Lordships that this, or, at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in Nasiruddin's suit, in so far as it set aside the partition, was to give to him a right to take from the plaintiff four annas of the rents of all the villages previously

allotted to him, and to give to the plaintiff a corresponding equity or right to have the twelve annas of the rents of the villages which had formerly belonged to Samdal. It cannot, their Lordships think, be said that the plaintiff was bound to assert this right in 1860, because, Samdal having appealed against the decree, there was of course a possibility of its being reversed or altered, and of Nasiruddin's suit being dismissed altogether. It was therefore uncertain against whom the right to receive the twelve annas share of the villages in question was to be asserted; nor did it follow that because the batwara, or family arrangement, had been declared to be of no effect as between Nasiruddin and the present plaintiff, it was of no effect as between the plaintiff and his brother, who were co-defendants in Nasiruddin's suit. Again, it appears that no attempt was made by Nasiruddin to take out execution pending the appeal, and it may fairly be supposed that, by arrangement between the brothers, there was an agreement that the property should continue to be enjoyed as it had been under the partition. In these circumstances it seems to their Lordships that even if, technically, the lands now in question remained, pending the appeal, in Samdal, there was no necessity or duty lying upon the plaintiff to assert his rights in those lands until Nasiruddin's heirs were put into possession, or, at all events, until the rights of the parties had been finally determined by the dismissal of the appeal. These considerations are alone sufficient to bring the plaintiff's suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871, which seems to their Lordships to govern the case, is the 145th article of the 2nd schedule, which says that the time from which the period of twelve years is to be calculated, is that, when, the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the plaintiff before 1863. A question has been raised at the bar whether the possession adverse to the plaintiff did not realy begin when Samdal, driven to his last shift, and unable to resist the execution on the part of Nasiruddin against his zamindari interest, first set up the claim to the lands in question in this suit as lakhiraj lands held by a title other than his zamindari title, and therefore capable of being held by him, although all his interest in the zamindari had passed away. There is some evidence on the part of the plaintiff that the ijaradars of his two annas interest in those lands were then actually and forcibly dispossessed under colour of this title. It is not, however, necessary to decide this question. It is sufficient to say that their Lordships cannot concur with the High Court in thinking that the twelve years are to be calculated from the 3rd December 1860, or from any time previous to the year 1863.

It has already been intimated that, in their Lordships' opinion, the defendant has wholly failed to establish a title as lakhirajdar to the lands in question. Their Lordships must, therefore, humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

The appellant will also be entitled to the costs of this appeal.

Agents for the appellant: Messrs. *Bailey, Shaw,* and *Gillett.*

Agent for the respondent: *Mr. T. L. Wilson.*

19th, 20th, 21st November, 1879.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

NAGARDAS SANBHAGYADAS (Plaintiff) ... } *Appellant,*

and

THE CONSERVATOR OF FORESTS AND THE SUB-COLLECTOR OF KOLABA (Defendants) } *Respondents.**

Khoti tenure—Ownership of wood growing on village lands.

The plaintiff sought to raise the question whether, in virtue of his being *izafatdar* and *khot* of three-fourths of a village, he was or was not proprietor of three fourths thereof, and entitled, as such proprietor, to three fourths of the wood, including teak as well as *izaili* wood, growing on the village lands.

His rights under the *izafati* title depended on two documents: one, an imperial *sanad*, dated in A. D. 1653; the other, a Marathi document, dated in A. D. 1722. The first was construed to confer upon the grantee, as collector of the revenue, certain perquisites, and to make hereditary a right which before had been only a personal right, with reversion to the sovereign, but not to confer any proprietary right in the village lands. By the second, all that was granted was a right to *babatas* or cesses, the grantee being the *desai*, or collector of the revenue, on behalf of the Government.

Therefore it was held that the *izafati* title did not carry with it the proprietary right.

On the question as to the *khoti*, it was held, without the expression of any opinion, that no *khot* is or can be the proprietor of the soil; that such a right is not vested in every *khot*. This *khot* of three-fourths of a village had been authorized by the Government to carry on the management, as *khot*, of the remaining fourth, and had agreed, at the time of entering into this arrangement, that he would preserve for the Government all the trees in reserves marked by survey numbers, and all the teak trees in the village. He had admitted that the Government had the power to make such reserves.

It was not shewn that the Government had cut down any *izaili* wood in the village: only that it had recovered the value of some *izaili* wood cut in the reserves without their leave.

It was decided that the *khot* had not made out a title to any teak wood as against the Government, nor a claim against it in respect of the *izaili* wood.

21st November, 1879.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is a suit in which the Plaintiff claims against the Conservator of Forests in the presidency of *Bombay* and the sub-Collector of *Kolaba* in the *Tanna* zillah, a three-fourths share of the proceeds of certain teak and izaili timber which he alleges was cut down by the Government in the village of *Pigode*. His plaint states that his share in the village of *Pigode*, or *Pigoda*, was acquired by him as the proprietor thereof, and he states that it is his watani (hereditary) khoti and izafati (village). He says, "Deducting the 4 annas share which belongs to the Government of the proprietorship of the said village, the remainder of the village, namely, a 12 annas share thereof, belongs to me as proprietor. Although I have a proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as izaili (inferior wood), by reason of my watani khoti and izafati thereof, the Defendants in the years 1865–66 and 1866–67 cut down teakwood and izaili wood thereof, and sold the same by auction as well as by private sale. Having (a right to take) a share of three-fourths of the proceeds of the same, I made several applications to both the Defendants, requesting to be allowed to have a three-fourths of the sale proceeds, but I obtained no redress. I sent notices also to them, but received no reply"—and so on. Then he claims three-fourths of the proceeds of the timber which he alleges was so cut down by the Government. The principal question is, was he the proprietor of the soil of three-fourths of the village, and as such proprietor entitled, as

* 7 Cowell's I. A., p. 55, I. L. R. 4, Bom. p. 264.

he alleges, to three-fourths of the jungle, including teakwood as well as izaili.

It will be necessary in the first place to consider what were his rights under the izafati title. That depends upon two sunnuds which were put in and relied upon, one dated in 1653, and the other in 1722. The sunnud of 1653 after certain recitals proceeds, "The farman is as follows: From the (beginning of the) months of the year one thousand (and) fifty-four," then there is a blank, the marginal note stating, "There is no grammatical connection whatever between the equivalent of this sentence and what follows in the original. It may probably be intended to mean that the various rights below named, appertaining to the village of *Pegoonda*, had been enjoyed by *Ismailji Abaji* from the beginning of the Arabic year 1054." The firman proceeds, "At this time *Ismailji Abaji Desai* of the tappa (district of) *Kharapat*, in the jurisdiction of the above-mentioned (town), has represented to the threshold of the universe"—that is, the Sovereign—"that the village of *Pegoonda* in the above-mentioned tappa (district) is a personal holding (khood-rawan) in lieu of isabat (dues) in this way, namely, that the fixed revenue of the above-mentioned village, consisting of ready money and corn, goes into the possession of the revenue station (thana), and some of the (taxes called) bab, and the whole of the (rights called) kanoonat relating to the above-mentioned village (assigned) for the maintenance of (his) children are his own reversionary rights (doombala khood),"—which is translated or explained in the margin to mean—"that will revert to the Sovereign on ceasing to be held by the present holder."—"And the (rights to certain perquisites called) hak-e-lawazimat and (those called) khariastotore of the above-mentioned tappa (district) are a personal holding;" then the applicant goes on to shew what were his personal holdings, and that the profits of the tobacco shop were a personal holding with a reversionary right to the Sovereign. Then he states, "It is hoped that by the royal grace, a gracious farman may be granted (to him) for the satisfaction of his mind." The farman which was granted is, "Let them (the above-named officers) recognise (the said rights as) reversionary (soombala) and continue the same;" that is to say, let them recognise all his personal rights, with reversion to the Crown, and then after him they are to continue the same rights to his children and children's children. It appears to their Lordships that the effect of this document was simply to give the grantee as the collector of the revenue certain perquisites arising out of the dues, and to convert that right, which was then a mere personal right with reversion to the Sovereign, into an hereditary right which was to descend to his children and to his children's children. It appears therefore to their Lordships to be clear that that sunnud gave no proprietary right in the village; it did not give an interest in the soil, and it gave no right to the timber.

The next document of 1722, which was a marathi document, is a short one: "To Mashaul-anam (*i. e.*, the honourable) the Desai, the Adhikari and the Kulkarui of talooka (or taraf) *Nagothna*," and so on. "The villages which are with (*i. e* held by) you as izafat have been (*i. e.*, are hereby) 'settled and granted' or 'granted on certain terms being made' by *Rajishri*." Then come the names of three villages of which one is *Pigode*. "In all three villages have been (*i.e.*, are hereby) 'settled' (or granted on certain terms being made). Therefore (as to) the babatas (cesses or tolls) appertaining to the said villages, whether cesses in cash or in kind (grain), whatever the amount (thereof) may come to, (the same) shall be 'received by you' (or paid over to you')." All that was granted is that he was to be allowed the babatas or the cesses or tolls, he being the Desai, or the collector of the revenue on behalf of the Government. That document therfore did not convey any interest in the soil, but merely gave a certain right to certain cesses or dues as the perquisites of the grantee as the collector of the Government revenue. Therefore as regards his izafati rights they did not give him the right of proprietorship.

The next question is, was he entitled to the proprietorship of the soil of the village by reason of his *watani* or hereditary khoti. With reference to that point a report of Captain *Wingate* was read from a collection of papers by the Government of *India*, from which it appears that a khoti had the right of proprietorship; but that was merely the expression of the opinion of Captain *Wingate* at that time. Since the date of that report, however, the point came before the High Court of *Bombay* and was judicially determined In that case—reported in the 3rd *Bombay* High Court Reports, at page 132—the Government had resumed the khoti, had granted certain rights to the sub-tenants of the estate, and were willing to allow the Plaintiff to take the khoti again upon certain conditions; namely, that she should be bound by the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the khoti except upon those conditions. The reasons for the decision were that the khot was not the proprietor of the soil. The learned Judge who decided the case in the first instance went very fully into the matter, and held that the khot was merely an hereditary farmer of the revenue. The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain *Wingate* to which reference was made from the records of the Government of *India*. Without expressing any opinion that no khot is or can be the proprietor of the soil, it is sufficient to say that it is clear that the proprietorship of the soil is not vested in every khot.

Then the question comes, was the Plaintiff in this case, by virtue of his khoti, entitled to the proprietorship of the soil and to the timber upon it.

It appears that an agreement was entered into by the Plaintiff on the 24th of December, 1861, as follows: "I give in writing this kararnama as follows: Being invested under Government Regulation (*i.e.*, Resolution), English Letter, No. 1832, dated the 18th May, 1860, received by me from the Government with (authority) to carry on the vahivat (management) from the year 1859-60 to the year 1886-87 as khoti of the fourth taxshin (share) of the mauja (village) aforenamed,"—that is, including this village,—"and being also authorized (by the Government) to collect the assessment of the Government shares (also), and having consented to do so, I give in writing the (following) body of clauses relating to the management to be carried on (by me). They are written as below: The full assessment on the village aforenamed fixed at the survey is Rs.2196 13*a*. 3*p*., deducting therefrom the sum of Rs.1648. 5*a*. 9*p*. in respect of the Government shares, the assessment on the remaining fourth share has been fixed at Rs548. 7*a* 6*p* The same I agree to pay by instalments as mentioned below,"—naming four instalments. Then by the 8th section, "The village aforenamed has been given (let) to me for twenty-eight years, from the (end of the year) 1859-60. Accordingly, for twenty-eight years from the current year 1860-61 up to the year 1886-87, I will without any hindrance continue to the cultivating tenants or their heirs (*i.e.*, I will allow the tenants to hold) such of the khoti nisbat lands as are entered in their names in the survey papers. The amounts of assessment on those lands have been settled at the survey." Then there are several other clauses, but the more important ones are the 15th and 16th. He says in the 15th clause, "Some land belonging to the aforenamed village has been divided into numbers and reserved to itself by the Government for preserving a forest thereon. I will preserve the trees thereon. I will not allow any person to cut down the same, nor will I myself cut them down. In like manner I will not allow any person to cultivate the same, nor will I myself cultivate the same. Should any person cultivate the same, or cut down the trees thereon, I will inform Government of the same. Should the Government order that cattle may be allowed to graze on the aforesaid land reserved for a

forest, I will accordingly allow cattle to graze thereon. I will not make any objection thereto. I will also preserve the teakwood trees that may be growing in this village in places other than the survey numbers aforesaid. I will not allow any one to cut them down, nor will I cut them down. If any person does cut them down, I will immediately inform the Government of the same."

Now that is an express agreement on the part of the khot that he will preserve all the trees in the Government reserves, and that he will preserve the teakwood trees that may be growing in the village in places other than the survey numbers. Can the Plaintiff in the face of that agreement, whatever his rights may have been as a khot, say, as he has said in his declaration, that he has "the proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as inferior wood."

It appears to their Lordships to be clear that according to the 15th section of that agreement, all the timber in the reserves were to belong to the Government, and that the khot was not to cut down any of the teakwood, whether in the reserves or not, and that he was not to allow any other person to do so. Then in clause 16 he says: "The Government has given to me the ownership of a fourth part of all the trees that now are growing, and of all the new ones that may grow hereafter in the village aforenamed, excepting the trees in the aforesaid preserved forest, and those on the lands claimed by the people, and those on cultivated lands, as also excepting the teakwood and blackwood trees growing on waste lands." Therefore he admits that the Government, when they authorized him to carry on the management of one-fourth of the village, and to collect the Government revenue thereof, had the power to reserve, and that they did reserve, all the trees in allotments reserved for a forest, and all the teakwood trees in every other part of the village.

It appears to their Lordships that there is no evidence that the Government cut down any izaili wood. There is an entry which shews that some persons as trespassers went on to the Government reserves and cut down some izaili timber. A sum is credited to the forest account in respect of the proceeds of izaili (inferior kinds of) wood. The entry is: "Some people having cut wood from the Government forest at *Mauja Pigoda* without permission, and having used the same for building their own houses and cattle pens, a report was made from the Peta Mahalkaris, Outward No. 109 of the year 1864-65, whereupon an order was received from his Honour the Deputy Conservator of Forests, bearing Registered No. 361, dated the 16th of August, 1865, to the effect that the value of the wood (so cut) should be recovered accordingly; (money was) recovered from the said people as *per* Memorandum, bearing the Mahalkaris signature, bearing the above date." The entry shews that the Government sued some persons as trespassers for cutting down izaili wood in the Government forest, and the Plaintiff claims in his declaration to be entitled to that izaili wood, because he says he is entitled to all izaili wood throughout the village. There is no evidence in the case of any izaili wood being cut down in any other part of the village, excepting in this portion of the village which was reserved as Government forest. The Plaintiff, as it appears to their Lordships, has not made out a title to any teakwood, and he has not made out a case against the Government as to their having cut izaili wood in any place, nor of their having recovered the value of izaili wood cut in any part of the village, except the Government reserves, in which the Plaintiff was clearly not entitled to any of the trees.

Under these circumstances their Lordships are of opinion that the decision of the High Court was right, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed, and that the Appellant do pay the costs of this appeal.

Solicitors for Appellant: *Hores & Pettison.*

Solicitor for Respondents: *H. Treasure.*

21st, 22nd and 25th November, 1879.

PRESENT:

Members of the *Judicial Committee*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the Courts of the Commissioner of Lucknow and the Judicial Commissioner of Oudh Respectively.

CONSOLIDATED APPEALS.

RANEE LEKRAJ KUAR (Defendant) ... } *Appellant*,

and

BABOO MAHPAL SINGH (Plaintiff) ... } *Respondent*,

and

RANEE RUGHUBUNS KUAR (Defendant) } *Appellant*,

and

BABU MAHPAL SINGH (Plaintiff) ... } *Respondent*.*

Proof of Custom—Indian Evidence Act (I. of 1872), *ss.* 35 *and* 48—*Reg. VII. of* 1822—*Admissibility of Village Wajib-ul-arz.*

Held, on the question whether there did or did not exist a custom in the Bahrulia clan in Oudh excluding daughters from inheriting, that the *wajib ul-arz* of a mouza in the Talook, stating the custom of the Bahrulia clan as to inheritance, had been properly received in evidence under s. 35 of the Indian Evidence Act, 1872. Further, that this custom was a usage of the kind which Reg. VII of 1822 required officers to ascertain and record: and that it was no valid objection that this *wajib-ul-arz* had been prepared and attested by officers subordinate to the Settlement Officer.

Semble.—That had it been the case that these papers were not to be treated as records describing a custom, but as recording only the opinions of those likely to know it, the 48th section of the Act would have made them admissible.

Appeals from a decree of the Officiating Commissioner of the Lucknow Division (28th August 1876), and from a decree of the Judicial Commissioner of Oudh, affirming the judgments of the Deputy Commissioner of Bara Banki (22nd October 1875 and 8th July 1876).

* 7 Cowell's I. A., p. 63, I. L. R., 5 Cal. p 744.

In 1873, the respondent, Mahpal Singh, sued the appellant, Ranee Lekraj Kuar, claiming the proprietary right in the Talookas Shiurajpur and Rawat Sarai, on the ground that he was entitled to them as the nearest male collateral relation of the last talookdar, Udit Partab Singh, who died in 1872 sonless, but leaving a daughter Raghubans Kuar. The plaintiff alleged that a custom of the Bahrulia clan (Bais Rajputs), to which the family belonged, excluded the daughter of Udit Partab Singh, and that Lekraj Kuar, who was then in possession, had no right to succeed to the estate by Hindu law, she being only a childless stepmother of the deceased talookdar. Mahpal Singh alleged title, under the custom, as the eldest living son of Fateh Singh, grandfather of Udit Partab Singh, and formerly talookdar.

The Deputy Commissioner decreed the claim, with the reservation that Lekraj Kuar, who had been for some time in possession of the talook in virtue of a compromise of certain disputes between her and the late talookdar's widow, Subhraj Kuar (the latter having been alive when proceedings commenced, but having since died), should be left in possession during her lifetime for her support and for that of Raghubans Kuar.

On appeal to the Commissioner of the Lucknow Division, the suit was remanded, under s. 354 of the Code of Civil Procedure (1859), for the trial of the additional issue—"Has Raghubans Kuar a better claim to the estate than the plaintiff Mahpal Singh." Thereupon Raghubans Kuar was made a party to the suit, and the Deputy Commissioner, finding in the negative upon this issue, made his return to the Commissioner, who confirmed his judgment to the effect that the alleged custom excluding daughters was proved. Against this decision Lekraj Kuar preferred the present appeal, but the suit as against Raghubans Kuar, who also appealed to Her Majesty, was carried a step further in the Indian Courts, an application being made in her behalf to the Judicial Commissioner of Oudh under Act XVIII of 1876, s. 28. The Judicial commissioner, calling for the suit under that

section, on the question of the admissibility of the evidence, gave judgment as follows on the 8th July 1876:—

"The principal evidence in support of the custom consists of the *wajib-ul-arz* of several properties owned by members of the Bahrulia clan of Rajputs—the clan to which the parties belong. Exception was taken to these documents on the part of the daughter, on the ground that they were not prepared or attested by the Settlement Officer in person, as required by Reg. VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them. It must be borne in mind that Reg. VII of 1822 has never been in force in this province in such a manner as to render the revenue or judicial officers bound by the letter of the Regulation. Officers in administering the province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text. Besides this, Reg. IX of 1833 was as much in force as Reg. VII of 1822, and the former provides for the appointment of subordinate officers empowered to perform under the supervision of the Collector all or any of the duties imposed on Collectors by the latter.

"The mere fact then that the settlement-records of this province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves.

"As to the objection that the *wajib-ul-arz*, especially that of Shiurajpur, contain matters which the officers by whom they were prepared were not authorized to insert, and that as regards Shiurajpur a rule of succession is prescribed which is opposed to Act I of 1869, it is sufficient to note that these documents are not put forward as evidence of a contract by which the parties are bound, but simply as evidence of the existence of a special family custom, not in the Shiurajpur Talook only, but generally throughout the Bahrulia clan.

"As remarked by the North-Western Provinces High Court in the case of *Debi Dat* v. *Inayat Ali* (1), a *wajib-ul-arz* is not a mere contract, it is a record of rights made by a public servant; and consequently without attestation or execution by the proprietors of the mouza it is entitled to weight as evidence of village custom. I would further note, that it has been ruled by this Court that entries made in settlement-records duly prepared and attested must be presumed to be correct records of facts until the contrary be proved. Legislative sanction has been accorded to this ruling by s. 17, Act XVII of 1876.

"Seeing, then, that the *wajib-ul-arz* of eight or more separate properties, owned by Bahrulia Rajputs, contain a clause declaratory of the existence of a custom, within the clan, whereby daughters are excluded from succession to real property, I must hold that the plaintiff adduced sufficient evidence in support of the existence of the custom he has set up, to shift the onus of rebutting the presumption raised by this evidence on to the opposite party, *i.e.*, the daughter; and as the daughter has failed to adduce any evidence to rebut this presumption, I must hold that the lower Courts were justified in finding that such a custom did exist, and that under this custom the daughter, Raghubans Kuar, was excluded from the succession to her deceased father, Udit Partab Singh, and that the Shiurajpur Talook must pass to the plaintiff as the nearest male collateral."

The fourth paragraph of the *wajib-ul-arz* relating to Shiurajpur was as follows:—

"4. Of transfer of landed property and succession. The talookdar has the power of alienating property by gift, sale or mortgage. The custom regarding inheritance is, that the eldest son of the talookdar succeeds on the latter's demise, and becomes absolute master of the entire inheritance. If there be more than one wife, the eldest male member of the family by all the ranees (wives) inherits, and the son of the eldest ranee (wife), as such, has no preferential right. Other sons are entitled to maintenance, provided they be

(1) 2 N. W. P. Rept., 395.

obedient to the member who succeeds. Other brothers have no right to claim 'sir' (1) or to be disobedient to him that succeeds to the talook; they must depend for their maintenance on his choice. No one, in case of a misunderstanding, has a right to claim a partition or separation contrary to the wishes of the talookdar. If the talookdar happen to have no offspring, the nearest relation succeeds him. The talookdar has power to adopt during his lifetime the nearest relation from among the sons in the family. After the death of the talookdar, the eldest ranee (wife) can succeed and have the same authority as her husband possessed. After the demise of the eldest ranee, if she have not adopted any body during her lifetime, the younger ranee succeeds to the estate and has the powers indicated above. If the eldest ranee be in possession of the talook, and there be more than one younger ranee, the latter are entitled to maintenance. The concubines and their issues have no right to share whatever,—they get food and raiment from the person getting the inheritance in case of their being submissive to him, and their seclusion in the 'pardah.' If during his lifetime the talookdar has granted a village, sir, or grove, to a concubine or her issue, they cannot retain possession after the talookdar's demise, contrary to the wishes of the person to whom the talook descends in succession. The daughters, whether the offspring of lawfully married wife or of a concubine, have no right or share; they are maintained until their marriage."

Mr *Leith*, Q. C., and Mr. *Doyne* for the appellant Lekhraj Kuar

Mr. *Cowie*, Q. C., for the appellant Raghubans Kuar.

Mr. *J. Graham* and Mr. *J. D. Mayne* for the respondent.

For the appellants it was contended that the *wajib-ul-arz* of Shiurajpur, and the other administration-papers of villages, admitted in evidence in this suit, had not been prepared and attested in the manner directed and required by Reg VII of 1822, having been prepared and attested by subordinate officers of the revenue settlement department, not intended by the Regulation to be entrusted with these powers. It was argued that these papers were not, therefore, admissible under s. 35 of the Indian Evidence Act, 1872, and that, if not shown to come within the latter Act, they were inadmissible. Nor was the custom in question such a usage as the Regulation contemplated. It was not connected with matters bearing on the revenue administration, those being the usage to which the Regulation referred.

The counsel for the respondent were not called upon.

The judgment of their Lordships was delivered by

The Right Hon'ble Sir Montague Edward Smith:—

The question in this appeal is whether the Plaintiff *Baboo Mahpal Singh*, or one of the Defendants, *Ranee Rughubuns Kuar*, is entitled as the next heir to *Udit Pertab Singh*, one of the talookdars of *Oudh*, to the talook of *Surajpur*, and another talook of which *Udit Pertab Singh* died possessed. *Udit* died without male issue, leaving a widow, since deceased, and an only daughter, the Defendant *Rughubuns*. The Plaintiff is the nearest male relation of the deceased talookdar, standing in the position of first cousin once removed. On the death of *Udit Pertab Singh*, his widow *Subhraj* was put into possession of the talooks in dispute; but under a compromise with *Ranee Lekhraj Kuar*, the step-mother of the deceased talookdar, the possession was given up to *Ranee Lekhraj*. That was the state of things when the present plaint was brought, and *Ranee Lekhraj Kuar* was alone made the Defendant. The first judgment in the case was given by the Deputy Commissioner when the Record was in this state. On an appeal from his judgment, the Commissioner directed that the daughter, *Ranee Rughubuns Kuar*, should be joined as a Defendant, and remanded the case to the Deputy

(1) Name applied to lands in a dara themselves. —*Wilson's Glossary* village, which are cultivated by the hereditary proprietors or village Zamindars *of Indian Terms*, p. 485.

Commissioner, directing a new issue which was necessary in consequence of her being brought into the suit. That issue in substance was whether the Plaintiff or the daughter was the next heir to *Udit Pertab Singh*, and entitled to succeed to his estate. There can be no doubt that by the general Hindu law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the cause, and by the issue which was joined after *Rughubuns* had become a Defendant on the Record, is whether in the *Bakrulia* clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their fathers' estate.

Other questions were raised in the suit, but the only question which remains to be determined is whether the evidence which was given by the Plaintiff to support that custom was properly admissible? This evidence consists of a number of *wajib-ul-arz*, or village administration papers, which state, in a manner which will be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the *Bakrulia* clan. There is no doubt that if those papers are properly admissible in evidence as proof of the custom, *Rughubuns*, the daughter, would be excluded by the custom stated in them. These *wajib-ul-arz*, or village papers, are regarded as of great importance by the Government. They were directed to be made by Regulation VII. of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th section is, "It shall be the duty of Collectors, and other persons exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land;" and other purposes are referred to in this section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of immediate reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the Province of *Oudh* were directed to be guided by the spirit of this amongst other resolutions.

The papers which are objected to were offered in evidence and received by the Courts under the 35th section of the *Indian Evidence Act*, 1872. The section is this: "An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village papers were made up with respect to the custom appears to be, that the officer recorded the statements of persons who were connected with the villages in the pergunnah in which this talook is situate. Some of the persons whose statements were taken were the proprietors of villages in the talook; others appear to be the proprietors of villages not in the talook, but in the pergunnah. The Record contains translations of the *wajib-ul-arz*, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts shew that the persons giving the information made statements, which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered of record in the office, and they must be taken upon the evidence to have

been regularly entered and kept there as authentic *wajib-ul-arz* papers. The objections which were taken to their reception are stated in the judgement of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter on the ground that they were not prepared or attested by the settlement officer in person as required by Regulation VII., 1822, and that they relate to matters which the settlement officer had no jurisdiction to include in them." Those are the only objections which are stated by the Judicial Commissioner to have been made. A further objection which was relied on by Mr. *Cowie* appears also to have been taken by the daughter in the course of the proceedings, viz., that she was not bound by the statements in question, inasmuch as she was no party to the making up of the *wajib-ul-arz*. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs all properly attested." It must therefore be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand from the statement of the Commissioner that they are all properly attested.

The first objection, and the one most relied upon, is that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the Regulations were directed to be of force in *Oudh*, but the Judicial Commissioner, as already mentioned, says: "Officers in administering the Province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to Collectors, and there are no Collectors in the Province of *Oudh*. Therefore in applying this Regulation in its spirit, we must substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of *India* to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are:—"It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the Settlement Records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information, and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the *wajib-ul-arz* were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the Bar. He says, "The objection was that they"—that is, the administration papers—"relate to matters which the Settlement Officer had no jurisdiction to include in them." That objection seems to their Lordships to be unfounded. The officers who were to make the inquiries were directed to ascertain and record "the fullest possible information in regard to

landed tenures, the rights, interests, and privilege of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures." This custom of the *Bakrulia* clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is that the papers, upon the face of them, do not shew that the officers had passed any judgment upon the information they received, and contain no record of their opinions or findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit, and gave a true description of the custom. Suppose the papers had had a heading such as the following: "The usages of the *Bakrulia* clan appear in the information recorded below." This would undoubtedly be an expression by the officer of his opinion that the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and place in the Government Records, ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The *Indian Evidence Act* has repealed all rules of evidence not contained in any statute or regulations, and the Plaintiff must therefore shew that these papers are admissible under some provision of the *Indian Evidence Act*. That relied on is the 35th section, which has been already read. It is necessary to look at the precise terms of this section; and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, is itself a relevant fact." There can be no doubt that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact in issue, viz., the usage of the *Bakrulia* clan. If so, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the custom, but as recording only the opinions of persons likely to know it, the 48th section would appear in that view of the entries to make them admissible. The 48th section is, "When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant." Then if opinions of this nature were relevant, the entry of such opinions in an official record is itself a relevant fact, which makes the entry admissible. There may be doubt whether what for the present purpose are assumed to be opinions would fall under the 48th clause, or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground, the *Evidence Act* does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of the North-Western Provinces

that *wajib-ul-arz* papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village customs. That case is found in the 2nd volume of the North-Western Provinces High Courts Reports, page 397 (1).

On the part of the daughter it was objected that being no party to the making up of the papers, she was not bound by the statements in them. She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence however was given on the part of either of these Defendants to shew that the custom did not exist, and their Lordships cannot but observe that if the custom did not exist, nothing could have been easier than to obtain proof of descents and successions to property, which would negative it. It appears that there are numerous villages in this talook, and more in the pergunnah; the *Bakrulia* clan is a large one, and if the custom did not exist the Defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships therefore think that these administration papers were properly admitted in evidence, that the objections made to their reception have failed; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the Court below are right, and they will humbly advise Her Majesty to affirm them, and to dismiss the appeal with costs.

Solicitor for the Appellants: *T. L. Wilson*

Solicitor for the Respondents: *Watkins & Lattey*

(1) Dabee Dutt v. Sheikh Guayat Ali and others.

25th November, 1879.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Allahabad.

ON PETITION OF F. W. QUARRY.*

Suspension of a pleader for misconduct—Act XX of 1865—Special leave to appeal.

The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct.

The Judicial Committee, not being prepared to say, from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal.

It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

This is an appeal made to the discretionary power of the Court to grant special leave to appeal against an order of the High Court dated as long ago as the 3rd of April, 1879, whereby the Petitioner was suspended for three months from practising as a vakeel. The period of suspension has obviously expired considerably before the time at which this application is made, and that in itself forms some ground why their Lordships should not accede to the application. Their Lordships, however, do not mean to go so far as to say that if the effect of the order had been to inflict upon the character of the applicant a lasting stigma, and there had been a clear miscarriage of justice shewn, the fact that the period of suspension had expired would alone have induced them to refuse

* 7 Cowell's I. A. p. 6; I. L. R. 2 All. p. 311.

this application. But it appears to their Lordships after hearing the statement at the bar, and reading the proceedings which have been filed in support of the application, that the Court below acted within its jurisdiction; that upon the complaint of Mr. *Bullock*, the Judge of the Small Cause Court, they formulated certain charges, charges which, if substantiated, would have justified their order, that a rule to shew cause was served upon the applicant, that he put in his answer, that there were affidavits filed on both sides, that the Court heard both parties, and having heard both parties made the order which is now complained of. Their Lordships think that the Court acted within its jurisdiction when they found upon the evidence that ground was made out upon which the rule should be made absolute, or rather that enough had been made out to justify them in suspending the applicant for the time for which they did suspend him from practice, and, so far as their Lordships can judge from the materials before them, they are not prepared to say that this was not a right conclusion. It would not have followed, even if their Lordships had entertained more doubt on the subject, that they would have granted an appeal against Judges acting regularly within their jurisdiction upon a pure question of fact. The application must therefore be refused.

Solicitors for the Petitioner: *Carpenter & Sons.*

27th November, 1879.

PRESENT:

Members of the *Judicial Committee* — The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'le Sir Montague Edward Smith, and The Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Allahabad.

BADRI PARSHAD (Plaintiff) ... ... } *Appellant,*

and

BABU MURLIDHUR and others (Defendants) } *Respondents**

Usury laws under Regulation XXXIV of 1803—*Obligation on mortgagee to file accounts.*

In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village jama, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, viz., Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bonâ fide* agreed should be allowed to the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee

* 7 Cowell's I. A. p. 51; I. L. R. 2 All. p. 593.

relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803; and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection.

Appeal from a decree of the High Court for the North-Western Provinces at Allahabad, dated the 25th November, 1876, affirming a decree of the Subordinate Judge of Aligarh, dated the 18th September, 1875.

This suit was for the redemption of a mortgage of *malikana* received from five villages in a talook called Guhrari, in the Aligarh district. The total rent payable to the *mukaddam biswadaram* of these villages, under the settlement of 1836, was Rs 9,870, of which they had to pay Government revenue to the amount of Rs. 7,649, retaining the difference, Rs. 2,221, as their *malikana*. On the 16th January, 1852, they mortgaged this *malikana* to a Gokal Das, agreeing to place him in the same position as they were themselves as regards the right to collect the whole *jama* from the malguzars. That part of the instrument of mortgage which was material to the question in this suit is set forth in the judgment on this appeal. In August, 1864, the son of Gokal Das sold the interest of the mortgagee, which had descended to him, to the respondents; and in 1874 and 1875 this appellant purchased from the mortgagors, or their successors, their interest in the mortgaged *malikana*. In June, 1875, the plaintiff sued for redemption, attempting to show that, allowing the actual cost of collection from May next after the execution of the mortgage, when the first collections were made, with interest at the rate of 12 per cent. per annum, the whole debt, principal and interest, would have been paid off in 1863-64. For the defence it was insisted that the plaintiff was bound by the stipulations of the mortgage. On an issue as to whether the sum of Rs.565 was a fair allowance for the costs of collection, the Subordinate Judge found that it was so; and that "the biswadars from whom the mortgagee lambardar had to collect rents are numerous in each village: in mauza Rothipura the biswadars are 90 and in Harduari 200, and the mortgagee has to collect very small items from them." He concluded that the plaintiff was not entitled to any reduction of the mortgage-money, as the contract had been *bonâ fide* made, and dismissed the suit. The High Court, on an appeal urging that the Rs. 565 must be regarded as a usurious addition to the legal interest, declared as follows:—

"We are of opinion, however, that the above stipulation in the mortgage is not in the nature of a contract for interest. When the parties agreed that Rs 565 should be allowed for expenses without an account, there was no evasion thereby of the law, or any contract to give usurious interest. This item was *bonâ fide* for the cost and risk of collections. It is an item in the accounts based on the footing of a distinct contract quite apart from the question of interest, and when we look at the position of the mortgagees, there was nothing unusual or unfair about it. They had to collect Rs. 9,870 from the biswadars, and were responsible for the payment of the revenue, and they had moreover to see that the biswadars made the collections from the tenants. Their position was certainly one of some risk, and the percentage allowed to them for the expense and risk of collecting was certainly not exorbitant or unusual. It may or may not be that their actual expenses fell short of the sum allowed, but this consideration will not render the arrangement a contravention of Regulation XXXIV of 1803, and therefore one to be set aside. The view here taken is, we find, supported by decisions of the Courts, cited by Mr. Macpherson in the 5th edition of his work on Mortgages, pages 51 and 53. We affirm the decision of the lower Court and dismiss the appeal with costs."

On appeal against this decision,

Mr. *Doyne* appeared for the appellant.

Mr. *Leith*, Q. C., and Mr. *Ernest E. Witt*, for the respondents.

Mr. *Doyne* for the appellant contended that the respondents as mortgagees were bound by law to produce accounts, and that without the production and verification

of the accounts no satisfactory conclusion could be arrived at on the question whether the allowance of Rs. 565 was a reasonable stipulation, or an evasion of the laws against usury.

The respondents were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and assignees of the mortgagee's interest. The mortgage deed between the original parties was dated the 16th of January, 1852. It was a mortgage of what was called the *malikana* interest of certain taloukdars; the amount of that *malikana* being, during the pendency of the then settlement, a fixed and known sum. The mortgage deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the jama fixed by the Government from the villages of the Ilaka, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the purgunnah; that he may bring to his own use the income of the *malikana* due to us, crediting every harvest Rs.1,656 per year as interest on the amount of consideration on this mortgage, at the rate of 1 per cent. per mensem, and take the remainder, Rs.565, the surplus of the *malikana*, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the *malikana* to the payment of two items—one, the interest on the mortgage amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the *malikana* profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. *Doyne* at the Bar, is whether this agreement is sufficient to deprive the Plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the Defendants to render the account mentioned in those two sections. A preliminary question however arises as to the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made, the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to 12 per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the Appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious intrest; that the Rs.565 constituted a percentage which was *bonâ fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about $5\frac{3}{4}$ per cent., was certainly neither exorbitant nor unusual. Having so found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs.565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs.565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the Defendants to file accounts would be to increase the costs of suit, which must ultimately fall on the Plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondents: *Pritchard & Sons.*

28th, 29th November, 1879. and 13th March, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MONIRAM KOLITA (Plaintiff) ... } *Appellant,*

and

KERRY KOLITANY (Defendant) ... } *Respondent,**

Hindu Law—Widow's Estate—Effect of Widow's Unchastity in regard to Estate vested in her.

A widow, who succeeds to the estate of her husband in default of male issue, whether she takes by inheritance or by survivorship, does not take a mere life-estate. The whole estate is, for the time vested in her; though in some respects for only a qualified interest. She holds an estate of inheritance to herself and the heirs of her husband; and upon the termination of that estate, the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death.

* 7 Cowell's I. A. p. 115; I. L. R. 5, Cal, p. 776.

It has not been established that the estate of a widow forms an exception to the general rule, that the estate of a Hindu once vested by succession, or inheritance, is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance.

The general rule is stated in the Viramitrodaya, Chap. viii, "On exclusion from inheritance," paras. 3, 4, and 5. This work, like the Mitakshara, may be referred to in Bengal in cases in regard to which the Dayabhaga is silent. A widow, who, not having been degraded or deprived of caste, had inherited the estate of her deceased husband, *held* not liable to forfeit that estate by reason of subsequent acts of unchastity.

Query as to the effect of her being degraded or deprived of caste for unchastity?

Appeal by special leave (13th May 1875) from a decree of a Divisional Bench (2nd June 1873), passed in accordance with a decision of a majority of ten Judges of the High Court (9th April 1873), which decree reversed, on special appeal, a judgment of the Deputy Commissioner of Sibsagar in the province of Assam, and restored that of the Munsif of Gholaghat, (24th March 1870).

Atma and Ghinbora, both deceased, were brothers of the blacksmith caste, inhabiting Mouza Jorehati, in Zilla Sibsagar, in Assam. Atma left a son, Moniram Kolita, the plaintiff in this suit; and Ghinbora left a son, Ghindela, who married Keri Kolitani, the defendant, and died childless in 1866. On his death, Keri Kolitani succeeded to the possession of his ancestral lands in the village (rather more than 23 bigas), and the revenue papers were made out in her name. After her husband's death, the widow began to cohabit with one Mohana, and had a child by him.

The plaintiff claimed the lands as his by inheritance. The defendant alleged her title as widow, and possession from her husband's death. The cohabitation with Mohana was stated as a fact in the Munsif's judgment, which on this point was, that the defendant, as widow of Ghindela, had not lost her rights, there not having been a second marriage.

This decision was reversed on appeal; the Deputy Commissioner holding that a widow's unchastity caused her to lose her estate in her deceased husband's ancestral lands. The defendant then filed a special appeal in the High Court, on the ground that, by the Hindu law, the succession having once devolved upon her, and the property having vested in her, she could not be divested of the same in consequence of her unchastity after her husband's death.

A Divisional Bench of the High Court was of the same opinion as the Deputy Commissioner, but this opinion being opposed to the decision of the High Court in *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (1) a reference was made by the Judges to a Full Bench, with the result that the decision of the Munsif was restored (2).

An application for leave to appeal to Her Majesty in Council, made to the High Court, was refused on grounds regarding the smallness of the property, valued only at Rs. 75. Leave to appeal was then granted by order in Council, dated the 13th May 1875.

The appellant's grounds were, that, upon the correct construction of the Hindu law of the Bengal school, and the authorities relating thereto, it should have been held that a sonless Hindu widow, who by reason of her chastity had obtained the estate of her husband, was entitled to continue to enjoy that estate only so long as the qualification of chastity itself, and the spiritual benefit accruing therefrom to her deceased husband, should continue; also that Act XXI of 1850 had no application to the facts of this case.

Mr *Cowie, Q. C.*, and Mr. *Doyne* for the appellant.

The respondent did not appear.

Reference was made to the authorities cited in the argument of the appeal in the High Court, reported in 13 Bengal Law Reports, pp. 30 to 39, especially to the following:

Mitakshara, Chap. II, Sec. I; Colebrooke's Digest of Hindu Law, Book IV, Chaps. III and IV; Strange's Hindu Law, Chap. VII; Macnaghten's Principles of Hindu Law, Vol. I, Chap. II; and Precedents of Hindu Law, Vol. II,

(1) 5 B. L. R., 466. (2) 13 B. L. R., 1.

Chap. I, Sec. II; *Maharanee Busunt Koomaree* v *Maharanee Kummul Koomaree* (1), *Radamoni Raur* v. *Nilmoni Das* (2), *Saumoney Dossee* v *Nemychurn Dass* (3), *Parvati* v. *Bhiku* (4), *Srimati Matangini Debi* v *Srimati Jaykali Debi* (5), *Nehalo* v *Kishen Lal* (6), *Hurrydoss Dutt* v. *S. M Uppoornah Dossee* (7), *Cossinath Byack* v. *Hurrosoondery Dossee* (8).

13th March 1880.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a decision of a Full Bench of the High Court of Judicature at *Calcutta*. It was admitted by virtue of a special Order of Her Majesty in Council, whereby the Appellant had leave to appeal in the form of a special case upon the following questions, viz,—

1st. Whether, under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and,

2nd. Whether the forfeiture, if any, is barred by Act XXI. of 1850.

The appeal was admitted, on account of the importance of the questions submitted for determination and the great interest which the Hindu community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice *Bayley* and Mr. Justice *Dwarkanath Mitter*, who were of opinion that the Defendant had, by reason of unchastity, forfeited her right in her husband's property, but in consequence of a contrary ruling of the High Court referred the two questions above mentioned to a Full Bench, with their remarks thereon.

(1) 7 Sel. Rep., 144; New Ed., 168.
(2) Montriou's H. L. Cases, 314.
(3) 2 Taylor and Bell, 300.
(4) 4 Bom. H. C. Rep., A. C., 25.
(5) 5 B. L. R., 466.
(6) I. L. R., 2 All., 150.
(7) 6 Moore's I. A., 433.
(8) Morton's Decisions, edition of 1841, p. 85.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, viz., Mr. Justice *Kemp*, Mr. Justice *Glover*, and Mr. Justice *Dwarkanath Mitter*, dissented from the opinions expressed by the majority of the Court. The case is fully reported in the 13 *Bengal* Law Reports, p. 1.

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the Appellant. The Respondent did not appear.

The opinion of Mr. Justice *Dwarkanath Mitter*, who was himself a learned and accomplished Hindu lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight, but, having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court is the case of *Matangini Debi* v *Srimati Jaykali Debi* (1), which was the cause of the reference.

That case was originally tried before Mr. Justice *Markby*, who delivered a judgment in which he shewed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr Justice *Macpherson*, who affirmed the judgment of Mr Justice *Markby*.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice *Dwarkanath Mitter*, on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindu commentators, touching the frailty and incapacity of women, and the necessity for their

(1) 5 Beng. L. R. 463.

dependence upon and control by some male-protector; and, from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the benefit of her husband's soul"; that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must therefore be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differed from Mr. Justice *Mitter's* view of the nature of a Hindu widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Cheif Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice *Glover's* judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (13 Beng. L. R. p. 55):—

"The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer greatest benefits, therefore they are first in the line of heirship. The *widow comes next, as being able to confer considerable, though less, benefits*, and *it is only because she is able to do this that she is allowed to take her husband's share.*

"It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put*; and, whether in after-life he offer the funeral oblations or no, *he succeeds to his father's inheritance from the fact of being able to offer them.* With the widow it is not so; she can only perfom ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (Dayabhaga, cap. 11, s. 1, v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse), see also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put*, is, according to the Dayabhaga, excluded for certain causes from inheritance in the same manner as other heirs (Dayabhaga, cap. 5, par. 4, 5, and 6); but, if he once succeeds, the estate is not divested for anything less than degradation, though causes which would have excluded him if they had existed before succession arise after the estate has descended. This is

admitted by Mr. Justice *Mitter* (see 7 Cowell's I. A., p. 121).

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice *Mitter*, in his judgment, delivered upon the Full Bench (13 Beng. L. R. p. 40), says:—

"Of all the authorities above referred to, the Dayabhaga of *Jimuta Vahana*, the acknowledged founder of the *Bengal* school, is undoubtedly the highest; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely the text of *Vrihat Menu*, cited in v. 7, s. 1, ch. xi. of Mr. *Colebrooke's* translation of the Dayabhaga; and that of *Catyayana*, cited in v. 56 of the same section and chapter.

These two verses are as follows:—

'(1.) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.'

'(2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property untill her death. After her let the heirs take it.'"

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the *patni* or widow should perform those ceremonies conducive to the spiritual benefit of her husband and herself, which can be accomplished by wealth, and which a female is competent to perform. See the Vira Mitrodaya, cap. III, part I, s. 2; and the Smriti Chandrika, cap. 11, s. 1, vs. 13, 16, and 20. In this view the text would run thus,—"The widow of a childless man having kept unsullied her husband's bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation."

Mr. Justice Glover points to the words "persevering in religious observances," to prove that the whole text applies to a period subsequent to the husband's death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smriti Chandrika, cap. 11, s. 1, verse 17, the meaning of the words, "persevering in religious observances" are thus explained, 'practising religious ceremonies even during the lifetime of the husband, with the husband's permission," &c., whence the inference is draw, in verse 18, that a *patni*, to inherit her husband's estate must be a pious woman. And again in verse 12, a virtuous woman is "one that lives with her husband, associating with him in the performance of rites ordained by *Sruti* and *Smriti*, and observing fastings and other religious ceremonies."

The second of the texts relied upon is that of *Catyayana*.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediatly preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dayabhaga or Mitakshara alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In cap. 11, s. 1, the author of the Dayabhaga, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband, for which purpose he had cited the text of *Vrihat Menu*. He says:—

"By the term 'his share' is understood the entire share appertaining to her husband, not a part only," (the translator adds the words "sufficient for her support").

And then in verse 55 he concludes :—

"Therefore the interpretation of the law is right as set forth by us," viz., that "the widow's right must be affirmed to extend to the whole estate" of her husband (v. 6).

He then proceeds, in verse 56, to deal with the mode of enjoyment, and to show that notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband's heirs. He says :—

"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it."

And then, in support of that proposition, he refers to the second text cited, and proceeds :—

"Thus Catyayana says:—'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. *After her death* let the heirs take it."

Mr. Justice *Mitter* in his judgment remarks, at p. 41 of 13 Beng. L. R., that the author of the Dayabhaga cited that text, not for the purpose for which he cited that of *Vrihat Menu*, viz. that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (see 7 Cowell's I. A., p. 129) :—

"This passage shews clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord.' *The participial form* of the word 'preserving,' *i. e.*, continually preserving, which is also the form used in the original *(palayanti)*, proves conclusively that the injunction is one in the nature of a permanently abiding condition, which the widow is bound at all times, and under all circumstances, to satisfy; and the right of enjoyment conferred upon her being expressly declared *to be subject to such a condition*, every violation of it must necessarily involve a forfeiture of that right."

Mr. Justice *Glover* also, at page 57, expresses a similar opinion, and he refers to the present participle "preserving" as denoting continuance, and as referring to the time after the widow has taken the property originally, and, he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She cannot," he says, "live with him until she is a widow, and while she lives with him she is to keep unsullied her husband's bed." It is by treating the words "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument that the words "keeping unsullied the bed of her lord" also express a condition. But that argument fails, inasmuch as it has been expressly held by the Privy Council, in the case of *Cossinaut Byaack* v. *Hurrosoondry* (1), that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice *Mitter* says that it lends in an indirect way considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate;

(1) Vyavastha Darpana, 97, and 2 Morley's Digest, 198

but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of *Catyayana's* text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs *Lower Bengal*, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindu commentators have often drawn opposite conclusions. Now how has *Jimuta Vahana* dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (vs. 58 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (vs. 60 and 61), and deals with her power of alienation, and the limitations upon it (vs. 62, 63, and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as *Jimuta Vahana*, if he had drawn from the text of *Catyayana* the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have stated that inference clearly by saying, in v. 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daughters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance shew that when it was intended to point out that a right was liable to resumption or forfeiture clear and express words to that effect were used. *Jimuta Vahana* in c. 11, s. 1, v. 48, of the Dayabhaga refers to a text of *Narada*, in which he says, "Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord. But if they behave otherwise the brother may resume that allowance." How different are those words from those used in the text of *Catyayana*.

Mr Justice *Mitter*, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the estate of her father does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to v. 31, s. 2, c. 11, of the Dayabhaga to shew that the text of *Catyayana* is applicable to all women. (See 13 Beng. L. R., p. 45 and 46, 48 and 49.)

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above-mentioned texts of *Vrihat Menu* or that of *Catyayana*. Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation," and "his share," and "the property," have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

Verse 31, s 2, c. 11, only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keep-

ing unsullied the bed of her lord." This is made clear by s. 30, in which it is said:—

"Since it has been shewn by a text cited (sect. 1, v. 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely the daughters and the rest, succeed to the wealth; therefore, the same rule (*concerning the succession of the former possessor's* next heirs) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's."

Then comes sect. 31, which is in the words following:—

"The word 'wife' in the text above quoted (sect. 1, v. 56) is employed with a general import, and it implies that the rule," (meaning the rule referred to in cap. 11, s. 2, and para 30) "must be understood as applicable generally to the case of a woman's succession by inheritance."

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed the latter authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that in their opinion those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindu law, that an estate once vested by succession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion of inheritance.

The general rule is stated in the Vira-Mitrodaya, a book of authority in *Southern India* (see 12 Moore's Ind. Ap. Ca, 466, and Mr. *Colebrooke's* Preface to the Dayabhaga), and which may also, like the Mitakshara, be referred to in *Bengal* in cases where the Dayabhaga is silent. It is there said, in para. 3 of the chapter on Exclusion from Inheritance (ch. 8), "among them, however, an outcast (*patita*) and addicted to vice (*upa pataki*) are excluded if they do not perform penance," and then in para. 4 the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares. In para. 5 it is said that the masculine gender in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs, as well.

Mr. Justice *Jackson* has ably pointed out the great mischief, uncertainty, and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindu society, and the relaxation of so many of the precept relating to Hindu widows. The following consequences may also be pointed out.

According to the Hindu law, a widow who succeed to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which see the *Shivagunga Case* (1)) does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the

(1) 9 Moore's Ind. Ap. Ca. 604.

heirs of her husband. But whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (1). The succession does not open to the heirs of the husband untill the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death (2).

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brother. The wife succeeds to the estate and the surviving brother is her protector. (*See* Dayabhaga, cap. 11, s. 1, v. 57.) If he survive the widow, he, according to the *Bengal* school, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother (Dayabhaga, cap. 11, s 1, v. 5; *id.* cap. 11, s. 6, v. 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it. (Dayabhaga, cap. 11, s 1, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that consequently the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who, if the widow had remained chaste, would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

In the case of *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (3), the following remark was made by the then Chief Justice. He said:—

"In the case of *Katama Natchiar* v. *The Rajah of Shivagunga* (4), it was held that a decree in a suit brought by a Hindu widow binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shewn that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject; but it is an

(1) 9 Moore's I. A. 604. (2) 9 Moore's I. A. 400.

(3) 5 Beng. L. R. 490.
(4) 9 Moore's Ind. Ap. Ca. 539.

agrument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight."

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at *Bombay*, in the case of *Parvati* v. *Bhiku* (1), and the High Court in the North-West Provinces, in the case of *Nehalo* v. *Kishen Lall* (2), have given judgments to the same effect as that of the Full Bench at *Calcutta* in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste before that Act a Hindu, whether male or female, was considered as dead by the Hindu law, so much so that libations were directed to be offered to his manes as though he were naturally dead: See *Strange's* Hindu Law, 160 and 261; *Menu*, cap. 11, s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. (Dayabhaga, chap. 1, paragraps 31, 32, and 33.) The opinion of Mr. *Colebrooke* in the *Trichinopoly case* is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act XXI of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

Solicitors for appellant: *Barrow & Rogers.*

(1) 4 Bomb. H. C. Rep. 25.

(2) 2 Ind. L. R. (Allah. Series) 150.

2nd and 3rd December, 1879.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DINOMOYI DEBI (plaintiff) ... } *Appellant,*

and

ROY LUCHMIPUT SINGH (Defendant) ... } *Respondent.**

Limitation—Act IX of 1871, sec. 20—Acknowledgment by agent—Evidence of authority—Parol evidence; not admissible, of existing documents.

Held, upon the evidence, that the agent had no general authority to sign the acknowledgment of the debt, he then not being in the Defendant's service, and that to the knowledge of the Plaintiff.

Held also, upon the evidence that the agent had no special authority from Defendant to sign the acknowledgment.

It is not simply a technical, but in reality a cardinal and substantial rule of evidence that an existing document is the best proof of its contents and it is dangerous to allow parol evidence to be given as to the same. If the letter containing the alleged special authority was not produced, and its non-production unexplained, the natural inference was either that the letter if written did not contain the alleged authority or that no such letter ever existed.

Held consequently that Act IX of 1871 sec. 20 did not save the suit from limitation.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This suit was brought by *Roy Luchmiput Sing Bahadoor*, who is a banker carrying on his business at *Rungpoor*, and having a branch bank at *Baloochur* in *Moorshedabad*, against a lady of the name of *Dinomoyi Debi Chowdhrani*, to recover a large sum of money which is claimed as being due upon the balance of

* 7 Cowell's I. A., p. 8.

a banking account. This balance represents principal due up to the 29th Assin, 1276, Rs.12,402, and interest from that date to the 22nd Assin, 1280, Rs.5548, making altogether Rs.17,950. The Plaintiff joined, as Defendant in the action, *Ram Tarun Hazra*, who was in the service of the first Defendant and whose position will be hereafter referred to, and also, as a third Defendant, *Rhada Churn Banerjee*, her son-in-law and her dewan. There seems to have been no ground whatever for joining these two persons, for they acted as agents only in the transactions which formed the subject of the action, and were in no way personally liable to the Plaintiff. They may be considered as being out of the suit. The defence made to this claim was first, a denial that the balance claimed was due, and secondly, that if that balance was at any time due the right to recover it was barred by the *Statute of Limitations*, No. 9 of 1871. It seems that *Ram Tarun Hazra* was what is called a jammanuvis, a kind of accountant in the Defendant's service; but undoubtedly he had mooktearnamahs or am-mooktearnamahs from the Defendant, for the lady herself, who was examined on the part of the Plaintiff, admits that they were given to him. However, they have not been produced. It is unquestionable also that *Rhada Churn* acted as dewan of the lady. It seems that she had on one or two occasions deposited considerable sums with the Plaintiff on deposit, and had also left with him on deposit valuable property in gold and silver; but on the other side moneys were drawn out from time to time on her account. A large sum of money, Rs.17,000, was drawn from the bank to pay for an estate which she purchased. The items of the banking account were disputed in the Court below, particularly with regard to that sum of Rs.17,000, and another sum of Rs.16,000, which, though it was admitted to have been taken out for the purchase of this estate, was said to have been again paid into the bank. The banking account was managed, and the sums drawn out by *Ram Tarun Hazra*, who seems to have been the principal actor in the transactions with the bank, though *Rhada Churn* interfered in them, and must have known what was the state of the account from time to time. It seems that the account began in 1272, and was finally closed, so far as regards the drawing out and paying in of money, in 1274.

Four accounts altogether have been referred to, which bear the signature of *Ram Tarun Hazra*. The period of adjusting these accounts appears to have been in the month of Assin, treated as the beginning of the commercial year. The accounts were kept both in Hindee and Bengali books. The dates spoken of in this judgment are those in the Bengali books. The last account (the third) which was adjusted—before we come to the adjustment and *kat-chitta* which are in question in this suit—was adjusted on the 10th Assin, 1275, which corresponds with the 25th of September, 1868. No other account was adjusted until that in question, and upon the adjustment of which the *kat-chitta* in dispute was said to be given in 24th Assar, 1277, corresponding with the 7th of July, 1870. Therefore this account, instead of being adjusted as in ordinary course it would have been in Assin of 1275, was not adjusted until the 24th of Assar, 1277; and it was adjusted, not at *Mahigunge*, where the former accounts had been settled, but at *Baloochur* in *Moorshedabad*. It is said that the reason of the delay and of the settlement having taken place at *Moorshedabad*, was that there had been some altercation about the amount of interest which should be charged upon the balance due. The two Judges of the High Court, Mr. Justice *Kemp* and Mr. Justice *Ainslie*, differed in the view they took of the truth of this mode of accounting for the delay. Mr. Justice *Kemp* gave credit to the statement of the Plaintiff's witnesses who said that the cause of the delay was the dispute about the interest. Mr. Justice *Ainslie* thought that the Plaintiff's story with regard to it was a mere pretence. It is

unnecessary, in their Lordships' view, to determine which of the learned Judges is right in his view of the evidence on that point. It is enough to say that this settlement was made out of the ordinary course, being made nine or ten months after the usual time for adjusting the account, and at an unusual place.

With regard to the first question, whether the balance which appears upon the accounts was at any time due from the Defendant to the Plaintiff, their Lordships, during the course of the argument, intimated that they did not find sufficient grounds for disagreeing with the judgment of the High Court upon that point. They desire to give no further expression of their opinion than to observe that the learned Judges had materials and evidence before them which they might fairly and properly consider, and their Lordships are not prepared to disagree with their judgment.

The question remains whether the debt is not barred by limitation. The last settlement of account, which was regularly made and adjusted by *Hazra*, took place on 10th Assin, 1275, nearly five years before the suit. In order therefore to take the case out of the operation of Act No. 9 of 1871 it is necessary for the Plaintiff to establish that there had been an acknowledgment either by the Defendant herself or by an agent of hers within the period of three years, which is the period of limitation applicable to the present claim. The 20th section of Act 9 enacts: "No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act unless such promise or acknowledgment is contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally or especially authorized in this behalf." The case of the Plaintiff is, that an acknowledgment was signed by *Hazra*, and that he, at the time he signed it, was the Defendant's agent, either generally or especially authorized in that behalf. The case is put in two ways: first that his general authority to act for the lady continued up to the time when he signed the documents to be presently referred to; and secondly, it is said that there is evidence of a special authority given to him by her to make these acknowledgments.

The account relied on is alleged to have been adjusted by *Hazra* on the 24th Assar, 1277 (the 7th of July, 1870). This account was entered in the Plaintiff's *khata* for the year 1275. It is extremely simple. It states the previous balance up to the 10th of Assin, 1275, Rs.11 108, and the only new item is this:—"On account of Chati game, Rs.2." Then interest is added from the 11th of Assin, 1275, to the 29th Assin, 1276, making a total of Rs. 12,402 8*a*., which is the sum mentioned in the plaint. On the same day the memorandum, called the *hat-chitta* stating the account in a similar manner, was signed by *Hazra*. It contains the addition, "Interest will be paid at Rs 1 per cent. per mensem."

The extent of *Hazra's* authority is not shewn by any document. The Defendant, who was called as a witness for the Plaintiff, stated that she gave am-mooktearnamahs to *Hazra*; but they have not been produced, nor is there any evidence of their contents. It was the duty of the Plaintiff, if he relied upon those am-mooktearnamahs, to produce them. It appears that one at least was registered, and the Plaintiff might have produced a copy. No effort was made to obtain the original. *Hazra* might have been served with a suphœna to produce it; and their Lordships, on the evidence before them, see no reason to suppose that *Hazra* was otherwise than favourable to the Plaintiff. If he really had authority, and if he had given these documents acting within that authority, it was his interest to establish those facts; and from his being found in communication with the Plaintiff, and also from the Plaintiff having produced documents which he could only have obtained from *Hazra*, there is reason to suppose that he was, to say the least, well disposed to the Plaintiff and to the present claim. Though the written authority has not been produced, their Lordships think enough appears upon the evidence to shew

that he had authority, at one time, to borrow money; indeed his acts in that respect were ratified by the lady herself.

Then comes the question whether the authority which he may once have had was continued down to the time (the 7th of July, 1870) when the acknowledgments in question were signed. In the absence of the am-mooktearnamahs the answer to that question must depend on other evidence.

It is proved that in Bhadro, 1276, *Hazra* left *Rungpoor* and the residence of the Defendant and went to his own home in *Moorshedabad*, and he never returned to *Rungpoor*. That was ten or eleven months before the signature of these acknowledgments. The fact that he left the Defendant's service and did not return is proved conclusively by a great number of witnesses. The Defendant herself gives this account of it: "*Hazra* having taken a month's leave, went home and never returned, and he performed no business on my behalf. After that the said *Hazra* was no longer my servant." Another witness, *Shoshodhur Chaki*, says: "In the month of Srabun or Bhadro, 1276, *Ram Tarun Hazra* went to his house at *Rampara* in *Moorshedabad*. He has not come back since then. He did not get his salary after he had gone away, nor did he perform any business." The same facts are stated by ten or twelve witnesses called on the part of the Plaintiff. Their evidence is nowhere denied or questioned, and is supported, if support were necessary, by the witnesses called on behalf of the Defendant. Whether when he first went away he was discharged or not is immaterial. In the absence of evidence to the contrary, it is certainly to be inferred from the facts stated that his service had come to an end. If so, it is clear that he would have no general authority to sign these acknowledgments on behalf of the Defendant.

Then it is said that the Plaintiff had no notice that *Hazra's* authority had been put an end to, and therefore that as far as he is concerned it must be deemed to have continued. Formal notice in cases of this sort is not required. It will be enough if the Plaintiff knew of the agent's authority having ceased. That would depend upon his knowing whether *Hazra* had quitted the Defendant's service, and that his authority was in that way revoked. Their Lordships find that *Raout Mull*, who was the Plaintiff's gomashta, and apparently one of the managers of the kooti at *Mahigunge*, was aware of the fact, and it is nowhere denied that the circumstances under which *Hazra* had left, and continued to be absent, were known. *Hazra* had gone to his own country in *Moorshedabad*. *Raout Mull* says that he knew he had gone there, and *Hazra* is afterwards found to be communicating with the Plaintiff upon this suit. The inference to be drawn from all the facts of the case is, that the Plaintiff or his manager must have been aware of the situation in which *Hazra* was, and that his connection with the Defendant had come to an end. If that be so, the Plaintiff's case fails, so far as it depends on *Hazra's* general authority from the Defendant to make the acknowledgments at the time at which he made them.

It is then contended that the Defendant gave a special authority to *Hazra* to make the very adjustment which constitutes the acknowledgment in question. If that had been made out, nothing of course could have been plainer than this case would have become. What is relied on to establish the special authority is a letter alleged to have been written by the Defendant herself. The evidence of it is to be found in the deposition of *Raout Mull*, and his statement is this: "Afterwards, in the year 1276, the *Hazra* went to his country in zillah *Moorshedabad*. *Dinomoyi* wrote a letter saying, 'You have calculated interest at too high a rate; for this reason the account cannot be adjusted here.' The *Hazra* is in *Moorshedabad*; he will go to the Plaintiff, and when the Plaintiff reduces the rate of interest the account will be adjusted." An inquiry in the course of the examination of this witness was made by the Defendant's counsel as to where letters were kept, and he says this:—"The letters that used to come when I

was present, I used to make over to the serishtadar of the kooti. They used to remain in the kooti with the gomashta. The letters that used to come to the gomashta remained with him." And then again he says:—"The said letter was written after the karbar was closed. I do not remember the year. *Dinomoyi* wrote at the commencement of the Nagri year 1926, or Bengali year 1277, about the adjustment of the accounts in *Moorshedabad*. I do not remember whether the said letter was to the address of the Plaintiff, or of me, or of the gomashta. I do not remember whether it contained the seal and signature of *Dinomoyi* or the signature of *Radha Churn* in bakalum. I received the said letter through the burkundar of the Plaintiff's kooti. The said letter used to remain in the Plaintiff's serishta. I cannot say where it is now." This witness could not say where it was as the time he was speaking, for he was no longer in the service of the Plaintiff, having left it for some time. This important letter, which would be evidence of specific authority having been given by the lady to *Hazra* to adjust the accounts, was not produced, and no attempt was made to account for its non-production. The learned Judges of the High Court do not seem to have recognised the weight of the objections which arise from the non-production of this letter, and the want of any proper explanation to account for its absence. All that Mr. Justice *Kemp* says of it is this: "It is to be regretted that the Plaintiff has not been able to file the letter from the lady, the Defendant No. 1, to this firm." The learned Judge assumes in that sentence that he was not able to file it, but there is no evidence that he was unable to do so. If such a letter existed, it should have been in his serishta. If any accident had occurred to prevent its production, it might have been shewn.

Their Lordships therefore cannot agree with the Judges of the High Court in thinking that a special authority to *Hazra* to make the acknowledgments in question was sufficiently proved. It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. Nothing is more dangerous than to allow parol evidence to be given of what they are alleged to contain when there is reason to suppose that the documents themselves exist. If a letter exists, it may contain something very different from that which the witness represents to be its contents. When an important letter is not produced, and no explanation is given for its non-production, an inference not unnaturally arises, either that the letter, if written, does not contain that which it is represented to contain, and therefore that it would not suit the purpose of the party to produce it, or that no such letter ever existed.

Their Lordships therefore think that the parol contents of this letter were not properly received in evidence; and they further think, independently of the technical point of its admissibility, that the evidence does not afford trustworthy proof of the contents of the suppose letter. It is to be observed that there is no evidence that the adjustment said to have been made in pursuance of it was ever communicated to the Defendant.

On these grounds their Lordships are of opinion that *Hazra's* authority, whatever it may have been, did not continue to the time when these acknowledgments were signed, and that the Plaintiff has failed to prove any special authority from the lady to *Hazra* to make them.

Their Lordships most humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the Subordinate Judge, and to direct that the Plaintiff do pay the costs of the litigation in *India*. He must also pay the costs of this appeal.

Solicitors for the Appellants: *Watkins & Lattey*.

Solicitors for the Respondent: *Gush & Phillips*.

4th and 5th, December, 1879.

PRESENT:

Members of the *Judicial Committee*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the Court of the Judicial Commissioner, Oudh.

SIR MAHARAJAH DRIG BIJAI SINGH (Defendant) } *Appellant.*

and

GOPAL DATT PANDAY (Plaintiff) ... } *Respondent.**

Birt Shankallaps—Limitation—Circular Order, 1861, ss. 1, 24—Act XVI. of 1865—Act XIII. of 1866—Act XXVI. of 1866, ss 1, 2.

Sects. 1 and 24 of a Circular Order of 1861, which enact in effect that if a birteeah is out of possession in 1855 his claim cannot be recognised have been treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself; but whether rightly so or not, they have in effect been repealed by Acts XVI. of 1865 and XIII of 1866.

The Circular Order applied to all birt tenures, including shankallaps, so far as the latter are in the nature of birts.

The effect of sects. 1 and 2 of Act XXVI. of 1866 discussed.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case the Plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zemindar," in twenty-eight villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the ground that inasmuch as Plaintiff did not prove that he had been in possession in 1262 and 1263 Fusli—in other words, in the year 1855, the year before the annexation of *Oudh*—his claim could not be entertained. The Commissioner of *Oudh* not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the Plaintiff was entitled to the right he claimed, which is sometimes described as a "birt shankallap" right, sometimes as a "shankallap" right (some kinds of shankallap being almost identical with that of birt, some being different from it), and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law, which he states to be whether paragraph 5 of ruling 5 of the Financial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: "In the investigation of this and all cases of the same nature it must be remembered that the extension of the term of limitation made by Act XVI. of 1865 is founded only on the agreement of the talookdars, and does not apply to tenures originating in favour. A claimant who cannot prove possession of his shankallap holding in 1262-1263 Fusli has no *locus standi* in Court." This ruling appears to be based upon a circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that circular on which the ruling is supposed to be founded are principally these: The 1st section enacts, "Though the settlement recently concluded with the talookdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talookdar and the ryot, shall be maintained as these rights existed in 1855." Then follows sect. 24, which relates to birt tenures, and is in these terms: "Where the birteeah has lost possession there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion that birteeahs who are found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pattahs

* 7 Cowell's Indian Appeals p. 17.

under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is a 'cession.' It was the purchase of the proprietary rights subordinate to the talookdar on certain conditions as to payment of rent which were held to be binding, though undoubtedly often violated by superior power." Section 26 runs thus: "Instructions are also required regarding the treatment of shankallap at settlement. Some shankallap is of much the same nature as birt, and therefore will be governed by the same rules: but it differs so far from 'bai-birt' that it is a condition of the former tenure that the talookdar can redeem it at any time by repaying the purchase-money. The option of availing himself of this condition should be afforded him at settlement. Other 'shankallap,' that which is styled tooshust and is usually given to Brahmins and Pandits, is a pure maafi tenure given by the talookdar and will be treated like other rent free grants by talookdars." The latter words refer us back to sect. 20, which is in these terms: "Those birts conferred by favour, or 'regatte' birts, as they are styled, in contradistinction to the former, or bai-birts, are not birts in their essential characteristics, but are identical with the rent free grants made by talookdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in paragraph 14 of the maafi rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures, and to tenures in the nature of shankallap, which are to some extent different from birt tenures, and are assumed to be held at the option of the talookdar; but their Lordships find no such distinction in the circular of 1861. The words treated as words of limitation in sect. 24 apply to all birt tenures. If a shankallap be a birt tenure they apply to it; if it be not a birt tenure they do not apply to it, and it follows that there is no term of limitation in the regulation applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855, his claim cannot be recognised. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself. We then come to a statute, No. XVI. of 1865, which is intituled, "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of *Oudh*." Sect. 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act"—and claims of this kind come under that category—"shall be debarred from a hearing under the rules relating to the limitation of suits in force in the province of *Oudh* if the cause of action shall have arisen on or after the 13th day of February, 1844," that is, twelve years before the annexation of *Oudh*, which occurred on the 13th of February, 1856. Act XIII. of 1866 followed, which is very much *in pari materia*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say, "And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th of February, 1844. It appears to their Lordships that whether

the provision in the Circular Order referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birtooah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could be raised on the question of limitation, their Lordships are of opinion that these two statutes are an answer to it.

But it has been contended that the disability, which it is said the Plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No XXVI of 1866 is relied upon for this purpose. It is entitled, "An Act to legalise the rules made by the Chief Commissioner of *Oudh* for the better determination of certain claims of subordinate proprietors in that Province;" and it enacts, "Whereas certain rules have been made by the Chief Commissioner of *Oudh* for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows:—1. The rules for determining the conditions to which persons possessed of subordinate rights of property to talookas in the territory subject to the administration of the Chief Commissioner of *Oudh* shall be entitled to obtain a sub-settlement of lands, villages, or sub-divisions thereof which they held under talookdars on or before the 13th day of February, 1856, and for determining the amounts payable to the talookdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of *India* in Council and published in the *Gazette of India* for September 1st, 1866, and which are published in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the Plaintiff's claim. The chief reliance has been placed upon sects. 1 and 2. The 1st section is to the effect that—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, "When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar, no sub-settlement can be made. But the claimants will be entitled, in accordance with the rules contained in the Circular Orders which have hitherto been in force in *Oudh* upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement, he must shew that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favour of the Plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the rajah. Then follow these words, on which reliance has been placed: "He must also shew that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under proprietary right, and not merely through privilege granted on account of service or by favour of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that inasmuch as this is a shankallap tenure of the kooshust description, and held merely by favour, and not as of right, the Plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the Plaintiff is treated in the first place by the Settlement Officer, who originally

dismissed it on the grounds which have been stated, as a claim not to "kooshust," but to "birt shankallap." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were five shankallap villages held by the Plaintiff's family; that about 1256 Fusli" (it is agreed that that should stand 1258 Fusli) "they lost possession when *Jadunath* executed the conditional deed of sale. There is proof that Plaintiff held his share separately, from the Defendant's own written note on the wajibularz presented by *Jadunath*; and as the Defendant neglects to produce the deed, there is no evidence to shew that *Jadunath* did or could legally convey the rights of *Gopal Datt*; that the rajah had no right to eject him in 1256 Fusli, and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. *Carpar*.

It appears to their Lordships that the effect of the finding is that the Plaintiff did hold, not merely in the words of the section, "through privilege granted on account of services or by favour of the talookdar," but by an under-proprietary right, which is distinguished from a holding through privilege or favour; that he was entitled to hold, not merely during the will of the talookdar, to which the latter part of the section appears to point, but *in invitum*; and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held pucka or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

Solicitors for Appellant: *Young, Jackson, & Beard.*

4th, 5th, 9th, 10th, and 11th December, 1879.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

INDROMONI CHOWDHRANI (Plaintiff) ... *Appellant,*

and

BEHARILAL MULLICK, for self and as Guardian of HARAN KRISHNA MULLICK, a Minor (Defendant) ... *Respondents.**

Hindu Law—Sudras in Bengal—Adoption.

Among persons of the Sudra caste in Bengal, no ceremonies in adoption, besides the giving and taking a child, are necessary.

Query—Whether, where the ceremonies of an adoption are not performed at the proper time, the omission can be subsequently supplied?

APPEAL from a decree of a Full Bench of the High Court of Bengal (23rd February 1874) reversing a decree of the District Judge of Murshidabad (1st February 1872).

The facts of the case, and the judgment of the Full Bench appealed from, are reported in 13 B. L. R., 401 *et seqq.*

On this appeal the same question that had been decided by the Full Bench, was raised and argued.

The respondent did not appear.

Mr. *T. H. Cowie*, Q. C., and Mr. *Doyne*, for the appellant, cited the following authorities in order to show that some ceremonies were necessary in adoption

* 7 Cowell's I. A. p. 24; I. L. R., 5 Cal., p. 770.

among Sudras in Bengal. It was suggested that from the authorities the necessity of the *datta-homam* was to be inferred; to be made, possibly, through an officiating Brahmin. It was contended that the text of Menu, relating to the effect of the absence of ceremonies,—cited in the Dattaka Mimansa, Sec. V. v. 45, and the explanation given in v. 46,—included Sudras. They cited Sutherlands' Synopsis, appended to his translation of the Dattaka Mimansa and Dattaka Chandrika, edition of 1825, page 228; Dattaka Mimansa, Sec. V, v. 56, and Sec. IV, vv. 50 and 51

Reference was also made to Colebrooke's Digest, Bk. V, Chap. V, s. 15; Strange's Hindu Law, Chap. IV; Macnaghten's Hindu Law, Chap VI; Vyavashta Darpana of Shama Churn Sircar, vyavashta 567, page 871 of second edition; and to *Kerutnaraen* v. *Mussamut Bhobinesree* (1), *Dyamoye Chowdrain* v. *Rashbehari Singh* (2), *Perkaschunder Roy* v. *Dhunmonee Dasi* (3), *Bhairab Nath Sye* v. *Maheschandra Bhadury* (4), *Sayamalal Dut* v. *Saudamani Dasi* (5), *Sabo Bewa* v. *Nabaghan Maiti* (6), *Nitianand Ghose* v. *Krishna Doyal Ghose* (7), *V. Singamma* v. *Vinjamuri Venkatacharlu* (8), *Sootrugun Sutputty* v. *Sabitra Dye* (9).

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

This suit was brought by the Plaintiff, the widow of one *Gopal Lall Mullick*, to recover possession of property which formerly belonged to his nephew, *Gocool Chunder*, who died in November, 1841. Her case is that upon *Gocool Chunder's* death the property claimed descended to his widow *Brojosoondari*, by whom it was enjoyed during her life; that on her death, on the 3rd of April, 1863, it devolved on *Gopal Lall Mullick* as the nearest collateral heir of *Gocool*; and that *Gopal Lall Mullick*, who died on the 7th of October, 1868, devised (for it is under a testamentary gift that she claims) all his interest in it to her. She treated *Behari Lall* as the principal Defendant, and alleged that he was fraudulently holding the property under the false pretence that *Brojosoondari* had adopted his brother *Haran Krishna*, and that he is the guardian of her adopted son. The Defendants insisted upon the adoption as valid, and the question was thus reduced to one of title between the Plaintiff and *Haran Krishna*. In this state of things the principal questions which arise on the record are whether the will upon which the title of the Plaintiff depends was executed by her husband; and if so, whether her title was defeated by a valid adoption? This question of adoption of course involves the two issues, whether *Brojosoondari* had authority to adopt, and whether she had in fact exercised that authority by adopting *Haran Krishna*. To these issues of fact has been superadded one of law, namely, whether, supposing the adoption to have been made in fact but without certain ceremonies, those ceremonies were so essential to such an adoption that the omission to perform them invalidated that which would otherwise have been a good adoption. The lower Court found in favour of the Plaintiff that the will had been executed; it found also that the authority to adopt, which it was said *Brojosoondari* had exercised, had been given to her by her husband, but it also found that no adoption in fact by her in exercise of that power had been established, and that if it had been established it would have been invalid for want of the necessary ceremonies. The High Court abstained from dealing with the issue as to the will, obviously because if the adoption were a good adoption it would prevent any interest in the property from passing to *Gopal Lall Mullick*, and he therefore could have had none to dispose of in favour of the Plaintiff. And taking up in the first instance the issues as to the adoption,

(1) 1 Sel. Rep., 161; New Ed., 213.
(2) 8 S. D. A. Dec., 1852, p. 1001.
(3) 8. D. A. Dec 1853, p 96.
(4) 4 B. L. R., A. C., 162.
(5) 5 B. L. R., 366
(6) 2 B. L. R., Ap., 51; 8 C., 11
(7) 7 B. L. R., 1; S. C., 15 W. R., 300.
(8) 4 Mad. H. C. Rep., 165.
(9) 2 Knapp P. C. Case, 297.

it found that the widow had authority to adopt; that she had duly exercised that authority; and having first referred to a Full Bench the question whether ceremonies were necessary and essential to an adoption in the case of Sudras, and having received from that body a certificate that they were not essential, it adopted that finding, and so disposed of the question of law. The result was a decree dismissing the Plaintiff's suit; and the present appeal is against that decree.

Before considering the question of adoption, it may be well to refer a little more particularly to some of the antecedent facts of the case. *Gocool Chunder*, as has already been said, died in November, 1841. He left him surviving, not only his widow, but *Gobind Lall Mullick*, his father. The estate in question had descended to him and a deceased brother *Brojendro Chunder Mullick* from their maternal grandfather, either directly or through their mother *Rashmoni Dossee*, it does not appear very clearly which, *Brojendro Chunder Mullick* died without children, and unmarried, and his eight annas share passed by law to his father. For several years the father-in-law and the widow appear to have gone on harmoniously. She was probably very young, her husband having died young, and the father-in-law naturally administered the whole estate. Then quarrels began between them, and *Gobind Lall* seems to have conceived the notion of defeating the widow's estate altogether by setting up a case that his son *Gocool Chunder* had in his lifetime adopted a cousin *Doyodronath* by name, who was one of the grandsons of *Gopal Lall Mullick*. Litigation ensued, and in the course of that litigation the widow appears to have pleaded a written authority to adopt. The case was tried before a Principal Sudder Ameen, who decided against her authority to adopt, but also decided against the case of adoption by her husband which was set up by *Gobind Lall Mullick*. The result of this decision, if it had stood, would have been to confirm *Brojosoondari* in her widow's estate, but with a negation of the genuineness of the written *anumati patro* which she had set up. On appeal the Sudder Court took the somewhat singular course of saying that inasmuch as the property was situated in different zillahs, and their previous leave to bring the suit in the zillah in which it was brought had not been obtained, the whole proceedings were *coram non judice* and must begin again. In that state of things *Gobind Lall Mullick*, the father-in-law, died in the month of March, 1858. Shortly after his death the *solehnamah*, or instrument of compromise, on which so much turns in this case, was executed between *Gopal Lall Mullick* and the widow. It contains clear admissions on the part of *Gopal Lall* that the case set up by his brother *Gobind Lall* as to the adoption of *Doyodronath* was a false case, and that the widow had an authority from her husband to adopt five sons in succession. It further contains the following provision: "And you shall take as your adopted son, in the manner prescribed by the Shastras, the son born of the womb of the wife of *Anund Mohun Mullick*, your sister's husband; that is to say, the son born of the womb of your uterine sister; but if for any cause you cannot adopt that son, you shall, by adopting successively the sons of any other person or persons of the same caste with yourself, maintain in accordance with your husband's permission the line of persons by whom offerings of water and the funeral cake are to be made to yourself and your husband, and to the *pitriloka* (ancestors) of both of you." This *solehnamah* also contained a confirmation of the gifts which *Gobind Lall* was said to have made out of the eight annas share which he inherited from his son *Brojendro Mullick*, viz., two gifts of four annas, and of one anna to *Gopal Lall Mullick*, and a gift of the remaining three annas to *Brojosoondari* herself; and further, an agreement between the parties thenceforth to hold the estate in the proportions of eleven annas and five annas.

It appears to their Lordships impossible for the representative of *Gopal Lall*, claiming through him, to contend in the face of this document that there was no power to adopt. Two Courts, moreover,

have found that there was authority to adopt, and their Lordships feel bound in this, if in any case, to adhere to their rule of not disturbing the concurrent finding of two Courts upon an issue of fact. It has however been strongly argued before them that inasmuch as the widow once set up a written authority to adopt, whereas the witnesses who now speak to the adoption seek to prove only a verbal authority to adopt, so much discredit attaches to the case for the adoption that the witnesses who depose to it are not to be believed when in conflict with those for the Plaintiff. Their Lordships do not conceive that that argument is well founded. The *soleknamah*, it may be observed, does not itself state whether the authority to adopt was written or verbal. It may well be that according to the course, unhappily too common, of Hindu litigation, when the widow found that her father-in-law, who was the principal witness, if the story now told is true, to the giving the verbal authority to adopt, had turned round upon her and was seeking to dispossess her by setting up a false case of an adoption by her husband, she may have been advised, and may have been foolish and wicked enough to adopt the advice, to set up a written authority to adopt which really never existed. And she may at the time when the *solehnamah* was executed have abandoned that case, and fallen back upon a verbal permission to adopt which was then admitted. But if this were so, her inconsistent conduct would not affect the credit of those witnesses who now speak to the verbal authority to adopt, and to the alleged exercise of it by her. Therefore their Lordships think that this argument ought not to have much weight with them in determining the credit of the witnesses who have sworn to the adoption.

The story of the adoption, as told by the Defendant's witnesses, is as follows: *Brojosoondari*, who had previously adopted one *Romesh Chowdry*, and after his death had taken some steps to procure in adoption a son of one *Mozoomdar*, an adoption which it is clear on the evidence was never perfected, determined to adopt *Haran Krishna*, the second son of *Anund Mohun Mullick*, being a person answering to the description in the *solehnamah* of the child to be taken in adoption. The child was formally given and received in adoption at *Brojosoondari's* house at *Neemteeta* in zillah *Moorshedabad* on the 20th of December, 1867, corresponding with the 6th of Pous, B. 1274; but no religious ceremonies were performed on that occasion. A few days afterwards she went to a place called *Ashtamoonissa* in zillah *Pubna*, which was the home of her father, and took up her abode with *Gourang Chunder Roy*, her nephew or cousin, taking with her *Haran Krishna*, the adopted son. Three months afterwards, in the month of Cheyt, she caused the *putreshti jag* ceremonies, including the datta homam or burnt sacrifice, to be celebrated under her auspices in the house of this *Gourang Chunder Roy*; and on that occasion executed a *wasiutnamah* in favour of *Behari Lall*, authorizing him to act as guardian of, and manager of the estate for, the adopted son during his minority. On the following day, the 31st of March, 1868, she further recognised the adoption by executing a *perwannah* to the ryots, declaring that she had adopted this child and that they were to pay their rent to *Behari Lall* on his account. She died at *Ashtamoonissa* a few days afterwards, on the 3rd of April, 1868, and at her obsequies, which took place there, *Haran Krishna* took the part which it is usual and proper for a son of the deceased to take. After the return of the Defendants to *Neemteeta* there was a dispute as to the fact of the adoption, and *Gopal Lall Mullick* and his faction appear to have got possession, temporarily at least, of the house of *Brojosoondari* at *Neemteeta*. It is pretty clearly established that *Gopal Lall Mullick* performed or affected to perform the *sradh*, which is customarily performed thirty days after the death of the deceased, at her house whilst *Haran Krishna*, as her adopted son, was performing a rival *sradh* in the house of his natural father. But although *Gopal Lall Mullick* may have got temporary possession of the

house, there is nothing to shew that he ever got possession of the property. There is in the Record some evidence of a threatened or apprehended disturbance, and of some persons having been bound over to keep the peace, but there is nothing to shew how *Haran Krishna* got into possession, as he unquestionably did get into possession, or that *Gopal Lall Mullick* ever took any legal proceedings to disturb or question that possession. That is the general effect of the evidence in favour of the adoption.

On the other side there are a great many witnesses who deny altogether the fact of the adoption. Some of them, relying on the absence of the usual publicity, say that if there had been an adoption they must have known of it; that they would have been invited guests, and would have been present at the ceremony; others again attempt to prove two distinct alibis, one being directed to shew that *Brojosoondari* was not at *Neemteeta*, where the adoption is said to have taken place in the month of Pous, but had quitted it for *Ashtamoonissa* in the preceding month of Aughran or at some prior time; the other to shew that *Haran Krishna* did not accompany her, but remained in the interval between Pous and Cheyt in the house of his natural father. It may be remarked that the most respectable witness who speaks to the presence of *Haran Krishna* in the house of his natural father at one time during this period is the pleader who was examined first for the Plaintiff, and that his testimony is not absolutely inconsistent with the Defendant's case, because it is part of that case that *Haran Krishna* was not at *Ashtamoonissa* during the whole of *Brojosoondari's* residence there, but in consequence of the illness of his natural mother was sent back to his natural father's house at *Neemteeta* for a time, returning in or before Cheyt to *Ashtamoonissa*. The evidence, however, of other witnesses who speak to the fact of his continued residence at *Neemteeta* is utterly irreconcilable with the notion of his having gone with *Brojosoondari* to *Ashtamoonissa*, or indeed with his ever having been there. Therefore there is a direct conflict of evidence, and it is perfectly impossible to reconcile the two stories. The learned Judges of the High Court seem to have gone very carefully through the evidence on both sides, and their Lordships are not disposed to dissent from the conclusion to which they came, that the testimony of the witnesses on the part of the Defendant, and especially that of *Gourang Chunder Roy*, is more worthy of credit than that of the witnesses for the Plaintiff. It is not necessary for their Lordships to go in detail through the evidence on both sides. It is sufficient to say that the conclusion to which the High Court came is that to which their Lordships, after hearing the whole of the evidence read, would themselves have been disposed to come, and that they also think it is confirmed by the probabilities of the case. One of the arguments on the other side as to the improbability of the alleged adoption was founded upon the state of ill feeling which is said to have existed, and which does seem at one time to have existed, between *Brojosoondari* and *Anund Mohun*, and her sister. It is not, however, shewn that that state of feeling, if it existed at one time, continued to exist up to the time of the alleged adoption. That it once existed is a circumstance which may perhaps explain why, instead of taking *Haran Krishna* in the first instance, *Brojosoondari* adopted *Romesh Chowdry*, and afterwards shewed some disposition to adopt a second person out of the family; but it seems very difficult to reconcile the hypothesis that her hostility toward *Anund Mohun* and his wife continued up to the time of her death, with the unquestionable fact that *Anund Mohun's* son *Behari* was with her at *Ashtamoonissa*, a place distant from his and her ordinary abode, for some time before, and up to, the time of her death. The reasonable inference to be drawn from that fact is that whatever may have been the state of feeling at a previous time between *Brojosoondari* and *Anund Mohun*, his branch of the family had been restored to her favour. Another point which was much argued as throwing discredit upon the evidence for the adoption

was founded on a document which the High Court has held was not properly proved in the cause, and which certainly might have been better proved if the person to whom it is said to have been addressed had been produced as a witness. This is the letter which *Anund Mohun* is said to have written on receiving the news of *Brojosoondari's* death to one *Gour Soonder Chowdry*, and in which he is supposed to speak of her having executed a gift on her death bed in favour of his son *Behari*, a gift inconsistent with the alleged adoption. Their Lordships are not prepared to say that if this letter had been better proved it might not have been explained as refering to the *wasiutnamah* under which *Behari* has certainly acted as guardian of the adopted son, though the document itself is lost. On the other hand the facts already stated as to the possession of the estate by *Behari* as guardian for *Haran Krishna*, and the omission of *Gopal Lall* to take legal proceedings to obtain possession, and the *perwannah* to the tenants, which the High Court has found to have been executed by *Brojosoondari* in her lifetime, go far to corroborate the general truth of the oral evidence in favour of the Defendant.

Upon the whole, therefore, their Lordships are of opinion, after weighing the evidence on both sides, that they must affirm the decision of the High Court as to the fact of adoption.

The next question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded on the 56th sloka of the 5th section of the Dattaka Mimansa, which says. "It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies, of gift, acceptance, and burnt sacrifice, and so forth; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words "so forth" in the case of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the datta homam, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. *Cowie*, shew that it has long been questioned whether even the performance of the datta homam was essential to a valid adoption, at all events in the case of Sudras, *Jaganatha* lays down (3 Digest, 244) this broad proposition: "The oblation to fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid," and in arguing in support of this proposition he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council (1) (which it appears was a case between Brahmins, Lord *Wynford* says in his judgment, "But although neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notice given of the times when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Serjeant *Spankie*, who had great experience in *India* and probably was better acquainted than English counsel at that period generally were with questions of Hindu usage and law. It cannot, however, be considered as more than a dictum, since the decision was against the adoption as a fact. It was, nevertheless, in accordance with the law as then laid down by Sir *Thomas Strange* at pp. 83 and 84 of the 1st vol. of his Treatise, 1st edit., and the authorities cited by him. Then it has been

(1) 2 Knap p. 287.

more recently decided in the *Madras* High Court that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the *Madras* decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the *Madras* Court applies even *a fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the late Sudder Dewanny Adawlut, clearly shew that the present question has long been treated as an open and vexed one by *Pundits* as well as Judges. It was so treated in a case before their Lordships in 1872, *Sreenarain Mitter* v. *Sreemutty Kishen Soondory Dassee* (1), but was not then decided, the suit being dismissed upon another ground. Lastly, the Full Bench in this case appears to have satisfied itself that the passage in the Dattaka Nirnaya, upon which *Pundit Shamachurn Sircar*, in his Vyavastha Darpana relies as an answer to those who deny that the performance of the datta homam is essential to an adoption by a Sudra, is in fact an authority the other way.

Upon the whole, then, their Lordships have come to the conclusion that the weight of authority is in favour of the finding of the Full Bench of the High Court.

They would have been sorry to come to a different conclusion, because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that the absence of it may fairly, as Lord *Wynford* observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony invalidates that adoption, would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits to impeach *bonâ fide* adoptions. Their Lordships, agreeing with and adopting the finding of the Full Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremonies performed at *Ashtamoonissa* as a remedy of any defect which up to that time may have existed in the adoption. They only observe that they have not been referred to any distinct authority that the defect may not be so supplied, particularly in cases where, as here, according to the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

The title of the Defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the Plaintiff, has been proved, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will of course be no order for costs, the case having been heard *ex parte*.

Solicitors for Appellant: *Watkins & Lattey*.

(1) Law Rep. Ind. Ap. (sup. vol.) 149.

11th, 12th and 19th December, 1879.

PRESENT:

Members of the *Judicial Committee*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

J. P. WISE and others (Plaintiffs) } *Appellants*

and

AMEERUNNISSA KHATOON and Others, (Defendants) ... } *Respondents,*

J. P. WISE and Others, (Plaintiffs) ... } *Appellants,*

and

COLLECTOR of BACKERGUNGE and Others (Defendants) ... } *Respondents,**

Reg. XI. of 1825—*Re-formation of Lands—Possession—Prescription.*

In a suit brought on the 11th of March, 1872, to recover certain plots of land, (1), as re-formations after diluviation of lands which had belonged to the Plaintiffs and as accretions thereto, (2), under a title by prescription; it appeared that the lands had formed in the bed of a river in 1859, and that the Plaintiffs took possession thereof as of re-formed lands and had been maintained in possession under Act IV. awards, but that in 1868 they were ousted by the Collector, who assessed the same under Reg. XI of 1825, and settled the same with his co-Defendants:—

Held, that whether or not in consequence of Act IX. of 1847 the Government were entitled to assess the lands, they were entitled to oust the Plaintiffs and to take possession of the lands as lands which had originally formed as an island, and were at their first formation surrounded by water which was not fordable;

Held, further, that sect. 15, Act XIV. of 1859 barred the Plaintiffs' title to recover simply on the strength of their previous possession, without entering into the question of title; the suit not having been brought within six months of dispossession.

Held, further, that possession for three years under an order of a magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription.

* 7 Cowell Indian Appal p. 73.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is a suit brought by Mr. *J. P. Wise*, and other persons of the name of *Bysack*, against several Defendants; first, the Government represented by the Collector of *Backergunge*; secondly, *Ameerunnissa Khatoon*; and thirdly, *Krishna Chunder Chatterjee*, for himself and as guardian of the widows of *Bykunt Chunder Chatterjee*. Certain other persons at the representatives of *Moulvi Wahed Ali* and of *Moulvi Abdool Ali* were afterwards, on the application of the Plaintiffs, added as Defendants on the record.

The suit relates to certain plots of land, B, C, D, E, and F, marked in an Ameen's plan made previously to a settlement in 1868. The Plaintiffs claim 10 annas of B and C, the whole of D, and the whole of E and F. They allege that the plots B, C, and D were re-formations of lands which belonged to them, and that E and F are accretions to D, or to B, C, and D. They also contend that, even if they failed to establish this title, they had, under the circumstances to be hereafter stated, obtained a title to what they claim in this suit by prescription. The case was tried before the Judge of *Backergunge*, and it was found by him, and that portion of his judgment was affirmed by the High Court, and it is not now disputed, that the Plaintiffs altogether failed in making out their title by re-formation.

The only substantial question which remains is, whether they are entitled to recover upon the ground that they had obtained a title to the 10 annas of B and C, and to the whole of D, by prescription. The first Court found that the Plaintiffs had obtained such a title; but that decision was overruled by a judgment of the High Court from which the present appeal has been preferred. The long course of litigation with regard to the lots in dispute, and also with regard to a lot A, which is not now in dispute, is thus shortly described by the Judge in his judgment. He said, "It seems necessary here to refer to the portion marked A, which, though

not the subject of the present claim, has been the subject of similar litigation between the Plaintiffs and the Defendants 2 and 3. It will be seen on the map that A is the northernmost portion of the series of churs of which B, C, D, E, and F are the portions now in dispute. A, it is said, first formed as an island in 1261, and the Plaintiffs took possession of it as having re-formed on the site of the diluviated kismuts, *Chur Selempore*, &c. Defendant No. 2 claimed it as an accretion to *Andar Chur*, which is a part of *Chur Kalkini*, and was held by Defendant in ijara from Government. A case was instituted under Act IV. of 1840, which resulted in the Plaintiffs being maintained in possession. Subsequently B and C formed in 1858 of 1859, and similarly in a case under Act IV. of 1840 the Plaintiffs were maintained in possession. In 1859 and 1861, Defendants Nos. 2 and 3 and *Abdul Ali*"—2 and 3 being *Ameerunnissa* and *Bykunt Chatterjee*, who is now represented by the other *Chatterjees*—"brought suits in the Civil Court to set aside these Act IV. awards. Defendant No. 2, in suit No 85 of 1859, sued to establish her title to A; *Abdu. Ali*, in No 366 of 1861, sued to establish his title to 2 annas of A; and in No 283 of 1861, Defendant 3, or rather his predecessor in interest, *Bykunt Chunder Chatterjee*, sued to establish his title to 6 annas of A, B, C, D. The Principal Sudder Ameen, whose decisions were affirmed by the High Court (see 2 Suth. W. R. 34 and 127), decreed all three suits except in regard to D. So that by these judgments the whole of A was decreed to the Defendants 2 and 3 and *Abdul Ali*, and 6 annas of B and C were decreed to Defendant 3." The Plaintiffs remained in possession of 10 annas of B and C, the whole of D, and the whole of E and F up to the year 1868, when they were ousted therefrom on behalf of Government by the Collector who settled them with the Defendants. The High Court in their judgment upon appeal from the decision of the first Court, say: "As regards the question whether the awards under Act IV. of 1840 in favour of the Plaintiffs, and the failure of the Defendants Nos 2 and 3 to set aside these awards by civil suits instituted by them, have given Plaintiffs such a title as will enable them to recover possession, it was urged that the Plaintiffs had not been in possession of any of the land claimed long enough to give them a title by prescription, for that the first re-formation of any of the land did not take place until 1859, and the Plaintiffs were admittedly deprived of possession in 1868. Further, that the Plaintiffs' title by prescription would not avail against Government; that it was clear that all these churs were formed in the bed of a navigable river, and were not re-formation of the Plaintiffs' villages; that first they appeared as an island, and then became fordable from the *Kalkini* side; that first the portion of the chur marked A appeared and subsequently became annexed to *Kalkini*, and then that the other portion joined on to A; and thus that, irrespective of the Government right to these as an island forming in the bed of a navigable river, they also became accretion to a Government estate, for *Chur Kalkini* belongs to Government, and A and the other lands accreted to it."

It had been held in a decision of the High Court that when lands are formed as an island in the middle of a river, and are surrounded by water which is not fordable, they do not belong to Government, if before the Government takes possession any portion of the water round the island becomes fordable from an adjacent estate; and the before-mentioned suits, in which the Defendants succeeded, were decided in accordance with that ruling. But that decision was overruled by the High Court in a Full Bench decision in vol. xiv. of the Full Bench Rulings of the *Weekly Reporter*, p. 28, and the High Court referring to it, say: "The Full Bench Ruling of the 17th of August, 1870 reported in W. R. vol xiv. p 28, Full Bench Rulings), was referred to as shewing that under the terms of clause 3, sect. 4, of Regulation XI. of 1825, these lands being at the time of their first formation the property, or to use the words of the Regulation, at the disposal of the

Government, they could not subsequently become vested in the Plaintiff or any one else. On the other hand, for the Plaintiffs, it was argued that the Lower Court's decision was right, that there had been constant litigation between the parties, that *Ameerunnissa* had always failed to prove her title, that Mr. *Wise* had been declared entitled to retain possession, and that his possession under an Act IV. award of the re-formed lands for more than three years revived his right to those lands. From the above statement it will be seen that the Plaintiffs do not seriously dispute the finding of the Lower Court, that they have failed to establish their title to any portion of the lands in dispute, on the ground of re-formation on the original sites belonging to them; but Plaintiffs argue that the Judge was right in holding that their title by prescription had been made out. Now the Judge in deciding this point appears to have overlooked the fact that the Government have been made the principal Defendants, that it was the Government who dispossessed the Plaintiff and who settled the land with the other Defendants, inasmuch as their title by prescription will not avail them against the Government, for it is clear that the taking possession by a party not entitled will not give them a title unless the possession has been of such duration as to extinguish the title of Government. In the present case it has been found that the lands only began to re-form in 1859, and as the Plaintiffs were admittedly dispossessed in 1868 they had not been in possession twelve years when dispossessed." The High Court, therefore, overruled the decision of the Lower Court that the Plaintiffs had obtained title by prescription.

It appears that *Kalkini* was originally gained from the river *Arialkhan*, in the district of *Backergunge*, and that Government had assessed it, as they had a right to do, under Regulation XI. of 1825. It was settled as an accretion to lands which belonged to *Ameerunnissa* and *Mahomed Wasil*; eight annas with *Ameerunnissa* for twenty years from the 3rd of May, 1848, and eight annas with *Mahomed Wasil* for twenty years from the 10th of May, 1848. *Mahomed Wasil* failed to pay the revenue as to his eight annas, and the Government took possession and granted a lease of it to *Ameerunnissa* for twelve years, which expired in 1867. The settlement of *Kalkini* having expired in 1868, the Government re-settled it and included the whole of the lands, B, C, D, E, and F, as part of *Kalkini* in the new settlement. It was found by the Ameen, who was deputed to make a local investigation, that the lands were formed in the bed of the river. They, therefore, according to the Full Bench ruling, reported in the 14 *Weekly Reporter*, Full Bench Rulings, p. 28, belonged to Government, who were entitled to take possession of them. The Plaintiffs say in their plaint, "The Defendant No. 1"—that is, the Collector—"on the occasion of the re-settlement of *Chur Kalkini* on the part of the Government, caused the entire area of the said chur"—that is, the whole of the lands which are claimed in the declaration—"to be measured with *Chur Kalkini*, and ousted us therefrom in the beginning of 1275, and made a settlement thereof with the Defendants Nos. 2 and 3, after disallowing our objections." *Ameerunnissa* did not act in violation of Act IV. of 1840. It was the Government who were entitled to the property, who took possession of the land and put *Ameerunnissa* and the other Defendant into possession of it under the new settlement.

It was contended that the Government could not in consequence of the provisions of Act IX. of 1847 include the lands which are now in dispute with *Chur Kalkini* without a new survey. The matter was referred to the Commissioner, and the Commissioner thought that the Government had no right to make the settlement; but the Defendants, having been put into possession by the Government, they proceeded under sect. 318 of the *Criminal Procedure Code*, which had been substituted for Act IV. of 1840, and obtained an order against *Wise* and others by which they were to be retained in possession. That is also stated by the

Plaintiffs in their plaint. They say: "The Collector having ousted them from the lands in dispute, made a settlement thereof with the Defendants Nos. 2 and 3 after disallowing our objections. The Commissioner, on our appeal, ordered the said land to be excluded from the said settlement, but a suit was instituted for possession under sect. 318 of the *Criminal Procedure Code*, and on the 9th of August, 1869, it was ordered that the land should remain in possession of the Defendants Nos. 2 and 3. Moreover under the orders of the Revenue Board, dated the 31st of October, 1870, the said lands have again been brought under settlement." The case had come on appeal from the Commissioner to the Board of Revenue, and they had held that the Government was justified in making a settlement of the lands as a part of *Kalkini*.

Even if the Government was not entitled to assess the lands in consequence of Act IX. of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and they were entitled to oust the Plaintiffs, who were trespassers, and to put the Defendants into possession.

It is quite clear that the Plaintiffs have failed to make out a title. The Defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the *Code of Criminal Procedure* to be retained in possession. If the Plaintiffs had wished to contend that the Defendants had been wrongfully put into possession and that the Plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under sect. 15 of Act XIV. of 1859; but they did not do so. The High Court, with reference to this point say (and, in their Lordships' opinion, correctly say): "Further, *de facto* possession having been given to the Defendants under sect. 318 of the *Code of Criminal Procedure*, in accordance with the Deputy Collector's award, the Plaintiff will not be entitled to a decree until and unless he can shew a better title to these lands than the Defendants. The fact that the Plaintiffs' possession as regards B, C, and D was confirmed under Act IV. of 1840, and that the Defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Sect. 2 of Act IV. of 1840 only affects persons concerned in the dispute. If *Kalkini* had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under sect. 15 of Act XIV. of 1859, which must be brought within six months from the time of that dispossession."

Their Lordships are of opinion that the High Court was right in holding that the Plaintiffs had failed to prove a right by prescription. Act XIV. of 1859, sect. 1, clause 7, enacts that, "To suits brought by any person bound by any order respecting the possession of property made under clause 2, sect. 1, Act XVI. of 1838, or of Act IV. of 1840, or any person claiming under such party for the recovery of the property comprised in such order, the period of three years from the date of the final order in the case." This, however, is not a suit brought by *Ameerunnissa* and the other Defendants, but it is a suit brought against them. Act IV. of 1840 had nothing whatever to do with title, it merely regarded possession. The Magistrate was not to inquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession. Their Lordships are of opinion that, independently of the title of Government to the lands which appear to have been originally formed as an island in the bed of the river, possession for three years under an order of a Magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription.

The Plaintiffs' suit was therefore prop-

erly dismissed as to B, C, and D. As regards plots E and F, it was found by the first Court that they were not originally accretions to D, and that the Defendant *Ameerunnissa* had satisfactorily established the fact that they belonged to her.

The Plaintiffs, upon the appeal of the Defendants to the High Court, objected to the decision of the first Court as to E and F upon the ground that they were entitled to them as accretions to B, C, and D; but the High Court held that as they had found that *Wise* had no title to B, C, and D, his claim must fail as to E and F. The Appellants having appealed to Her Majesty against the judgment of the High Court as to B, C, and D, appealed also as to E and F upon the ground that they were accretions to B, C, and D. But their Lordships, having affirmed the judgment of the High Court as to B, C, and D, it follows as a matter of course, upon the Appellant's own contention, that the decree as to E and F must also be affirmed.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the High Court.

Solicitor for Appellants: *T. L. Wilson.*

13th, 14th, 15th, 16th January and 21st February 1880.

PRESENT:

Members of the *Judicial Committee*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

PALLIKELAGATHA MARCAR AND ANOTHER (Defendants) } *Appellants.*

and

JOHN GOTHFRIED SIGG AND ANOTHER (Plaintiffs) } *Respondents.**

Construction of agreement as to duration—Effect of recital in a document in regard to control over operative words.

The parties during several years had transactions consisting of the deliveries of produce by the defendants to the plaintiffs' agent, under advances, upon separate contracts, specifying prices, and of consignments by the defendants through the plaintiffs. A "purchase account" and an "interest account," kept between them, resulted in a "general account;" and in 1872 a large sum was due thereon to the plaintiffs, to whom, in 1873, the defendants sent letters mortgaging property with instruments of title accompanying.

In the beginning of 1874 the parties entered into a written agreement, which described the balance due in respect of previous advances as the "block account," comprising also an "interest account," and the transactions proceeded. The intention was shewn that the advances should be liquidated "by returns," but the only date mentioned from which an inference could be drawn as to the intended duration of the arrangement between the parties was the 30th June 1875.

In this suit, brought in December 1875, it was contended that the right construction of the agreement of 1874 required that it should continue to subsist (unless rescinded either by mutual agreement, or on breach of its stipulations by one party justifying its rescission by the other) until the liquidation of the balance by returns; at all events, as regarded the "block account."

In order to the working of an agreement for a liquidation in such a way, it would have been necessary to imply obligations, for which no express provision had been made; nothing, for instance, having been fixed as to the extent, or duration, of the business, or as to the rates at which produce was to be offered or accepted.

* 7 Cowell's I. A. p. 83, I. L. R. 2 Mad p. 232.

Held, that such provisions could not now be supplied, and that the stipulations as to the "block account" were binding only during the continuance of the arrangement for the conduct of the business by the parties, such arrangement being terminable at will, after the 30th June 1875.

The letters of 1873, and the documents of title deposited with them, were held to constitute a security for the general balance due from the defendants to the plaintiffs, and not only a security for advances on certain of the contracts referred to in a paragraph in the nature of a recital; for the latter was not necessarily repugnant to the wider construction, and the operative words were wide enough to apply to all the transactions between the parties.

The construction of an ambiguous stipulation in a written agreement may be governed or qualified by a recital; but, if the intention is clearly to be collected from the operative words, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

APPEAL from a decree of the High Court at Madras (21st February 1878), confirming a decree of the District Court of South Malabar (16th July 1877).

The respondents, John Gothfried Sigg and George Gothfried Volkart, trading under the name of Volkart Brothers, sued in the District Court of South Malabar, in December 1875, the appellants Pallikelagatha Marcar and Pallikelagatha Mahmad Marcar, trading under the name of P. Marcar, to recover Rupees 4,05,779. This sum consisted of Rupees 1,80,897, alleged to be due in respect of advances made by Volkart Brothers to P. Marcar on contracts for the sale of produce, supplied during a course of dealings, by the latter to the plaintiffs' agent at Cochin; of Rupees 2,24,882, alleged to be due on an interest account; and of interest on the latter sum from the 7th December 1875. The plaintiffs also claimed that two instruments of mortgage, dated respectively the 21st January 1873 and the 25th October in the same year, should be declared to be valid mortgage by P. Marcar, securing to Volkart Brothers the whole balance due from the former to the latter firm. In a cross suit P. Marcar sued for delivery up of these documents, and for specific performance of an alleged agreement by Volkart Brothers to continue carrying on the transactions between them and P. Marcar.

The District Judge decreed to the plaintiffs Rupees 3,92,990 with costs, dismissing the cross suit without costs. The defendants appealed to the High Court; the plaintiffs thereupon presenting a memorandum of objections under Section 348 of the Code of Civil Procedure (1859) as to so much of the decree as rejected part of their claim. The High Court confirmed the decree of the District Judge, dismissing the appeal with costs and disallowing the objections. This appeal was then made. The facts out of which this suit arose are stated in the Judgment of their Lordships, which refers to part of the documentary evidence adduced, making such reference by the marks used to distinguish the documents in the record of the proceedings. The following are the exhibits to which reference is so made in the Judgment, no additional statement of their connection with the facts in the case being necessary:—

Exhibits I and J, letters from P. Marcar to Volcart Brothers, sent to Mr. Spitteler, agent at Cochin of the latter firm.

EXHIBIT I.

COCHIN, *21st January 1873.*

MESSRS. VOLKART BROTHERS,

Cochin.

DEAR SIRS,

As I have been, and am now, accustomed to contract with you for the supply of country produce and other merchandize, and we are mutually, I presume, anxious to continue the relationship—and, in the course of these transactions, there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts—and you very naturally would like some security, I agree to the following proposition which, if it meets with your approval, be good enough to countersign, and the matter will be satisfactory to both parties.

I possess various landed properties in Cochin and elsewhere, some in Jenm, some in Kanam and other titles. For convenience, I have stated them all in

the list at the end of this letter. I have written, in the 9th column, the title on which each is held, and, in the 10th column, I have stated how far, if at all, I have made any charges upon them, and except, as I have stated there, they are quite free. Now I will give up to you all the available title-deeds of these properties, and have made a list of them in the 11th column, and you shall hold them as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property, as a pucka mortgagee would have; only you must agree not to sell any of it, until you have given me full twelve months' notice from the time we shall come to a settlement of accounts to pay up, or from the time demand shall have been made by you of the amount claimed by you; but, if I fail then, you may sell, at my expense, for the best price you can get, any of the properties successively, till you have satisfied my account current out of the proceeds, giving me a strict account of what you sell.

I hereby engage that I will not attempt to dispose of or pledge any of the properties in the list, without first getting a letter from you consenting to it, and, upon my payment of all balances due, you will at once return to me all the documents now deposited with you and cancel this letter.

If by any evil chance we should not be able to agree in the amount due, then, instead of going to the courts, we will each call in a friend to arbitrate, and, if necessary, they shall appoint an umpire and we will each abide by the award.

In any changes that may take place in the members constituting the firm, this agreement shall remain unaffected.

EXHIBIT J.

MESSRS. VOLKART BROTHERS,

Cochin.

DEAR SIRS,

In continuation of my letter of 21st January 1873, I beg to hand you further securities, as per schedule annexed, subject to the conditions contained in my above-mentioned letter.

COCHIN, *25th October 1873.*

EXHIBIT S.S.S.

In consequence of your having agreed to allow the debt, which I owe you, to stand over for the present, I hereby bind myself strictly to adhere to the following conditions.

Against my contracts of Native Coffee, I will, for the future, claim advances to the extent of Rupees 15 only per cwt., the balance to be paid to me in proportion, on the delivery of coffee into your hands; from such payments, you will deduct Rupees 5 per cwt., which are to be placed to the credit of my old account, and interest will be credited to me thereon in account, as if I had paid you the respective amounts on the day on which the corresponding contracts have been signed.

I engage to repay you, by the 31st March 1874, at least Rupees 3,00,000 on account of my debt to you.

I also engage to pay you in cash, on the 30th June 1874, the interest that has accrued on my debt.

I shall not deal with any other firm, unless you give me special permission to do so.

On the other hand, I understand you to make me the following concession.

In consideration of my engagements, referred to above, I understand you will not dispose of any of the securities, which I handed over to you, until the 31st March next, provided that I faithfully carry out all my engagements towards you, during the present season, and I further understand you to promise me a further time of at least 12 months, for the repayment of the balance money, that will be due to you on the 31st March 1874.

EXHIBITH L.

Whereas P. Marcar stands indebted to the said Volkart Brothers to the amount of Rupees 6,78,012-10-1 per 30th June 1873, as per account current rendered and approved of, the following conditions have

been agreed upon by both parties for the re-payment by P. Marcar of the money due to Volkart Brothers.

1. The debt of P. Marcar to Volkart Brothers to be divided into two distinct parts for which separate accounts are to be kept.

2. The first account—to be styled "P. Marcar's Block Account"—shall be debited for Rupees 3,00,000, computed to be the total amount of the said P. Marcar's losses on his old transactions with Volkart Brothers. No interests are to be debited or credited on this account.

3 The second account—to be styled "P. Marcar's Interest Account"—shall be debited with Rupees 3,78,0121-0-1 per 30th June 1873, being the balance of the amount due to Volkart Brothers by P. Marcar—interest at the rate of 9 (nine) per centum per annum to be calculated on this account on both the debit and credit side, and balance of interest to be paid in cash by the 30th June of each year. Should, however, on the 30th June 1875, Volkart Brothers feel satisfied that P. Marcar has given them every assistance to forward business, they promise to return him 3 per cent. of the 9 per cent. charged on this account, thus reducing the actual rate to 6 (six) per centum per annum for credit and debit side—the same reduction of interest to be made subsequently, until the entire settlement of this account, should P. Marcar continue to afford the same satisfaction.

4. The "Block Account," as described in para. 2, shall be liquidated by returns only on all contracts of P. Marcar with Volkart Brothers, according to the following scale:—

					Rs.
On every cwt. of coffee contracted or purchased					3
Do.	do. of pepper		do.	do.	... 1
Do.	Candy of C. N. oil		do.	do.	... 3
Do.	do.	Fish oil	do.	do.	... 2
Do.	do.	Coprah	do.	do.	... 2
Do.	do.	Coir yarn	do.	do.	... 2

5. The returns, which P. Marcar has already made or has agreed to make on fulfilled or pending contracts respectively, amounting to Rupees 53,050-13-0, as per Memo. No. 1 annexed, are to be placed to the credit of "P. Marcar's Block Account." All other sums of money hitherto paid by the said P. Marcar in cash, goods, consignments, and by the sale of refuse cocoanut oil on and after the first July 1873 as per Memo. No. 2 annexed, are to be credited to P. Marcar's interest account.

6 Volkart Brothers engage to grant P. Marcar, if required by him, advances on all contracts of coffee they may enter into with him, such advances, however, not exceeding 50 (fifty) per centum of the respective contract price; the balance or balances to be paid by Volkart Brothers at such times and in such proportions as the coffee may be delivered into their premises. As regards advances on other articles but coffee, this must always be a matter of special agreement at the time of each contract, it always being understood that the aggregate amount of running advances on pending contracts shall at no time exceed Rupees 1,50,000 (one hundred and fifty thousand rupees), in all, such advances of course to be given in proportion to contracts only, and not to be considered as continuing advances.

7. This agreement shall not be considered infringed should Volkart Brothers see fit to make advances to P. Marcar in excess of the Rupees 1,50,000 stipulated in para 6 to facilitate business.

8. P. Marcar engages not to sell or offer any produce to any other firm without first having offered such goods, at same or lower rates, to Volkart Brothers.

9. Copies of all future contracts entered into with P. Marcar by Volkart Brothers to be given him; those of contracts Nos. 1 to 12 inclusive have already been rendered.

10. This agreement to be binding on the heirs, executors, administrators, and assigns of both the contracting parties.

11. This agreement has been made out in double, one for P. Marcar, the other for Volkart Brothers.

Mr. *J. T. Benjamin*, Q. C., and Mr. *J. D. Mayne* for the Appellants.

Mr. *F. Herchell*, Q. C., Mr. *A. R. Scoble*, Q. C., and Mr. *H. Cowell* for the Respondents.

For the appellants it was contended that the respondents had not had a right to set aside the agreement of the 2nd January 1874, but had done so in violation of the contract between the parties. Payment of the debt acknowledged by the document of the above date was to be obtained by Volkart brothers in the manner provided, or contemplated, by it. The agreement contemplated the liquidation of the advances "by returns," at all events, as far as the "block account" was concerned. And the only mode in which that agreement could be duly brought to an end, before such liquidation, was by rescission, either on mutual agreement, or on such breaches of it by one party as would justify rescission by the other. No such breaches, on P. Marcar's part, had occurred. On the other hand a considerable part of the amount due on the block account had been discharged by returns, according to the intention of the parties at the time of entering into the agreement of 2nd January 1874, to which Volkart Brothers were bound to adhere.

In reference to the mortgage by P. Marcar, it was contended that his property was not pledged to secure the whole debt upon the general account between the parties; but that the letters, forming the instruments of mortgage, limited the security to certain amounts; and that there could be no departure from what those letters indicated as the intention of the writer. Reference was made to *Macintyre* v. *Belcher* (1) and *Stirling* v. *Maitland* (2).

For the respondents it was argued that whether or not there had been established in evidence a non-performance of the agreement by P. Marcar, justifying rescission by Volkart Brothers, the latter had been rightly held by the Lower Courts to have been in a position entitling them to bringing the relations between themselves and P. Marcar to an end. It remained that the balance was payable. There were the concurrent findings of two Courts as to the balance due on the "block account" and also the balance on the "interest account." The letters of 21st January and 25th October 1873 formed a valid mortgage for the balance due on the general account.

Reference was made to the *Mayor of Harwich* v. *The Eastern Counties Railway Co.*

21 February 1880.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The respondents (the plaintiffs in the suit out of which this appeal has arisen) are merchants, carrying on business at *Winterthur*, in *Switzerland*, under the style of *Volkart Brothers*. Their house had subordinate branches or agencies in *India* for the purposes of their trade with that country. Of these, the head or principal one was at *Bombay*, and under the management of a *Mr. Knapp*; the other was at *Cochin* where the transactions in question took place, and was managed, up to some time in February, 1874, by a Mr. *Spitteler*, and after that date by a Mr. *Jung*, who had previously been his assistant.

The appellants, the defendants in the suit, are native merchants at *Cochin*, trading under the style of *P. Marcar*, the second defendant being the active partner of the firm.

The history of the transactions between the plaintiffs, through their agents at *Cochin*, and the defendants may be conveniently divided into three periods, the first ending with the annual settlement of accounts up to the 30th of June 1872; the second beginning from that time and ending with the execution of the agreement L on the 2nd of January 1874; and the third, which comprehends the transactions under that agreement, ending with the institution of the suit on the 10th of December 1875.

The first is material only in so far as it shows what was the course of dealing between the parties whilst there was no substantial (if any) dispute between them. Their transactions were of two kinds. The first and more important class consisted of purchases, chiefly of native-

(1) 32 L. J., C. P., 254. 8. C. 14, Com. Bench, N. S., 654.

(2) 34 L. J., Q. B., 1.

grown coffee, oil, and pepper, made by the defendants from the producers and delivered to the plaintiffs' agent at *Cochin* for shipment to their firm in Europe. These were almost invariably made upon contracts for future delivery at a stipulated price, of which the following, made on the 23rd of September 1872, may be taken as an example. The material parts of it are as follows:—

"Contract with *P. Marcar* of *Cochin*, for 1,000 cwts. Malabar native coffee, at Rs. 30½ per cwt., delivery on or before the end of January 1875.—I., the undersigned *P. Marcar* of *Cochin*, agree and bind myself to deliver to Messrs. *Volkart*, of *Cochin*, on or before the end of January next, one thousand cwts. Malabar native coffee," to be packed, garbled, and delivered as therein mentioned, "at the price of thirty and a half rupees per cwt. net. . . . . On account of which agreement, I have this day received from *Volkart* and *Brothers* the sum of Rupees 50, the balance to be paid as agreed. In case of non-fulfilment of this agreement, I bind myself to pay to Messrs. *Volkart Brothers* as penalty, Rupees 3 for each cwt. short delivered."

It is to be observed that the Rs. 50 mentioned in this form of contract was rather in the nature of earnest money to bind the contract than the measure of the advance made to enable the defendants to perform it. Such advances were almost invariably made, but they seem to have been made on general account, the particular amount of advance attributable to each particular contract being, apparently, settled orally under the provision expressed in the words "to be paid as agreed," and deducted from the price when that was adjusted on the delivery of the produce. That this was so appears by the receipts for advances, the adjustment of particular contracts, and the copies of "purchase accounts" set out in the record.

The other class of transactions consisted of consignments to *Europe* by the defendants on their own account, made through the firm of *Volkart Brothers*. There were thus cross accounts between the plaintiffs and defendants, viz., the purchase account and the consignment account, which were kept separately under these titles, and besides these there appears to have been an "interest account," the nature of which it is difficult precisely to define, but which was certainly different from the "interest account" to be spoken of hereafter These three accounts would naturally result in a general account current between the two firms, which Mr. *Jung* swears was regularly kept. The date as on which these accounts were balanced, and ought to have been settled, was the 30th of June in each year. But such settlement, at all events of the general account current, does not appear to have been very regularly made, since the account K, which purports to show the balance of the general account current on the 30th of June, 1873, comprehends items which ought to have been included in the account for the preceding year, and was not finally adjusted until March 1874. It may, however, be collected from the purchase account A, the consignment account B, and the interest account D, that the general balance due from the defendants to the plaintiffs on the 30th of June, 1872, was about Rs.168,8678–10–.

The price of native coffee rose in the latter part of 1872 and 1873. On the 24th of January, 1873, Mr. *Spitteler*, who then managed the *Cochin* agency, obtained from the defendants security in the shape of the letter I, and the deposit of the title deeds therein mentioned. The true construction of this letter, which is one of the principal questions in the cause, will be afterwards considered. In February 1873, the price of coffee having risen to Rs.40 per cwt., it became manifest that the defendants could not fulfil their contracts with plaintiffs for deliveries in 1873 without heavy loss. In these circumstances, Mr. *Spitteler* made to them further and extraordinary advances, amounting to Rs.500,000 in the whole, by payments which in the defendants' case, are stated to have been made on the 12th, 13th, and 19th of February, and the 8th of March, 1873. It became a matter of controversy in this suit what were the object, nature, and effect of this

transaction. The defendants have set up that they threatened to abandon their contracts on the terms of repaying the particular advances attributable to them, and of paying the stipulated penalty of Rupees 3 per cwt.; that they were persuaded by Mr. *Spitteler* to forego this intention, and to accept the advances, on the understanding that the money was to be employed in buying coffee at the market price on account of *Volkart Brothers*, on whom the losses incurred in this operation were to fall. Mr. *Spitteler*, on the other hand, has deposed that, when the advances were made, the coffee deliverable on the contracts for 1873 had been all, or nearly all, actually or constructively delivered (an assertion hardly borne out by the terms of the contracts or other evidence in the cause), and that the advances were made in order to enable the defendants to pay for the coffee, and thus to obtain the command of the market for the following season.

The best evidence of what was understood by the parties to be the nature of the transaction between them is that afforded by their written statements made at the time. These have been admitted, without objection, on the record. Mr. *Spitteler*, advising his principals in *Europe* of these advances, when they amounted to only Rupees 300,000, wrote, on the 19th of February, 1873, as follows:—

"Coffee. On the coast Rs. 40 to Rs. 40½ are readily paid, but most of the dealers find it already now impossible to get produce, and it is already pretty distinctly and openly said that *E. Baudry & Co.* have received notice from their contractor, *Baboo*, according to which a great part of their contracts will remain unfulfilled. The reason we can explain easily. *Marcar* has not only 5000 cwts. over his contracts already had delivered to him, but his friend *Ramon* has still about 20,000 cwts. in his possession, which are in the first place reserved to *Marcar*. As he actually requires money for these payments, we have agreed with him that he should not sell for one month, without our sanction, either to natives or exporters, but should keep in his possession the whole quantity for the chance of orders. There against we advanced him three lacs, and he has to make good to us all interest, back commissions, &c., in case we should not find any employment for the remaining coffee, otherwise we shall bear these charges ourselves, but shall pay *Marcar* a corresponding lower rate than market rate. Through this arrangement we have enabled *Marcar* partly to recoup himself for the sustained loss, whereas we, on the other side, reserve ourselves a good chance to do some further considerable business this season. We have no doubt, under the exceptional circumstances, you will approve of our having done so, especially as we hold in our possession security for the greater part of the amount."

In the letter of the 10th of July, 1873, which the second defendant wrote to Mr. *Solomon Volkart* in the course of the subsequent negotiations, he says,—

"Last year I entered into several coffee contracts for coffee delivery, amounting to 40,000 cwts., at different rates, averaging Rs.31-14-9, per cwt. f. o. b, and have suffered considerable loss in them. I little expected that the price of coffee would have risen so high in a few days, and that, too, at a figure which no merchants experienced at any time. My friends, as usual with them, held a large portion of coffee. I was, however, unable to arrange a fixed price, owing to their exorbitant demands, and, although aware of the failures of the *Brazil* and *Java* crop, I little anticipated that price would grow beyond 30 to 31, being the highest limit native coffee was ever raised to; and I forbode the certainty of a recession. With these impressions, I entered into the contracts with your firm. The first few parcels which arrived in the market were met with ready buyers at Rs.30½ per cwt., for ungarbled, besides a payment of Rs.3 per cwt. for expenses of conveyance, there being a marked increase of price daily, particulars of which were duly communicated to your Mr. *Spitteler*. I saw the necessity of paying for the coffee at market price to my parties in order to fulfil my contracts with you, as well as securing the remain-

ing coffee in their hands, who would otherwise have resorted to others, thus entailing on me serious difficulties to bring them round again for future operations, with the view of covering the loss which threatened me on all sides. With these circumstances, I was compelled to receive the advances from Mr. *Spitteler*, who foresaw that if I were to pay penalty for short delivery, as stipulated in the agreement, there would have appeared to my favour Rs.400,000, as compared with market price, against Rs.121,000, being penalty at Rs.3 per cwt., with certain and sure loss to the firm. I, however, considered my credit in your office, the position you hold in the commercial circles, and the difficulties in which you would have been involved, and taking courage in the confidence you repose in me, did all that I possibly could towards the fulfilment of my agreement, trusting entirely, as I now do firmly trust, that, with a little assistance and time from you, I should be able to make up the loss."

It is unnecessary to quote more of this letter. Its whole tone is that of a debtor admitting his liability for the advances in question, but pleading with his creditor for indulgence in consideration of the circumstances in which, and the motives for which, that liability was incurred. The account which it gives of the substance of the transactions is not inconsistent with that of Mr. *Spitteler*, though differing from it in some details, and particularly in the suggestion that, but for the consideration due to the plaintiffs, and for the prospect of future business, the defendants might have escaped from their contracts of 1872–73 with less loss, by paying the stipulated penalty of Rs.3 per cwt. Looking to that letter and to the other evidence in the cause, their Lordships have no difficulty in coming to the conclusion that not only was the sum of five lacs so advanced to the defendants as much a debt due from them to the plaintiffs as any of the ordinary advances made on the purchase account (a fact found by both the Indian Courts, and now hardly disputed), but that the defendants fully recognised and admitted that liability in 1873. The first suggestion of their contention to the contrary would seem to have been made in their letter of the 26th of November, 1875, when the differences between them and the plaintiffs, which resulted in the institution of this suit, were at their height.

The plaintiffs, on being advised of these exceptional advances by Mr. *Spitteler's* letter of the 19th of February, 1873, lost no time in telegraphing their surprise and dissatisfaction, and seem to have contemplated immediate proceedings for the recovery of the amount from the defendants. Thereupon ensued a long correspondence, and a negotiation, of which it is sufficient to state that it extended over many months, that it was conducted in *India*, on the part of the plaintiffs, not only by Mr. *Spitteler*, but by Mr. *Knapp*, the manager of the *Bombay* agency, and Mr. *Sigg*, a partner in the European house, who was sent out for that purpose, and that it ended in the execution of the agreement L, on the 2nd of January, 1874. In the course of this negotiation, and on the 25th of October, 1873, the defendant gave to the plaintiffs the further security contained in the letter J and the schedule thereto, and various arrangements, of which it is unnecessary to say more at present, were proposed and rejected. Of the final arrangement, embodied in the document L (the construction of which will have to be hereafter more particularly considered), it is now only necessary to state that it proceeded on this basis. The balance due to the plaintiffs by the defendants was stated to have been, as on the 1st of July, 1873, Rs.678,012-10-1, but was afterwards found to have been only Rs.613,007-6-.5, as shewn by the account K. Of this balance, Rs. 300,000 were to be carried to what was styled "the block account," and the remainder to what was styled "the interest account," by which was meant an account bearing interest.

"The block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, such returns to be calculated according to a stipulated scale. This arrange-

ment was to be partly retrospective, in that a sum of Rs.53,056-13 was to be carried to the credit of the "block account" as for returns on transactions between the 1st of July, 1873, and the 1st of January, 1874, and various sums, amounting to Rs 145,357, were to be credited to the defendants on the "interest account," as due to them in respect of transactions during the same period. And, lastly, the agreement contained an express stipulation that the balance of interest to accrue due on "the interest account," which was to carry interest on both sides of the account, should be paid in cash on the 30th of June in each year.

The subsequent transactions between the European and the native firms all proceeded on the basis of the arrangement embodied in L. It is unnecessary to examine these in detail. It is sufficient to state that during this last period of the dealings between the plaintiffs and defendants their relations seem to have been somewhat strained, but did not become actually hostile before the month of August, 1875. On the 10th of that month the *Cochin* agency wrote a letter to the defendants, enclosing an account headed "interest account," and demanding payment of a sum of Rs 35,119-14-9, as presently payable under the terms of letter L, for interest due on "the interest account" up to the 30th of June, 1875, and for short proceeds. The defendants paid on account Rs.10,000 in September, and the further sum of Rs. 583-3 on the 3rd of November, the latter sum being all which, on their mode of stating the account, they admitted to be their due. Their letter remitting this last sum, and the account enclosed in it, are in the record. On the 10th of November, 1875, the plaintiffs, after giving credit for these sums, and for another small payment of Rs.146-3-10., and admitting some errors in their previous account, reduced the balance, of which they again demanded present payment, to Rs. 15,768-3-7.

On the same day they wrote another letter to the defendants, apparently in answer to some offer of produce, in which they said:—

"We beg to say that, as already verbally told your Mr. *Marcar*, we cannot entertain the idea of entering into fresh engagements with you, until such time as the balance of interest and short proceeds has been settled satisfactorily, and in accordance with the agreement of 2nd January, 1874. We hereby request you peremptorily to hand over such amount, viz., Rs. 16,014-6-7, with the interest due up to date to bearer."

The difference between this sum and that demanded in the letter of the same date is the sum of Rs. 146-3-0, of which the letter admits the receipt by a cheque.

The sum to which the amount in dispute was thus reduced was made up of the sum of Rs. 12,789-1-11, which, being the difference between interest at 6 per cent. and interest at 9 per cent. upon the balance of "the interest account," the defendants claimed to be allowed under the provisions of L; and of that of Rs. 2,979-1-8, as to which, though they admitted it to be due for short proceeds, they insisted that it was not then payable, but ought to be carried to their debit in "the interest account." Further correspondence, of a more or less angry character, passed between the parties, till on the 8th of December, 1875, the plaintiffs wrote to the defendants as follows:—

"In reply to your letter of the 7th instant, we beg to state that you are well aware that we consider that you have entirely broken your engagements with us for the liquidation of your block account, both in regard to the offers you have made and in carrying out your contracts, and also in regard to the returns, the benefit of which you ought to have given us. In reference to the interest account, you have refused to pay us the interest due us on the 30th of June last, and you have entirely neglected to make any attempt to pay us the large balance due us on this account. Under these circumstances, we are compelled to put the case into Court, and any further discussions will be useless. We must, therefore, decline to take notice, at present, of

the tissue of erroneous statements you have put forward in your last letters."

In reply to this, the second defendant wrote on the same day a letter of remonstrance denying the imputed breaches of plaintiffs' agreement, expressing his willingness to go on under it, showing that the dispute as to the interest might be settled "by means otherwise than legal," and concluding as follows:—

"Under these circumstances, take notice that I hold you responsible to me for all damages arising from your withdrawal from a contract which up to yesterday I showed a ready disposition to carry out myself; that from this date I repudiate your further right to fall back upon that agreement; and that I shall bring such action against you for the recovery of compensation for loss sustained by your breach of contract as I may be advised to take."

The plaint was filed on the 10th of December 1875. It sought to recover the sum of Rs. 1,80,897-5-2, the admitted balance on the block account without interest; and the sum of Rs. 2,24,882-8-7, as the balance due on the interest account, with interest on such balance "from the 7th of December, 1875." The balance thus claimed on "the interest account" included the Rs. 15,768-3-7, of which immediate payment had been demanded in November. The plaint also prayed for a declaration that the instruments of mortgage I and J created and were mortgages of the interest of the defendants in the properties mentioned in the schedule, and that, if necessary, an account might be taken of what was due by the defendants to the plaintiffs on the said mortgages.

The issues finally settled in the suit were:—

(1.) Whether the mortgage instruments of the 21st and 25th of October, 1873, I and J, are valid and subsisting mortgages for the balances that may be found due by defendants to the plaintiffs, or for any part thereof.

(2.) Whether, on the 30th of June, 1873, there was a balance of Rs. 6,13,097-6-5. due by defendants to plaintiffs.

(3.) Whether the defendants have committed any breach of the agreement of the 2nd of January, 1874, and if not, whether the plaintiffs are entitled to sue for the balances due on the block account and the interest account.

(4.) Whether plaintiffs are entitled to bring their suit before submitting to arbitration the dispute as to Rs. 12,789-1-11, on account of interest.

(5.) A similar issue as to the before mentioned sum of Rs. 2,979-1-8, the remainder of the sum claimed by the plaintiffs as a cash payment payable as on the 30th of June, 1875.

The District Judge, Mr. *Wigram*, in a very careful and able judgment, disposed of these issues as follows:—

Upon the 1st, he found that, on the true construction of instruments of mortgage I and J, they and the deeds deposited with them constituted a security for the general balance due from the defendants to the plaintiffs.

Upon the 2nd, he found that that balance was, on the 30th of June, 1873, the sum of Rs. 6,13,007-6-5.

Upon the 3rd, he found that the agreement of the 2nd of January (L) was, upon the true construction of it, revocable at will by the plaintiffs, but that, if it were not so revocable, they had failed to prove any breach of it on the part of the defendants which justified the rescission of it.

As to the 4th and 5th issues, he found that the plaintiffs were not entitled to sue for the dis-

puted amount of interest until that dispute had been settled by arbitration; but that there was no such objection to the claim for the Rs. 2,970-1-8, the amount, and the defendants' liability for it, in some way or another, not being in dispute.

The result of his judgment was that the Plaintiffs were entitled to a decree for Rs. 3,92,090-12-10, and to a declaration that, if that amount was not paid within three months, the Plaintiffs were entitled to sell the right, title, and interest of the defendants in the properties mortgaged to them under the Exhibits I and J, and a decree was made accordingly on the 16th of July, 1877.

From this there was an appeal, and, so far as it related to the 4th issue, a cross appeal, to the High Court, which dismissed both appeals, and confirmed the decree of the Lower Court in its integrity. The judgment of the High Court appears, from the somewhat scanty note of it, to have proceeded, so far as it related to the 3rd issue, upon the supposed proof of actual breaches of the agreement L on the part of the defendant, and not upon the revocability of that agreement at the will of the plaintiffs.

In dealing with this appeal their Lordships are relieved from any further consideration of the 2nd and the 4th issues. What has been already said sufficiently indicates their entire concurrence in the finding of the two Indian Courts upon the former. And there is now no cross appeal against the finding in favour of the defendants upon the latter.

The questions, therefore, for determination are reduced to the following:—

1st. Whether the finding upon the first issue is correct; a question which depends upon the construction to be put on the document I, since that governs also the effect of J.

2nd. Whether the plaintiffs were entitled to rescind wholly or in part the agreement embodied in document L, without proof of an actual breach of it by the defendants sufficient to justify such rescission; and

3rd. If they were not so entitled, whether there is sufficient proof of any such breach.

4th. Whether there is error in the decree, in so far as it declares the plaintiffs at liberty to sell the mortgaged premises, if the defendants should not pay the amount decreed within three months.

The contention of the defendants is that the construction of I is to be governed by the first paragraph in it, which, speaking in the name of the second defendant, says,—

"As I have been and am now accustomed to contract with you for the supply of country produce and other merchandise, and in the course of these transactions there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts, and you very naturally would like some security, I agree to the following propositions, &c."

They insist that this statement, being in the nature of a recital, limits the security to advances made upon contracts for future deliveries of produce, and consequently must exclude from it the advances, to the amount of five lakhs, which constitute so large a portion of the balance found due to the plaintiffs, particularly if *Spitteler's* statement, to the effect that when those advances were made all, or almost all, of the defendants' contracts with the plaintiffs up to that time had been fulfilled, is to be taken to be correct.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

The distinction is recognized and the authorities on this subject collected in the case of *Walsh* v. *Trevanion* (1).

What, then, is the effect of the operative part of this instrument. It says,—

"You shall hold them (the deeds) as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property as a pukha mortgagee would have, only you must agree not to sell any of it until you have given me full twelve months' notice from *the time we shall come to a settlement of accounts to pay up*, or from the time demand shall have been made by you of the amount claimed by you; but if I fail, then you may sell, at my expense, for the best price you can get, any of the properties successively, *till you have satisfied my account current, out of the proceeds*, giving me a strict account of what you sell." And the next paragraph contains the following sentence: "And upon my payment *of all balances due*, you will at once return to me all the documents now deposited with you, and cancel this letter."

The conclusion which their Lordships draw from the above passages taken together, and examined by the light which the proved relations of the parties at the time throw upon them, is, that the security was intended to cover the general balance that might become due from the defendants to the plaintiffs upon all the accounts between them. The words "upon our contracts," which the defendants insist can only be taken to mean the particular contracts for the delivery of produce referred to in the paragraph in the nature of a recital, do not appear to their Lordships to be necessarily repugnant to this construction. Such contracts may have been chiefly in the minds of the parties, but the words themselves are wide enough to embrace all their transactions. And what follows strongly favours the wider construction. There is to be no sale until twelve months after one of two events, viz, a settlement of accounts or a demand. The first case implies a settlement of accounts in order to ascertain the amount due. How could that be ascertained unless all the different accounts were brought into a general account current, and a balance struck thereon? Let it be supposed that "the purchase account," taken alone showed a large balance due for advances. It can hardly have been the intention of the parties that the property should be sold to pay that balance; if, on the other hand, a balance was due from the plaintiffs to the defendants on "the consignment account:" and this explains the following sentence, "if I fail, then you may sell, &c, until you have satisfied *my account current*." The "account current" would include both accounts. And this intention is made still more clear by the subsequent stipulation that the event on which the deeds shall be returned and the latter cancelled is the payment of *all* balances due. Again, let it be assumed that there was no account open between the parties except "the purchase account." The advances were entered generally to the debit of the defendants in this account, as on the dates on which they were made, in round sums. Neither this, nor any other account that has been produced shewed what particular advance was made on each particular contract. The five lakhs were entered in this account in the same manner as the sums previously advanced. It can hardly have been intended that if it should prove necessary to realize the securities, the account so kept was to be analysed and recast in order to ascertain which of the sums so debited were secured, and which were due upon open account.

The learned counsel for the defendants have relied upon their refusal to execute S. S. S., one of the abortive proposals made in the course of the negotiations for a settlement between February, 1873 and January, 1874. Whatever may have been the motive of the refusal (and this has not been very satisfactorily proved), parol evidence of what took place a considerable time after the execution of I can hardly affect the construction of that document. If it could have any such effect, the evi-

(1) 15 Q. B. (N. S.) 750.

dence of what took place during the long negotiation which ended in the execution of L would, taken as a whole, rather lead their Lordships to the conclusion that both parties were negotiating under the belief and upon the assumption that the whole debt then due was covered by the mortgage securities.

Upon the whole, therefore, their Lordships have come to the conclusion that the Judge's finding on the first issue before him was correct, and that the whole of the before-mentioned sum of Rs 613,007-0-5. was, and that the balance of it now recoverable is, secured by the mortgage securities in question.

Their Lordships have now to determine the more difficult question of the construction and effect of the document L.

The contention on the part of the plaintiffs is that it was revocable at their will, as found by the District Judge. The contention of the defendants is that, unless rescinded by mutual agreement, or upon a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation under it of both the "block" and the "interest" account, or, at all events, of the block account; and further that, if in the events that have happened, the plaintiffs are entitled to sue for and recover the balance due on "the interest account," they cannot sue for or recover the balance due on "the block account," as to which they have agreed that it was to be liquidated by "returns only."

The circumstances under which the agreement was entered into have already been partially stated. That they afford no ground for the suggestion that the settlement in question proceeded upon the compromise of a doubtful claim, or of a disputed debt, is a conclusion in which their Lordships have already intimated their concurrence. On the other hand, it is clear that, although the arrangement was on the face of it in ease and for the benefit of the defendants, the plaintiffs found, or thought they found, their own advantage in it. Had they shewn no forbearance, had they driven the defendants to extremity, they would probably have lost great part of the large sum then due to them, and they would certainly have lost the advantage which they expected to reap from the employment of the defendants, who were supposed to have acquired the command of the market, in their future operations in native produce. The agreement actually made is extremely loose. It fixes no time for its duration, or for the liquidation of the debt. It was, no doubt, purposely left vague upon this point; since one of the grounds on which the second defendant says he objected to execute S. S. S. was that it bound him to pay a certain amount by a fixed time.

The only specified date from which any inference as to the intended duration of the arrangement can be drawn is the 30th of June, 1875. From that it may fairly be inferred that the parties contemplated dealing on the footing of the agreement up to that time at least. But all beyond that time is left indefinite.

The defendants, however, contend that it follows, by necessary implication from the terms of the document, that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until the whole debt, or, at all events, that portion of it which was carried to the block account, was liquidated in the manner thereby provided. The passages on which they mainly rely are,—

1st. The statement that "the following conditions have been agreed upon by both parties for the repayment by *P. Marcar* of the money due to *Volkart Brothers*."

2nd. The provision as to the rebate of interest, which contains these words,—"The same reduction of interest to be made subsequently *until the entire settlement of this account* should *P. Marcar* continue to afford the same satisfaction."

3rd. The provision that "the block account shall be liquidated *by returns only* on all contracts," &c.

Their Lordships are clearly of opinion that the extreme contention of the De-

fendants that the whole debt was to be repaid under the agreement, which was, therefore, to subsist until that liquidation had taken place, cannot be maintained. The "interest account" stands upon a different footing from the "block account." It was to remain as a debt carrying interest, and that interest was to be paid annually, but no precise stipulation as to the mode of liquidating the principal is to be found in the agreement unless it is to be inferred from the 5th paragraph that, for the future as for the past, sums of money to become due to *P. Marcar* for cash, goods, consignments, &c., were to be carried to their credit. There was, however, no provision for the continuance of the consignment business, which would presumably be the principal source of such credits. Hence, even if the agreement was intended to subsist, and did in fact subsist, until the block account had been liquidated by the returns, there might have remained at that time a balance due on the interest account which the plaintiffs would have been entitled to sue for and recover.

And it further appears to their Lordships that, as regards the balance due on the "interest account," the utmost that can be implied from the agreement against the plaintiffs is a covenant not to sue for it until after the 30th of June, 1875.

The question, then, under consideration is reduced to the "block account," and the effect of the words "shall be liquidated by returns only," &c. Now, even as to this account, the provisions are extremely loose, and such as could not be duly worked unless the contracting parties continued to act with the highest good faith, and on a perfect understanding with each other. Nevertheless, they seem advisedly to have abstained from making express provisions either for the continuance or for the due working of the agreement, each trusting to the honor, and, probably, still more to the self-interest of the other. Such an agreement is conceivable if it was intended to endure so long only as both parties desired it to continue. But, for the effectual working of an irrevocable agreement for the liquidation of the block account in a particular way, it would be necessary to imply covenants and obligations for which the parties have failed, apparently from the difficulty of agreeing upon them, to make express provision. For example, no express provision is made as to the extent of the business to be done; the rates at which one party is to offer, and the other to accept, produce; the result upon the letter of the agreement being that, if either were disposed to act unreasonably, he would have the means of postponing the liquidation of the account indefinitely. And if the parties have thus abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, can the Court, which is called upon to enforce it, supply them. Their Lordships are of opinion that it cannot do so. Among the reasons stated by Lord *Denman*, C. J., in delivering the judgment of the Court in *Aspdin* v. *Austin*, (1) are the following, which appear to be particularly applicable to this case; he says:—

"Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which

(1) 5 Q. B. (N. S.) 671, 684.

the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These considerations have led their Lordships to the conclusion that the stipulations, even as to the block account, were binding only during the continuance of the arrangement for the conduct of future business, and that on the true construction of the agreement, either party had power, at least after the 30th of June, 1875, to determine it, should it be found, as undoubtedly it was found, to be working unsatisfactorily. They had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures, the defendants supplying the produce at a profit to the plaintiffs, who realized a further profit on its export to *Europe*, and the former undertaking further that a portion of their profits should be applied in liquidation of their liability on former transactions. Their Lordships conceive that on this construction full effect can be given to all the express stipulations contained in L, and, further, that in the events which have happened the plaintiffs have not lost their right to sue for and recover the balance due to them either on "the block" or on "the interest account." In truth, had they broken any covenant, express or implied, the remedy of the defendants would seem to have been an action for unliquidated damages, the measure of which would not necessarily be the balance due on the block account.

Their Lordships' construction of L, renders in unnecessary to consider whether, assuming the agreement to be irrevocable, the plaintiffs have established a breach of it on the part of the defendants which would justify the rescission of it, a question which, regard being had to the conduct of the parties with respect to the alleged breaches, might not be free from difficulty. Upon the last point their Lordships find that there is no error in that part of the decree which empowers the plaintiffs to realise their securities in case the defendants should fail to pay the sum due within three months from the date of the decree. They are of opinion that a sufficient demand, within the meaning of the letter I, was made immediately before the institution of the suit, and was so understood by the defendants to have been made. Such seems to be the result of the letters of the 8th of December 1875. The allowance of three months for the payment of the sum decreed to be due to the plaintiffs on the mortgage securities was therefore in ease of the defendants. Their Lordships will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Solicitors for the Appellants: Messrs. *Talbot* and *Tasker*.

Solicitors for the Respondents: Messrs. *Watkins* and *Lattey*.

4th, 5th, and 6th February, 1880.

PRESENT:

Members of the *Judicial Committee*. The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE NEW BEERBHOOM COAL COMPANY (Plaintiffs) } *Appellants*,

and

BULARAM MAHATA and others (Defendants)... } *Respondents*.*

Specific Performance—Construction of Agreement in a Pottah—Assignment of Pottah—Rights of Assignees against original Lessors.

The owners of ancestral village lands gave a *makurari pottah* of land in a *mouza* to the proprietor of a neighbouring collieries "for quarrying coal, for building stores, for garden, for orchard, for road-making, and for other uses." The *pottah*, besides the above, contained the following, as

* 7 Cowell's I. A. p. 107, I. L. Rep. 5 Cal. p. 932.

translated :—"You will build a factory according to any plan you choose, and possess the same. Within that aforesaid *mouza* we will not give settlement to anybody. If you take possession, according to your requirements, of extra land over and above this *pottah*, we shall settle such land with you at a proper rate. Thereat we shall make no objection." The lessee, after being in possession for some years under the *pottah*, assigned it to the plaintiffs, who afterwards took possession of the whole of the extra land, and demanded a *pottah* therefore from the defendants, and made a contract advantageous to themselves to sell it to third persons. The defendants refused to grant them a *pottah*. In a suit for specific performance,—*Held* on the construction of the *pottah*, that if the lessee, or his assigns, had required additional land for the purpose of carrying out the objects for which the *pottah* was granted, then the lessors would have been bound to settle so much of the adjoining land with them as might have been necessary for such requirements.

Held also, that the plaintiffs, the assignees, were not entitled to compel the defendants to grant them a *pottah* of the extra land, even at a reasonable rate, merely for the purpose of selling it.

Semble.—In a suit for specific performance of an agreement to sell land, the fact that on account of the extraordinary character of the property, as its containing coal or other valuable minerals, there is considerable difficulty in fixing a reasonable rate for it, is not a sufficient reason for refusing a decree.

APPEAL from a decree of the High Court at Calcutta (25th April 1878), confirming a decree of the Officiating Judge of East Burdwan (27th September 1875).

The facts of the case fully appear in the report of the hearing in the High Court (1).

Mr *T. H. Cowie*, Q. C., and Mr *Macnaghten* for the appellants.—A contract to sell or let lands at a proper rate is capable of being enforced as pointed out by the High Court—Sugden's Vendors and Purchasers, 11th Edn., p. 327; but that Court has drawn a distinction, which has no existence in the law on this subject, based on the greater difficulty in the valuation of land containing minerals as compared with land valued only for the utility of its surface. The difficulty in valuing mining land is no legal obstacle where a contract of the above description has been made. And in this case the defendants have shown by their sale to the Bengal Coal Company what they consider to be a fair price; nor can they be heard now to say that there is no basis for calculating it. The plaintiff company took possession under the contract of 1858 assigned to them, and in 1875 were in possession under a title which they could have defended had they been sued. That they should be now deprived of their right to the possession, on account of the default in the opposite party to the contract, would be contrary to equity. The contract is not obnoxious to the rule against perpetuities; *Birmingham Canal Co.* v. *Cartwright* (2). Independently of the question whether this contract was capable of being transferred, like the covenant running with the land of the English common law, it is enforceable by a purchaser as an agreement to use, or abstain from using, Mahatidihi, save in one way; and this prevails against all who have notice of it. It is not denied that the Bengal Coal Company had notice. There is, besides, a clause in the *pottah* of 1858 agreeing that to none except to the person whom the plaintiff company represents will the Mahatas grant the land in question. Reference was made to *Tulk* v. *Moxhay* (3), *Jay* v. *Richardson* (4), *Catt* v. *Tourle* (5), *Luker* v. *Dennis* (6), and *McLean* v. *McKay* (7).

Mr. *Leith*, Q. C., and Mr. *Doyne* for the respondents.—The construction sought to be placed on the agreement of 1858 is one that, if correct, would render it a contract making permanently inalienable the larger portion of Mahatadihi: to allow this construction would, therefore, be to support a contract contrary to the policy of the law. The right, however, by the language of the *pottah*, when strictly followed, is not more than a right conferred upon Mr. Erskine and his assigns to take up land in Mahatadihi for the require-

(1) I. L. R. 5 Cal., 175.

(2) L. R., 11 Ch. D., 421.
(3) 2 Phillips' Ch. Rep., 774.
(4) 30 Beavan, 563.
(5) L. R., 4 Ch. Ap., 654.
(6) L. R., 7 Ch. D., 227.
(7) L. R., 5 P. C. Ap. Cas., 327.

ments of the colliery and the works; building and road-making are among the objects specified. The objects for which the *pottah* of 1858 was granted, indicate and limit those for which extra land may be taken.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK :—

The proper decision of this case depends upon the correct construction of the contract of the 13th of September, 1858, between the *Mahatas* and Mr. *Erskine*. The contract is set out in the record; but it is agreed that the translation made by the Judge may be taken as the correct one. The contract was as follows: "Mouzah *Mahatadihi*, in *Chakla Panchloti (Pachete)*, in pergunnah *Shergurh*, is our ancestral rent-paying *brahmottur* land. Out of this talook the share of one co-sharer, *Ramdhun Mahata*, 2 annas, and that of *Uma Churn*, 1 anna 6 gundahs 2 cowris 2 krants, being in all 3 annas 6 gundahs 2 cowris 2 krants, is (already) a *mokurruri* of yours. Putting aside that interest, then out of the remainder, forming a *kismut*, 12 annas 13 gundahs 1 cowri 1 krant, a piece not to comprise crop-bearing land, that is to say, a piece of land quite uncultivatable and waste land, a piece to cover in all 51 beeghas, is leased to you under this *pottah*, for quarrying coal, building stores for garden, for orchard, for road making, and for other uses. The boundaries thereof are on the east, &c." (describing them). "This land, amounting to fifty-one beeghas within those boundaries, is leased to you at the rent of Rs.25. 8a and a suitable bonus. You are to quarry coal, and till garden and erect building, and so on, and pay the above rent every year and month as per schedule annexed below; and you will carry on your factory according to use and wont. If you default you are to pay interest according to law. The rent is not to be liable to increase or decrease at any time. You will be allowed no deduction in respect of drought or flood, or for uncultivableness. You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouzah we will not give a *pottah* to any factory person;" that is to say, "we shall not let (literally, give settlement) to anybody." It is not necessary with reference to their Lordships' view of the case to decide whether this really was a contract not to give a *pottah* to any person, or a contract not to give a *pottah* to any other factory person. The Plaintiffs, however, in their plaint have treated it as a contract not to give a *pottah* to any person whatever. If so, that might render the contract bad in restraint of alienation; but it is unnecessary to determine that question. Then it goes on:— "If you take possession," or more literally "take possession," and then, "according to your requirements, of extra land over and above this *pottah*, and we shall settle any such lands with you at a proper rate. Thereat we make no objection."

It is contended on the part of the Plaintiffs that this was a contract which Mr. *Erskine* or his heirs could assign to any one, and that the person to whom he assigned it would be at liberty to require the *Mahatas* to settle the land with them at a reasonable rate It may be assumed for the present purpose that Mr. *Erskine* had the power to assign the contract to any one; and it may also be assumed that the *Bengal Coal Company*, as the purchasers from the *Mahatas* of the adjoining land, with notice of the contract, were also bound by it But then the questions arise, whether it was the intention that *Erskine* or any one to whom he might assign it should be at liberty to take the whole of the mouzah for any purpose whatever, whether for quarrying coal or not; and whether the *Mahatas* bound themselves to grant to *Erskine* all the cultivatable as well as uncultivatable land in the mouzah. The construction which the Plaintiffs have put upon the contract is, that *Erskine* was entitled, at any time and for any purpose, to take possession and to compel the *Mahatas* to grant him a lease of the whole of the residue of the mouzah at a reasonable rate. The words are: "If you

take possession, according to your requirements, of extra land." Now what is the meaning of the words—"according to your requirement?" Does it mean "according to your requirements for any purpose, or according to your requirements having regard to the lease of the fifty-one beeghas and the purpose for which it was granted?" Assuming that the words, "You are to quarry coal," and "You are to build a factory," were not obligatory, still they shew that the object of *Erskine* in taking the lease was that he might quarry within the fifty-one beeghas; that he might erect a factory, and carry on mining operations. Then comes the stipulation, which must be read in the sense that if, using the fifty-one beeghas for the purpose for which you have taken them, you should require adjoining land as incidental to the lease, then we agree to grant it you at a reasonable rate. Could *Erskine* have assigned the lease of the fifty-one beeghas to one person, and then sold his interest with regard to the adjoining land to another person, so as to seperate the two? Their Lordships are of opinion that he could not. It appears to them that the true construction of the contract was, that if *Erskine* or his assigns should require additional land for the purpose of carrying out the objects for which the lease was granted, then the *Mahatas* would settle as much of the adjoining land with them as might be necessary for the purpose of such requirements. It is unnecessary to make any distinction between the waste land and the cultivatable land in that view of the construction, because the land was not taken possession of by the company as requiring extra land for the purposes of the lease, but merely for the purpose of selling it. The *Beerbhoom Company*, to whom *Erskine* had assigned the agreement, ask the Court to compel a specific performance of it, because they had entered into a contract of sale to the *Bengal Coal Company* for a sum of money which they say would give them a profit of Rs. 26 [illegible] odd. They say in their plaint, "Having got this agreement, we afterwards negotiated with the *Mahatas* for a lease of the adjoining land (not that the *Mahatas* agreed to grant a lease) upon the terms that we were to pay Rs. 1. 8*a*. for the waste land, and Rs 3 for the cultivatable land." And then they ask the Court to grant them specific performance of the agreement by compelling the *Mahatas* to grant them a lease at those rates; or if the Court will not order a lease at those rates, then at such rates as the Court shall think reasonable.

Their Lordships are of opinion that the Judge of the First Court came to a correct conclusion upon the 6th issue, on which he found that, apart from the fifty-one beeghas, the assignees could not compel the *Mahatas* to grant a lease of the remaining lands of the mouzah. Their Lordships are not bound by, nor do they concur in, the reasons which the learned Judge gave for that decision. The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirmed it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome. Their Lordships therefore, without concurring in the reasons of either of the Lower Courts, have come to the conclusion that the *Beerbhoom Company* were not entitled to compel the *Mahatas* to settle the remainder of the land at reasonable rates, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, with the costs of this appeal.

Solicitors for the Appellant: *Lawford, Waterhouse, & Lawford.*

Solicitors for the Respondents: *Bailey, Shaw, & Gillett.*

19th and 20th February, 1880.

PRESENT:

Members of the *Judicial Committee* The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montagne Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

KARUNABDHI GANES RATNAMAIYAR (Defendant) ... *Appellant,*

and

GOPALA RATNAMAIYAR and RANGAIYAR (Plaintiffs) ... *Respondents,**

KARUNABDHI GANESA RATNAMAIYAR (Defendant) ... *Appellant,*

and

RAMARATNAMAIYAR and Another ... *Respondents.**

CONSOLIDATED APPEALS.

Hindu Law of Adoption—Alleged assent by the sapinda of a person deceased, to support adoption by the widow.

The sapinda of a deceased person gave his child to the widow of the latter to be adopted in pursuance of an authority which she represented herself to have had from her husband. This natural father of the child was the eldest and managing member of a joint family consisting of himself and his three younger brothers, sons of the first cousin of the deceased. The three younger brothers disputed the validity of the adoption.

Two Courts having found against the existence of an authority to the widow given by her deceased husband, the question remained whether the manager giving his child, in the manner in which he had given it for adoption, he being a sapinda, and in a position to represent other sapindas of the deceased, was an assent by a sapinda to an adoption by a widow sufficient to support her adopting in the absence of an authority from her husband.

It was decided that under all the circumstances under which this child had been applied for by the widow and given by the father, the assent of the latter was not one which had rendered the adoption valid as against the brothers.

There was no sufficient evidence to show that the widow applied to the boy's father to give his assent as *sapinda* to an adoption, on the ground that she could not adopt without the *sapinda's* assent.

It was not necessary to determine whether this *sapinda* could alone have given a valid assent, if it had been given to the widow as one having no authority from her husband to adopt; and if it had been given without his mind's having been influenced by other and undue considerations.

CONSOLIDATED appeal from two decrees of the High Court of Madras (10th and 27th April 1877), confirming two decrees of the District Court of Trichinopoly (30th September 1876 and 11th December 1876).

For the Appellants: Mr. *J. D. Mayne.*

For the Respondents: Mr. *J. F. Leith,* Q.C., and Mr. *R. V. Doyne.*

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The validity of the adoption in question in this appeal is disputed upon several grounds: first, that the widow of *Subbarayar* had no authority from her husband to adopt; secondly, that she had not got the assent of the sapindas to the adoption; and, lastly, that *Subbarayar*, her deceased husband, could not have married the mother of the adopted boy, that is, his half-sister's daughter, and, consequently, that the adoption of the child was invalid.

Both Courts found that the widow had no authority from her husband to adopt, and their Lordships will not disturb that finding. The first Court held that *Subbarayar* could not legally have married his sister's daughter, but the High Court entertained a different opinion upon that point. It is unnecessary for their Lordships to express any opinion upon it, and they therefore abstain from doing so; but, at the same time, they feel bound to say that they are not satisfied with the reasons which the learned Judges of the High Court have given for holding that *Subbarayar* could have married the mother of the boy, she being the daughter of his own half-sister.

* 7 Cowell's I. A. p. 173, I. L. R., 2 Mad., p. 270.

The case turns upon the question of the assent which was given by *Sawmi Aiyar* to the widow to adopt. Their Lordships do not consider it necessary to give an express opinion as to whether *Sawmi Aiyar* could alone have given a valid assent if it had been given to her as a widow having no authority from her husband to adopt, and had been given without his mind having been influenced by other and undue considerations, because their Lordships are of opinion that, looking to the circumstances of the case, there is no sufficient evidence to shew that the widow applied to *Sawmi Aiyar* to give his assent to an adoption to be made by her without the authority of her husband but rather that she applied to him to give his son to be adopted by her under an authority which she had from her husband. The Judges of the High Court expressly say: "But if we endeavour to ascertain whether *Rangammal*, as a widow not having authority from her husband, sought for and obtained his kinsman's authority to adopt a son to him, the evidence appears to give no certain answer. According to several of the witnesses, the widow spoke and acted as one already possessed of authority from her husband which she was about to execute, and consent was asked to its execution in favour of *Karunabdhi Ganesa Ratnamaiyar*. There is little, if any, satisfactory evidence to shew that an authorization was sought as from a kinsman having full power to grant or withhold permission"

Their Lordships are of opinion that that remark was well founded, and that there is no evidence to shew that the widow applied to *Sawmi Aiyar* to give his assent to her adopting because she could not adopt without his consent; but that the evidence shews she applied to him to give her his child in order that she might adopt him in pursuance of an authority which she had from her husband, which she represented herself to possess.

It is said that, although it is alleged in the widow's part of the agreement that she wished to adopt a son in pursuance of a permission given to her by her husband, there is no such statement as that in the agreement executed by *Sawmi Aiyar*; but when the agreement of *Sawmi Aiyar* is looked at, he expressly refers to the agreement which had been signed by the widow; he says, "I, as guardian, shall, according to the agreement executed by you, &c." Therefore he refers to the agreement which is said to have been executed by the widow, and adopts the statements made in it; namely, that she was proposing to adopt a son in pursuance of a permission given by her husband. The application to *Sawmi Aiyar* was not to give his consent to an adoption which the widow could not make without the assent of the sapindas, but it was an application to give his son to be adopted in conformity with an authority which she had received from her husband.

But, independently of that, it appears that *Sawmi Aiyar's* mind must have been influenced by the arrangement which he made with the widow. *Sawmi Aiyar* does not give his consent to an adoption merely, but he stipulates with the widow that if she adopt he is to become the guardian of the child. He says: "I, as guardian, shall, according to the agreement executed by you, look after all the real and personal properties due therein to the share of your child, and deliver them as soon as your adopted son attains proper age." The widow also says: "And whereas the said child is a minor, and you, as the managing member of the joint family, are looking after all the moveable and immoveable properties, &c., you, as guardian shall look after all the real and personal properties due therein to the share of my said child untill he attains proper age, and then deliver the same to him with an account of incomes and expenses."

In the absence of an adoption, *Sawmi Aiyar* would have been entitled upon partition to only one-fourth of the property—he being a member of a joint family with his brothers,—and his brothers would have been entitled to the other three-fourths; but if a valid adoption should be effected the adopted son of *Subbarayar*

would become entitled to half the property, viz., the half share which belonged to the deceased husband of the widow; and the brothers, instead of each being entitled to one-fourth, would be only entitled to an eighth. *Sawmi Aiyar* himself would, of course, lose a portion of the share, which would pass to the adopted son; but then he stipulated that he should remain guardian of the adopted son, so that until he should attain his full age no partition between himself and the adopted son could have been enforced, because he was the guardian; the widow could not have asked for a partition in the name of her son, because he had stipulated that *Sawmi Aiyar* should be his guardian. The consequence was that by the arrangement made with the widow he really got during the minority the management of, and the interest in as a member of the joint family (which, if a partition with his brothers should take place, would consist of himself and the adopted son), five-eighths of the estate. The brothers might have separated, but still the infant who was adopted could not have separated from *Sawmi Aiyar* without bringing a suit against the latter for a partition; and to such a suit the guardianship for which *Sawmi Aiyar* had stipulated as part of the consideration for giving his consent to the adoption would have presented exceptional obstacles.

There is another matter by which his mind was probably influenced. It is stipulated in the deed that "my adopted son has nothing to do with the village of *Erikkolam* in the taluk of *Musori* obtained by you, the same being the acquisition of your maternal grandfather." By reason of this stipulation the adopted son was to take no interest in that portion of the estate which was then claimed by *Saromi* as his separate property, but is now found to be a portion of the joint family property.

Their Lordships, looking at all the circumstances under which the assent was given, are of opinion that the assent was not one which rendered the adoption valid and binding as against the brothers; and their Lordships will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, and that the Appellant pay the costs of this appeal.

Solicitors for the Appellant: *Gregory, Rowcliffe, & Rawle.*

Solicitors for the Respondents: *Burton, Yeates, & Hart.*

27th and 28th February, 1880.

PRESENT:

The Members of the *Judicial Committee.* The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Robert Porrett Collier.

RAM KRISHNA DAS SURROWJI (Plaintiff) ... } *Appellant,*

and

SURFUNNISSA BEGUM, RICHARD HENDRY and others (Defendants) ... } *Respondents.**

On Appeal from the High Court of Judicature at Fort William in Bengal.

Attachment before Judgment—Civil Procedure Code (Act VIII of 1859), s. 240—Objection as to non-compliance with requirements of s. 239—Burden of Proof—Civil Procedure Code (Act X of 1877), ss. 274, 276.

A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 6, comprising property attached before the date of the mortgage under s 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semble—A re-attachment of property often decree does not imply an abandonment of an attachment obtained before decree.

* 7 Cowell's I. A. p. 157, I. L. R., 6 Cal. p. 129.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

In this case the Appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII. of 1806, sect. 8, to recover possession of the property in suit from the Respondent, who held it as purchaser at an execution sale in a suit against the mortgagor. The mortgage deed was in the English form, with a power of sale. Inasmuch as it was sought to be enforced in the mofussil, the procedure prescribed by the regulation has been applied to it as if it were a mere bye-bil-wafa, or deed of conditional sale. The suit is the ordinary suit which in such cases the mortgagee, who has foreclosed is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, viz., that it is brought against the purchaser under the execution sale as well as against the mortgagor, and that the former is the substantial Defendant.

In such a suit the Plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title or to the proceedings in foreclosure may be taken.

The Respondent was one of a firm of builders who, in December 1872, sued one *Surfunnissa Begum*, as the daughter of *Moonshi Busloor Ruheem* and the representative of his estate by virtue of a certificate under Act XXVII. of 1860, for the amount claimed as due to them for work done partly in the lifetime of *Busloor Ruheem* and partly after his death. On the 10th of December, 1872, they applied for and obtained, under sections 84 and 85 of the *Civil Procedure Code*, an attachment before judgment, in order to secure the property. Mr. *Doyne* took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by sect. 81 and the subsequent sections having been adopted. But, in their Lordships' opinion, it must be taken that, as between *Surfunnissa Begum* and the Plaintiffs in this former suit, ther was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd of January, 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the Plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property which is the subject of this litigation.

In these circumstances *Surfunnissa Begum*, on the 20th of May, 1873, executed the mortgage under which the Plaintiff claims; and the principal question raised by this appeal is whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them The decree in that suit was made on the 13th of September, 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the Appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the Respondent cannot claim the benefit of the former attachment. Upon this point the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although where property has been attached before judgment it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there were, as there Lordships think there was, a valid and subsisting attachment at the date of the mortgage,

that alienation, unless it can be shewn not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him.

Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned counsel for the Appellant, and particularly by Mr. *Cowell*. It is said that sect. 240 does not govern the case for the following reasons. That section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th the provisions of the 239th section, which says, "In the case of lands, houses, or other immoveable property the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the zillah in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the Plaintiff, who was seeking to oust the Defendant from possession to prove the non-observance of the formalities in question, rather than for the Defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under sect. 85 of the Act." In the case which has been cited from the *Weekly Reporter*, vol. x., it is clear from the judgment of Mr. Justice *Macpherson*, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its procedure gives them. Upon this record they think the judgment of the High Court was right, and will therefore humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The costs of this appeal will follow the result.

Solicitors for Appellant: *Barrow & Rogers*.

Solicitors for Respondents: *Wrentmore & Swinhoe*.

3rd, 4th and 5th March, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

ADRISHAPPA BIN GADGIAPPA (Defendant) ... *Appellant,*

and

GURUSHIDAPPA BIN GADGIAPPA (Plaintiff) ... *Respondent.**

Deshpat watan held by desai—Presumption as to partibility—Custom—Burden of proof.

In a suit for the partition of part of a *deshpat watan*, brought by the younger brothers of a joint Hindu family against their eldest brother, the *desai*, the defence was that the *watan* was held by him as an impartible inheritance, subject to a right, by custom, that a brother should receive maintenance out of the income derived from it.

Held that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the *desai*, to show that the *watan* had, contrary to the general Hindu law, been inherited by him alone.

It was for the *desai* to show, by evidence of the nature of the tenure of the *watan*, that it was impartible, or to show, by evidence of family custom, or of district, *i. e.* local, custom, that impartibility attached to it, such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu law.

Where the defendant in a suit for the partition of a *deshpat watan* held the hereditary office of *desai*, and the *watan* was property appertaining to the office, the decree for partition was accompanied by a declaration that it was made without prejudice to the right of the *desai* to any income, payable out of it, for the performance of his duties, to which he might be entitled under any law in force.

Appeal from a decree of the High Court of Bombay (28th July, 1875) reversing a decree of the Political Agent, Southern Mahratta Country (11th March, 1874).

Digby and *Graham* for the Appellant.

Leith Q. C., and *Mayne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case a suit was instituted by two younger brothers against their elder brother, all being members of a joint Hindu family, whereby the younger brothers claimed two-thirds of the Inam village of *Konoor*, which is admitted to be that part of a deshpat watan, or property held as appertaining to the office of desai, which lies within what is, strictly speaking, British territory; the rest of the watan being within the territory of the feudal chief of *Jamkhandi*, in the Southern Mahratta Country. The elder brother insisted that, inasmuch as he held the office of desai, and this property belonged to his office, he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowances by way of maintenance. The action was brought in the year 1861, in the Court of the Political Agent, and through a lamentable delay, as their Lordships cannot help thinking it, of successive political agents, was not decided in first instance until the year 1874. The effect of the decision of the Political Agent, whose judgment was for the Defendant, may be stated to be this: that the property appertaining to a desaiship must be assumed *primâ facie* to be impartible, and that sufficient evidence had not been given of its partibility. This judgment on appeal was reversed by the High Court, who laid down a different rule or rather presumption of law. The effect of the judgment of the High Court was, that there is no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof in the manner which the Political Agent supposed; that in such cases the burden of proof is upon the desai, who seeks to shew that the property devolves upon him alone, in contravention of the ordinary rule of

* 7 Moo. P. C. C. p. 162, I. L. R. 4 Bom. 494.

succession, according to the Hindu law. The High Court further came to the conclusion that no sufficient evidence had been given by the Defendant either of family custom or of district custom to prevent the operation of the ordinary rule of law whereby the property would be partible. The question in the cause, in a great measure, depends upon which of these two views of the law is right. Their Lordships are of opinion that the High Court was right; that there is no general presumption, as has been contended for on the part of the Appellants, which shifts the burden of proof; and that it lies upon the Defendant, who seeks to show that the estate is impartible, to give evidence of the special tenure of the watan, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law. Their Lordships have also come to the conclusion that the High Court was right in the opinion which they formed that the evidence given in this case was insufficient.

The High Court intimate that the contention with respect to a family custom was abandoned in the argument before them; but be that as it may, their Lordships are of opinion that no such family custom has been proved. A pedigree has been put in whereby it appears that, as far back as the year 1780, the watan, which had been resumed at that time by the Native Government, was conferred on or restored to one *Gurushidappa*; but inasmuch as *Gurushidappa* appears to have been an only son, that devolution of the property throws no light upon the question in dispute From *Gurushidappa* it appears to have devolved, in 1814, upon his only son *Gadgiappa*. Subsequently, in 1836, the dessaship devolved upon *Adrishappa*, the present Defendant. It would appear that his family, consisting of himself and his two brothers, remained joint until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little light upon the controversy; it certainly does not support the contention of the Defendant that he was entitled to the possession of the property as impartible, giving his brothers only maintenance.

An official document has been put in, bearing date 1800, being an official account of certain dessaships then under sequestration by the Government, whereby it would appear that a sum of Rs. 150 per annum, payable out of the watan, had been allotted to one *Kadappa*, who seems to have been a distant cousin of *Gurushidappa*. It further appears that that allowance has continued up to the present day to be enjoyed by a descendant of this *Kadappa*; and that a similar allowance is enjoyed by another member of the family, descended from a common ancestor with the parties to this cause That circumstance, however, of itself, and without further explanation, does not appear to their Lordships sufficient to maintain the contention of the Defendant. These two members of the family, who are said to be still living and to receive the allowances, might have been called, and they might, if the case of the Defendant is correct, have shewn the origin of their allowances, and possibly that there had been some previous custom in the family whereby the eldest son took the property, subject to allowances to his younger brothers, or to other members of the family. Even such evidence, it may be remarked, if forthcoming, would presumably have related to a period anterior to the re-grant of the watan to *Gurushidappa* in 1780. But, in the absence of any such evidence, their Lordships are not disposed to attach much weight to this mere entry in the account. Beyond that there is no evidence.

Their Lordships, therefore, are of opinion that the High Court was right in determining that there was no evidence in this case of family custom one way or the other.

With respect to the custom of the district, although the evidence may shew that tenures of this kind are more frequently impartible than partible, it is not, in their Lordships' opinion, of that con-

clusive character which is necessary to establish a general district custom. They are of opinion that the High Court was justified in finding that no sufficient evidence of such a district custom had been given.

There Lordships may observe that in the year 1854, upon the brothers quarrelling, the case came before the chieftain of *Jamkhandi* in respect of that part of the watan which is in his territory. He, in the first instance, decided in favour of the Defendant; but subsequently, some years after, upon receiving evidence, which he appears not to have done before, decided in favour of the Plaintiffs. That decision, although it was subsequently set aside by the Secretary of State on the ground that, for the special reason stated in his despatch, the chief had no jurisdiction in the matter, may be invoked by the Plaintiffs as, at all events, some evidence in their favour.

On the whole, therefore, their Lordships have come to the conclusion that the High Court was right in the view which they took of the law and of the burden of proof, and of the proof itself, and that their decision *quoad* the partibility of this property should be confirmed.

A difficulty which their Lordships have felt in the case, and to which the High Court have not adverted, is the following: The Defendant held the hereditary office of desai, and the watan is admittedly property appertaining to the office; and it appears to have been the policy of the Indian Government that desaiships should be maintained, and that the desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative, of the Government. This policy has been recognised and enforced by various Acts of the Legislature, the latest being apparently Act No. III of 1874 of the Legislative Council of *Bombay*. The provisions of that statute seem to be in some degree retrospective.

Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the Defendant's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force. And, accordingly, they will humbly recommend to Her Majesty that such a declaration be added to the decree of the High Court; but that, subject thereto, the said decree be affirmed. They also direct that the costs of this appeal be taxed; that the amount of such costs, when taxed, be added to the costs of the cause, and paid with them out of the estate.

Solicitors for the Appellant: *Ashurst, Morris, & Co.*

Solicitors for the Respondent: *Ramsden & Austin.*

5th March, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GOURCHANDRA RAI (Defendant) ... } *Appellant,*

and

PROTAPCHANDRA DASS (Plaintiff) ... } *Respondent.**

Principal and Surety—Giving Time—Interest paid in advance—Discharge of Surety—Accommodation Acceptor—Contract (Act IX of 1872), s. 135.

The drawer of *hundis* paid advance interest to the holder to obtain time, which he did obtain, for payment after due date. *Held*, that the liability of an accommodation acceptor of the *hundis* depended on whether he knew of and consented to this arrangement.

Held on the merits, that he knew of, and consented to, advance interest being taken.

Appeal from a decree of a Divisional Bench of the High Court of Bengal, dated 16th May 1878, reversing, so far as it affected this appellant, a decree of

* I. L. R. 6 Cal., p. 241.

the Subordinate Judge of *Dacca*, dated 14th September, 1876.

The facts of the case and judgment appealed from are reported in the Indian Law Reports, 4 Cal., 132.

Mr. *Cowie*, Q. C., and Mr. *Doyne*, for the Appellant.

Mr. *Leith*, Q. C., and Mr. *Graham*, for the Respondent.

The judgment of their Lordships' was delivered by

THE RIGT HON'BLE SIR JAMES WILLIAM COLVILE:—

Accepting the facts found by both the Courts in India, their Lordships agree with the High Court that the liability of the appellant, as accommodation acceptor of the *hundis*, depends on the answer to be given to the question whether he knew of, and consented to, the advance interest being taken. The High Court has answered the question in the affirmative, and their Lordships entirely agree in that conclusion. Monohur Laha's evidence alone is sufficient to establish the fact that the defendant did know of, and consent to, the payment of the advance interest; and he was a witness called by the appellant. Nor do their Lordships think that the testimony of the witnesses adduced by the plaintiff is, though exceptions may be taken to parts of it, altogether inconsistent, as has been argued, with that of Monohur Laha. That which relates to a conversation between the plaintiff and defendant in the billiard-room of the former, upon which there was no cross-examination, is quite consistent with all that Monohur Laha has deposed to. Again, the probabilities of the case appear to their Lordships to be all in favor of the conclusion of the High Court. Pogose, the drawer of the *hundis* and the party primarily liable upon them, was absent from his place of business; his affairs were evidently in a very shaky condition; and although it was possible that when he came back again he might be able to make some arrangement for the payment of the *hundis*, he had no present means of meeting them. In these circumstances it is hardly conceivable that the plaintiff would enter into a transaction, the effect of which would be to relieve the only solvent party from liability upon the *hundis*. On the other hand, it was much to the interest of the defendant to take the chance of the re-establishment of Pogose's credit, and therefore to assent to such an arrangement as was actually made.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson*.

Agents for the Respondent: Messrs. *Watkins* and *Lattey*.

9th March, 1880.

PRESENT:

Members of the *Judicial Committee*.—The right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Allahabad, North-Western Provinces.

HIRA LAL (Decree-Holder) ... } *Appellant*,

and

BADRI DAS and others (Judgment-Debtors) } *Respondents*.*

Limitation—Proceeding to enforce decree—Act XIV. of 1859, s. 20.

It was the object of the Legislature in Act XIV. of 1859, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment creditor believed, *bonâ fide*, though

*7 Cowell's I. A. p. 167, I. L. R. 2 Alla. p. 792.

erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

Appeal from a judgment of the High Court of the North-Western Provinces (25th May, 1877,) affirming a judgment of the Judge of Agra (31st May, 1876,) allowing the objection of the respondents to the execution in 1874 of a decree obtained in 1867.

In 1867 the decree of which execution was refused in the Indian Courts was obtained by the appellant and one Makhan Lal, since deceased, for Rs. 11,560. A certificate for execution was issued on the 23rd March, 1868, by the Judge of that Court who in December, 1868, (nothing having been realized under it,) ordered that the execution be made over to the Subrodinate Judge. The latter in December, 1868, ordered issue of attachment; and, on this proving fruitless, the execution-case, on the 3rd April, 1869, was struck off the file by the Subordinate Judge. The proceedings taken from time to time by the decree-holders in the Court of the Subordinate Judge to enforce the decree after that date until the re-institution of the proceedings in execution of the decree in the Court of the Judge of Agra, by petition of the 9th April, 1874, are stated in their Lordships' judgment.

Mr. *L. Graham* appeared for the appellant.

The respondents did not appear.

Mr. *Graham* referred to the following cases, contending that the proceedings taken by the decree-holders had been sufficient, within the meaning of s. 20 of Act XIV. of 1859, to prevent the operation of that section, to bar execution.—*D. A. Dalvi* v. *Lakshuman Hari Patil* (1): *Dheeraj Mahtab Chund* v. *Bulram Singh* (2): *Ram Sahai Singh* v. *Degan Singh* (3): *Roy Dhunpet Singh Roy* v. *Madhomotee Dabia* (4): *Benoderam Sen* v. *Brojendro Narain Roy* (5).

(1) 4 Bom. H. C. Rep. A. C. J., 86.
(2) 13 Moo. Ind. App. 479.
(3) 6 W. R. Misc., 98
(4) 11 B. L. R., P. C. 23.
(5) 13 B. L. R., P. C., 169.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The question in this case is whether the judgment creditors, who on the 14th of January, 1867, obtained in the Court of the Judge at *Agra* a decree against the Respondents, were on the 9th of April, 1874, barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869 the Subordinate Judge struck the execution case off the file. On the 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

Between the 3rd of April, 1869, when the Subordinate Judge struck the case off his file, and the 9th of April, 1874, proceedings were from time to time taken by the decree holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the *Limitation Act* XIV. of 1859, sect 20.

It appears that on the 18th of February, 1870, an application was made by the decree holders to the Subordinate Judge to set off a debt of Rs.1300, which they owed to a debtor of the Respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree holders should file a receipt for Rs 1300, and that the case should be struck off the pending file. On the 18th of February, 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs.1300, was satisfied. Subsequently on the 8th of January, 1872, an application was made to the Subordinate Judge to send a certificate of the decree to the political agency at *Indore* in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the

record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it necessary, under sect. 216 of Act VIII. of 1859, to serve the judgment debtors with a notice, in order that they might, if they could, shew cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment debtors were not found. That was on the 2nd of April, 1872. The Subordinate Judge held that that was not a sufficient service upon the Defendants, and ordered the case to be struck off the file of pending cases. On the 3rd of May, 1872, he made an order: "That a notice be sent to the judgment debtors by post in a registered cover, fixing the 18th day of May as the date for shewing cause, and that the case be brought forward on the said date." On the 30th of May, 1872, the Nazir of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment debtors. The cover has been returned to-day by the post, open. The cover has a slip attached thereon, in which it is written, in Hindi, that *Buddri Nauth*, treasurer (that is one of the judgment debtors), refuses to take it. Therefore the cover in question is submitted with this petition." On the 3rd of June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment debtors at *Indore*, but the judgment debtors not having received the cover, it was returned. The judgment debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree holders' pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th of December, 1873, upon a report of the Mohurrer that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th of January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by sects. 285 and 286, Act VIII. 1859, and copy of the application for execution of decree, be sent to the agent at the *Indore* Cantonment." On the 9th of April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until the 3rd of June, 1872, that the decree holders had a certificate on which they had not acted and they prayed the Court that under sect. 237 certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment debtors in the *Indore* Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097, belonging to the judgment debtors, and that money was sent to the Judge at *Agra* by means of a bill. On the 13th of May, 1876, the Judge, having received the money from the *Indore* Agency, ordered that the Rs 13,097. 7*a*. 9*p*. be given over to *Meer Jaffar Hosein*, pleader for the decree holders, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the Defendants made the following objection, amongst others: "1. That the decree holders' decree is beyond time." Thereupon the Judge, on the 18th of May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree holders should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the

money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree holders, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st of May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires* and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorized by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree holders had not shewn due deligence in the case, and doubted whether any of the proceedings were *bonâ fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bonâ fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorized him to take up and dispose of the application then pending, and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to and orders of the Subordinate Judge if he had had jurisdiction would have been sufficient to prevent the operation of the *Statute of Limitations*, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. Sectin 14 of Act XIV. of 1859 enacts: "In computing any period of limitation prescribed by this Act the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same Defendant or some person whom he represents *bonâ fide*, and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which on appeal shall have been annulled, for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from any such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating *bonâ fide* and which due diligence, before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of sect. 20 of Act XIV. of 1859, with regard to executions. Section 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment decree or order of such Court unless some proceeding shall have been taken to enforce such judgment decree or order, or to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bonâ fide* and with due diligence before a Judge whom the party *bonâ fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of sec. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment debtors had appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even

though he had not, the proceedings would have been proceedings within the meaning of sect. 20. They ought equally to be so, though the judgment debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Roy Dhunput Singh* v. *Mudhomotee Dabia* (1). There, "An execution sale was stayed by consent for two months, and the execution-suit was struck off the file. During that period the executing creditor applied to the Court to restore the execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment debtor in another suit, alleging that he (the execution creditor) had attached them; but it turned out that he had attached them in another suit. Held, the application being *bonâ fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bonâ fides* of the proceedings. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty, that the decree of the High Court was erroneous, and that it be reversed; that in lieu thereof an order be made reversing the order of the Judge of Agra of the 31st of May, 1876, and ordering that the Rs. 13,097 7*a*. 9*p*., with such interest as they may be entitled to under the order of the 18th of May, 1876, be paid to the decree-holders; and that the appellants have the costs in all the lower Courts subsequent to the petition of objection of the 18th of May, 1876, and the costs of this appeal.

Solicitors for the Appellant: Messrs. *Watkins* and *Lattey*.

(1) 11 Beng. Law Rep. 23.

12th and 13th April, 1880.

PRESENT:

Members of the *Judicial Committee* — The Right Hon'ble Sir James William Colvile. The Right Hon'ble Sir Barnes Peacock. The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GANESHEE LAL TEWARI (Representative of the Decree-holders) ... } *Appellant.*

and

SHAMNARAIN and others (Representatives of the Judgment-Debtors) } *Respondents.**

Civil Procedure Code (Act VIII of 1859), s. 259 — Certificate of Sale—Mesne Profits.

The possession, with mesne profits, of land comprised in a *zur-i-peshgi* lease of the year 1851, was decreed to the *zur-i-peshgidars* in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favor of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the *zur-i-peshgidars*; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

Held, (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by sale, but remained in the representatives.

* I. L. R. 6 Cal. p. 213.

Appeal from a decree of the High Court of Bengal, 24th August 1876, affirming a decree of the Subordinate Judge of the Sarun District, 1st March 1876.

Mr. *R. V. Doyne* for the Appellant.

Mr. *C. W. Arathoon* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This was an application by Ganesh Lal Tewari, the appellant, as the representative of Maddan Mohan Tewari and Kalipershad Tewari, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouza called Kukurha awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought by the Tewaris against the predecessors of the respondents. The facts are shortly these: Perhlad Sen, who was the Rajah of Ramnagar, executed, on the 23rd December 1851, a zur-i-peshgi mortgage to the Tewaris of certain mouzas, including Mouza Kukurha, for a sum of Rs. 49,453. Shortly after the mortgage, one Binda Lall, the predecessor of the respondents, set up a *mokurari* lease of Mouza Kukurha, which, as he affirmed, had been granted to him by the Rajah prior to the zur-i-peshgi mortgage. The suit was brought by the Tewaris to set aside that *mokurari*, on the ground that it was colourable and put forward by Binda Lall in collusion with the Rajah to defeat the zur-i-peshgi, so far as related to Mouza Kukurha. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of "the entire 16 annas of Mouza Kukurha, the property let out in zur-i-peshgi lease, on the basis of a Zur-i-peshgi lease dated 23rd December 1851." The decree was, that the plaintiffs do recover possession of the entire 16 annas of the mouza, and that the *mokurari potta* be set aside. Then there is this award with reference to mesne profits: "That the amount of mesne profits from 1262 Fasli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lall." This was the decree of the Principal Sudder Amin. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which was initiated by the Rajah to set aside the zur-i-peshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee—*Kaleepersad Tewari* v. *Lalla Binda Lal* (1). In the result the Rajah failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution-proceedings are founded.

Prior, however, to any proceedings taken to execute this decree, the Rajah obtained a judgment for some debt against the Tewaris, and in the suit in which he obtained that judgment, he, by the usual proceedings, attached and sold their interest in the zur-i-peshgi lease. The purchaser under that sale was his own Rani, and it is said that she purchased benami for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Rani purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860 passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is as follows: "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874 A.D. Whatever title, right, and concern the judgment-debtor had in the said estate have been purcha-

(1) 12 Moore's I. A., 343.

sed by Mussamat Maharani Bind Basini Debi, inhabitant and proprietor of Ramnagar, Parganna Majhwa, for Rs. 15,500, and she has deposited the entire consideration-money. Therefore this certificate is granted to Maharani Bind Basini Debi, the auction-purchaser of the estate aforesaid; and it is hereby proclaimed that whatever title, right, and concern the said judgment-debtor had in the estate aforesaid have become extinct from the 7th December 1874, the date of sale, and vested in Maharani Bind Basini Debi, the auction-purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment-debtor." Then there is this description of what is sold: "The right and title under the original deed of zur-i-peshgi lease, dated the 23rd December 1851, for Rs 42,453 in respect of 15 mouzas,"—naming them, and including Kukurha It may be observed that the purchase-money is only Rs. 15,500 (fifteen thousand five hundred) and the zur-i-peshgi was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the respondents, who represent the judgment-debtor, Binda Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Rani, the auction-purchaser. But the decree which had been obtained by the Tewaris was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgi, and the right of the judgment debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profits under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrong-doers, and the action was brought by the mortgagee against them as wrong-doers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment-creditor in that decree have been transferred to the purchaser of the zur-i-peshgi rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is: "We also think with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained have passed, with the zur-i-peshgi rights on which the decree was based, to the purchaser of those rights." Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree, that might have been done. What was done was to sell the existing rights of the judgment-debtors under the zur-i-peshgi.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with a declaration that the appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale to the Maharani, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The appellant will also have the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Wrentmore* and *Swinhoe*.

Solicitors for the Respondents: Mr. *T. L. Wilson*.

27th, 29th, 30th, April, and 24th, June 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

LULLOOBHOY BAPPOOBHOY, CASSIDASS MOOLCHUND and others (Plaintiffs) ... } *Appellants,*

and

CASSIBAI and others (Defendants.) ... } *Respondents.**

Hindu Law—Inheritance—Order of succession to inheritance by the Hindu law of Western India—Gotraja sapinda—Right of widow of collateral relation.

By the Hindu law in force in Western India the widow of a collateral relation, although she is not specified in the texts among the heirs to members of her husband's family, may come into the succession as one of the classes of gotraja sapindas of that family.

According to the law of the Mitakshara, as accepted in Western India, the right to inherit in the classes of gotraja sapindas is to be determined by family relationship, or the community of corporal particles, and not only by the capacity of performing funeral rites

The High Court having affirmed as a right, according to the law actually prevalent in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate, as a gotraja sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage gotraja sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor.

Appeal from a decree of the High Court of Bombay, (April 29th, 1876,) reversing a decree of a Division Court, (April 20th, 1872,) except as to costs.

Cowie, Q. C., and *Graham*, Q. C., appeared for the Appellants.

Leith, Q. C., *Scoble*, Q. C., and *Mayne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

The question which arises in this appeal relates to the succession to the estate of *Mooljee Nundlall*, a Hindu inhabitant of *Bombay*, which opened on the death of his widow *Surusvuthebai*. *Mooljee* died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of *Mooljee's* death, his paternal first cousin, *Gungadass Vizbhoocundass*, was his nearest male relative. He died in the lifetime of *Mooljee's* widow, leaving no son, but leaving a widow *Mancooverbai*, the original Defendant in this suit, and two daughters, who all survived *Mooljee's* widow. *Mancooverbai* died during the progress of the suit, and the Respondent *Cassibai* is her executrix.

The first and second Plaintiffs in the suit claim to be entitled to the estate of *Mooljee*, as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice *Westropp*:—

"It has not been denied that, according to the law, which under the Mitakshara and Mayukha prevails in this Presidency, *Lulloobhoy* and *Moolchund* (the father of *Cassidass*, the second Plaintiff) were gotraja-sapindas of *Mooljee*; the common ancestor of them and of *Mooljee* was *Motilall*, who, counting inclusively, was sixth in ascent from *Mooljee*, and the brothers *Lulloobhoy* and *Moolchund* were seventh in descent from *Motilall*. They are therefore on the extreme verge of sapinda relationship."

The other Plaintiffs are purchasers from the first two Plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the

* 7 Cowell's I. A. p. 212; I. L. R. 5 Bom. p. 110.

Courts in *India*, and the single question to be now decided is, whether by the Hindu law of inheritance prevailing in *Western India*, *Mancooverbai*, the widow of *Gungadass*, who as paternal first cousin was related in the third degree to *Mooljee*, became by her marriage with *Gungadass* a gotraja-sapinda of *Mooljee*, and as such entitled to succeed to his estate in preference to the first and second Plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice *Bayley*, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause decided in favour of the right of the widow, following the decision of a Division Bench in the case of *Lakshmi bai* v. *Jayram Hari* (1). Upon a remand of the case on other points, Mr. Justice *Bayley*, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favour of the Plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a full Bench of the *Bombay* High Court, and Mr. Justice *Bayley's* original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in *Bengal* and *Southern India* is opposed to the right claimed by the widow's; but they arrived at the conclusion that a different interpretation of the law has been accepted in *Western India*, and the elaborate judgments of the Chief Justice (in which Mr. Justice *Sargent* concurred) and of Mr. Justice *West* are directed to elucidate the grounds on which the distinction rests.

The books whose authority is principally followed in *Western India* are *Menu*, the Mitakshara, and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of *Bombay*. The learned Judges have sought to support their decision in favour of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in *Western India*, evidenced by decisions and the opinions of Shastris, has fixed and determined the law for that part of *India*.

A text of *Menu* was cited, which is supposed to affirm the right of women to inherit:—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and their issue, samanodaka or distant kinsmen shall be the heir." (Chap. IX., pl. 187.) The words "male or female" appear to have been imported into the text by Sir *W. Jones* and Mr. *Colebrooke* on the authority of a commentator, *Kalluka Bhatta*. Even if it be assumed that these words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the *Bengal* and *Madras* schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of *Baudhayana* which declares that "women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in *Benares*; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. III., part 7.)

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in *Western India*, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja-sapinda of her husband's family, and as such entitled by the law prevailing in *Bombay* to inherit the estate of one of its members.

It is not disputed that on her marriage

(1) 6 Bomb. H. C. R. 142.

the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. *Borradaile* to his reports may be referred to. He says, "because a woman on her marriage enters the gotra of her husband, so Respondents, being sugotras of *Pitambur*, are sugotras of his wife also" (1 *Borr.* 70, n. 2) Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to shew that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making funeral offerings. It was also cited for the declaration that husband and wife and brother's wives are sapindas to each other:—

"(He should marry a girl) who is non-sapinda, *i e.* (1), a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such an one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with paternal uncles and aunts and the rest. So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brother's wives also are (sapinda relation to each other) because they produce one body (the son), with those (severally) who have sprung from one body (*i e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that wherever the word sapinda is used, there exists between the persons to whom it is applied) a connection with one body, either immediately or by descent."

A translation of some passages in the Sanskara Mayukha to the same effect will be found in the judgment of Chief Justice *Westropp*, of which the following is an extract:—

"Therefore (to explain the different parts in the formation of the word 'Asapinda' by dissolving the compound 'Asa-pinda,') she is sapinda who has one and the same pinda (body) (*i e.*) Deha-vayava (constituent atoms) *na* (not) *sapinda* is Asapinda. Thus, therefore, the father's constituent atoms, viz., blood, fat, &c., directly enter into the body of the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great-grandfather, &c., also somehow the transmission of constituent atoms mediately exists. So with the mother, &c., also so the wife has sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sapindya in other cases also should be inferred."

Vijnyaneswara and *Nilakantha* were, no doubt, treating in these passages of

(1) Sic.

sapinda relationship in connection with marriage; but no further definition of sapindas is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and consequently where it was treated of in relation to the right to inherit.

In addition to the above-mentioned authorities, the Chief Justice refers to the Dattaka Mimansa, as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned Counsel for the Respondents that, even if sapindaship for the purpose of inheritance had to be determined by the efficacy or funeral oblations, the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather *Kissoredass*, the common ancestor (in the third degree) of her husband and *Mooljee*. Their Lordships do not think it necessary to consider the authorities on which this contention was supported (though they may observe that a judgment of Mr. Justice *Dwarkanath Mitter* affirming that a sister's son is, under the Mitakshara, as interpreted in *Benares*, entitled to succeed, throws great light on the subject (1); since they are prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the law of the Mitakshara, as interpreted and accepted in *Western India*, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

(1) 2 Beng. L. R. (F.B.R.) 28.

If then, as already pointed out, the wife upon her marriage enters the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all, as one at the class of gotraja-sapindas, and it is in this way that her claim has been put forward at the Bar.

The Author of the Mitakshra, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in c. 2, s. 5, to treat of the succession of Gentiles. Extracts from this section are given in the judgment (2) of the Chief Justice, the translation of Mr. *Colebrooke* being amended by substituting for the English rendering of the names of the various classes of kindred, the Sanskrit names given in the original.

The six first slocas are thus rendered :—

"'1. If there be not brother's sons, gotrajas (3) share the estate. Gotrajas are the paternal grandmother and sapindas (4) and samanodakas (5).'

"2. In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before (6) cited,

(2) Ind. Law Rep. (*Bombay* Series) ii. 431.

(3) Trans. by Colebrooke, "Gentiles."

(4) Trans. by Colebrooke, "relation connected by funeral oblations of food."

(5) Trans. by Colebrooke, "relations connected by libations of water."

(6) Mitak. ch. ii. s. 1, pl. 7.

'And the mother also being dead, the father's mother shall take the heritage' (1). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the inheritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction.

"3. On failure of the paternal grandmother, gotraja-sapindas (2)—namely, the paternal grandfather and the rest—inherit the estate."

For bionagotra sapindas (3) are indicated by the term bundhu (4).

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great grand-father,' his sons and their issue, inherit. In this manner must be understood the succession of samanagotra sapindas (5).

"6. If there be none such, the succession devolves on samanodakas (6), and they must be understood to reach the seven degrees beyond sapindas (7), or else as far as the limit of knowledge and name extend. Accordingly *Vrihat Menu* says, 'The relation of the sapindas ceases with the seventh person, and that of samanodakas (8) extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra (9).'"

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to shew that women are entitled to inherit as sapindas, the paternal gradmother being named as the first sapinda for this purpose. There is a passage also to this effect in the Mayukha, c. 4, s. 8, pl 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive, and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of c. 2, s. 5, of the Mitakshara cited above:—"On failure of the paternal grandmother, gotraja-sapindas, namely, "grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great-grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhus contained in the Mitakshara is not exhaustive: *Girdhari Lall* v. *The Bengal Government* (10). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. *Graham* observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

Mr. Justice *West*, after discussing the Mitakshara and some of its commentators, came to the conclusion that "upon the whole it would appear more probable than not, upon the text of the Mitakshara and its recognised exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favourable to her right to inherit. The

(1) Menu, ch ix pl 217.

(2) Trans. by Colebrooke, "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

(3) Trans. by Colebrooke, "kinsmen sprung from a different family, but connected by funeral oblations."

(4) Trans. by Colebrooke, "Cognate."

(5) Trans. by Colebrook, "kindred belonging to the same general family and connected by funeral oblations."

(6) Trans. by Colebrooke, "kindred connected by libations and water."

(7) Trans. by Colebrooke, "the kindred connected by funeral oblations of food."

(8) Trans. by Colebrooke, "those connected by a common libation of water."

(9) Trans. by Colebrooke, "the relation of family name."

(10) 12 Moore, Ind. Ap. Ca. 448.

important point for consideration remains, namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the *Bombay* school, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayukha is also very fully discussed in the judgment of Mr. Justice *West*, and his consideration of it led him to the conclusion that, if the "foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below who have interpreted its text in a sense highly favourable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr Justice *West*:—

"*Visreswara*, the author of the Subodhini, the chief commentary on the Mitakshara, says that 'gotraja' may properly be taken to include both males and females; and *Balambhatta*, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother."

The author of the Vaijayanti, a commentary on *Vishnu*, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr *Colebrooke* upon a case in the Appendix to *Strange's* Hindu Law (vol ii. p. 234). Mr. *Colebrooke* thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the Shastris, and the decisions of the Courts bearing on the question.

The answers of the Shastris, which have been referred to at the Bar, will be found in a Digest of the Hindu law of inheritance by Messrs. *West* and *Buhler*, compiled from the replies of the Shastris recorded in the Courts of the *Bombay* Presidency. Mr. *West* is the Judge of the High Court whose judgment has been already adverted to. These replies are in many cases unsatisfactory and incorrect, but they are numerous, and the series taken as a whole undoubtedly recognises and affirms the right of the widow to inherit as a gotraja-sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice *West*, and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the *propositus*.

Some early decisions of the Sudder Adawlat, reported by *Borradaile*, are to the same effect. In the case of *Dhoolubh Bhuee* and *Others* v. *Jeevee* (A.D 1813), it was held that *Jeevee*, the widow of the son of a brother of *Pitamber*, the *propositus*, was entitled (on the death of *Pitamber's* widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of *Pitamber* (1). It is not, however, stated in the report when *Jeevee's* husband died.

In another of the cases cited from *Borradail* (*Muhalukmee* v. *The Grandsons of Kripa-troocul* (2), the Sudder Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a daughter's son being specially provided for by the Mitakshara (c 2, sec. 2, pl. 6).

(1) 1 Borr. 67.
(2) 2 Borr. 519.

In a later case reported in *Borrodaile* (1824), it was held that the widow of a predeceased son was entitled to inherit in preference to the brother of the *propositus* (*Roopchund Tulukchund* v. *Phoolchund Dhurmchund and Another* (3)). This seems to be a direct decision on the right of the widow to inherit, though whether in the order of heirs the preference was rightly accorded to her in this case may be questioned.

In the case of *Lukshmibai* v. *Jayram Hari and Others*, the High Court of *Bombay* (Justices *Lloyd* and *Melvil*) gave a clear and unqualified judgment in favour of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the *propositus*. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the *Bombay* side of *India*.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice *Westroop* and Mr. Justice *West*, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in *Western India*. The Chief Justice has passed a long judicial career in the Courts of *Bombay*, and Mr. Justice *West* is one of the compilers of the digest of the law of inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in *Bombay* is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

Solicitors for the Appellants: *Ashurst, Morris, Crisp, & Co.*

Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

(3) 2 Borr. 616.

4th May, 1880.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GRISHCHUNDER CHUKERBUTTY and another, Guardians of Dwarkanath Chuckerbutty, a Minor (Defendants).... *Appellants*,

and

JIBANESWARI DEBIA, Mother and Guardian of Kailas Chunder Chuckerbutty (Plaintiff). ... *Respondent*,

and

GRISHCHUNDER CHUKERBUTTY, Guardian of Dwarkanath Chuckerbutty, a Minor (Defendant) ... *Appellant*,

and

BISESWARI DEBIA, Mother and Guardian of Prosunno Kumer Chuckerbutty (Plaintiff). ... *Respondent*.*

Sale in Execution of the "right, title, and interest" of a Judgment-Debtor in a partly executed Decree—Possession of land attached under Reg. V of 1805, s. 26.—Right of Purchaser.

A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a talook, which had been

* I. L. R. 6 Cal. p. 243

since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Reg. V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Amin purporting to put the decree-holders into constructive possession of a certain number of mouzas of the talook.

In 1850, the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, "their right, title, and interest" in the decree of 1843. *Held*, that possession of the mouza having been delivered, so far as it could be delivered, considering the attachment to which the talook containing these mouzas was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution-sale was only the unexecuted portion of the decree of 1843.

APPEALS, on leave obtained, from decrees of the High Court of Bengal, dated 12th June 1876, affirming decrees of the Subordinate Judge of Mymensing, dated 4th January 1875, so far as they were adverse to the defendants, appellants. The suits were orginally dismissed by the Court of first instance on the ground of limitation (14 June 1873); but, on appeal to the High Court, having been remanded for trial, as being not barred by limitation, they were tried and decided in favour of the plaintiffs, against the appellants—decisions which were upheld in the High Court.

The same question was raised by both appeals, *viz.*, whether the entire rights of the respondents, and of those whom they represented, under a decree dated 11th November 1843 of the Court of the Principal Sudder Amin of Mymensing, had been purchased in 1850 on behalf of the predecessors in estate of the appellants, or only such portion of that decree as then remained unexecuted; it being contended by the respondents that, at the date of the sale, the decree had been partly executed.

Mr. *Cowie*, Q. C., and Mr. *J. Graham*, Q. C., for the appellants.

The respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This case was reduced during the argument to a point of law, which becomes intelligible upon the statement of a few facts.

Brojo Kishor and Ram Kishor were brothers, joint in estate, of whom Ram Kishor died sometime before 1835, leaving two sons, Ram Kumar and Nobo Kumar. In the year 1835 an estate, consisting of an 8-anna share in a talook, called Newaz Ali, and belonging to one Abdul Samad, was bought in the name of Ram Kumar, but with the joint funds of the family. Brojo Kishor died in 1836, having, shortly before his death, separated from the other branch of the family. He left two widows, each of whom adopted a son, one adopted son being Ishan Chunder and the other Mohesh Chunder. Upon, or sometime after, the death of Brojo Kishor, Ram Kumar set up an exclusive title to the purchased estate; and the representatives of Brojo Kishor, who at that time were the adopted sons, in the year 1839, brought a suit against Ram Kumar and his brother Nobo Kumar, for the purpose of having their title declared and obtaining possession of Brojo Kishor's moiety of this property, and obtained a decree awarding to them that possession on the 11th November 1843. Both the Plaintiffs in that suit afterwards died, Ishan Chunder being now represented by his widow Jibaneswari, the respondent in one of these appeals, and Mohesh Chunder by his adoptive mother Biseswari, the respondent in the other appeal. After their death, and in or about 1848, the representatives of Ram Kishor obtained a decree against the two last-named widows, as the then representatives of Brojo Kishor, in respect of a money demand against Brojo Kishor. They proceeded to the execution of that decree. The usual notice and proclamation of sale were made, and on 16th July 1850 the appellants bought, in pursuance of the usual proclamation, among other things, the right, title, and interest of the judgment-debtors in the decree of the 11th November 1843. The question in the cause is, what passed by the sale of that decree?

It is necessary to state that, in the year 1837, the whole talook of Newaz Ali,

which was subject to a number of disputed claims, was attached by an order of the Civil Court, and remained in the possession of an officer of the Collector untill the year 1866. But, notwithstanding this, the Court, upon the representatives of Brojo Kishor obtaining their decree in November 1843, attempted to give the decree-holders, at all events, constructive possession of a certain number of the mouzas, part of their share of the purchased estate, and for that purpose deputed an Amin to ascertain what belonged to them. The Amin made a lengthened investigation, and, after hearing both parties, and going over the ground, he marked out by sticks and posts certain lands which, according to his view, the decree-holders were entitled to, and he gave them, or professed to give them, possession of those lands; and he also required the ryots to sign *kabuliats* with respect to these lands. These proceedings came before the Court, and were approved by the Court. It is undoubted, therefore, that the Court intended to deliver possession as far as it could, and believed that it had the right to deliver possession effectual for the execution of the decree to the decree-holders of a certain number of mouzas. The question is, whether the representatives of Ram Kishor, buying the decree on the 16th of July 1850, bought with it those mouzas with respect to which it had been executed in the manner described, or only so much of the property to which it relates with respect to which it remained unexecuted?

The attachment continued untill 1866, when it was discharged. Thereupon Jibaneswari brought her suit for the purpose of obtaining possession of her share of those mouzas of which, as she alleged, possession had been given in execution of the decree of the 11th November 1843. Biseswari also brought a suit for the purpose of obtaining her share of the same mouzas. These suits involve the same question, and the same judgment applies to both of them. The defendants alleged their right to the whole of that which had been bought of Abdul Samad. The first Court in India found in favor of the plaintiffs in the two suits with respect to the greater part of the property. That decision was affirmed by the High Court, upon the grounds on which it was given, the main ground of both decisions being that, in point of fact, possession was delivered of the mouzas in question before the sale of the 16th August 1850, as far as it could be delivered, considering the Government attachment to which the whole talook was subject, and that the delivery of the possession, such as it was, was effectual to execute the decree.

Their Lordships have felt some difficulty about this case; but, on the best consideration they are able to give it, they do not see their way to reversing the decision of the High Court. It has been contended, with a good deal of force, that no actual possession could have been given while the whole talook was under attachment. At the same time, the Court appear to have undertaken to execute the decree, to give such possession as could be given, and to have adopted proceedings which they deemed proper for that purpose, and possession has been given in the manner described of the mouzas now in question. That being so, the question is, what was sold by the description of "the right and interest of the judgment-debtors in the decree?" Was it that of which possession had been given in the manner described, or was it only of that portion of the decree which remained to be executed? Their Lordships, on the whole, think it must be taken that what was put up for sale, what was intended and what was understood to be sold, must have been the unexecuted portion only of the decree. Under these circumstances, although the case is not unattended with difficulty, their Lordships will humbly advise Her Majesty that the decision of the High Court be affirmed. Inasmuch as the respondents have not appeared by counsel, there will be no costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Watkins* and *Lattey*.

Solicitor for the respondents: Mr. *T. L. Wilson*.

6th, 8th, and 11th May 1880.

PRESENT:

Members of the *Judicial Committee.*—The right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Bombay.

LAKSHMAN DADA NAIK (Defendant) ... } *Appellant,*

and

RAMCHANDRA DADA NAIK (Plaintiff). ... } *Respondent.**

Hindu Law—Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitation Act XIV of 1859, Section 1, Clause 13—Resjudicata—Act VIII of 1859, Section 2.

A Hindu of the Southern Maratha Country, having two sons undivided from him, died in 1871, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed, on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveables the claim failed, because they were situate beyond the jurisdiction of the court

Held, first, that this suit was not barred under Act VIII of 1859, section 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death

Secondly; that the suit was not barred under the Limitation Act XIV of 1859, section 1, clause 13. As to the immoveables; setting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables on the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, section 14. As to the moveables; assuming that they could, on the question of limitation, be treated as distinct from the moveable, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the moveables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous

So far, also, as the father's interest was concerned, the succession only opened on his death.

Thirdly; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one third share.

Held, that under the Mitakshara law, as received in Bombay, the father could not dispose of his one-third share by will

The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond the decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will, were held to be sound and sufficient to support that dicision.

APPEAL from a decree of the High Court of Bombay (2nd August 1876) confirming, as to the questions raised in these proceedings, a decree of the Subordinate Judge of Belgaum (8th January 1875.)

Leith, Q. C., and *R. V. Doyne* for the appellant.

Cowie Q. C, and *J. D. Mayne* for the respondent.

11th May, 1880.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The Appellant in this case is the second, and the Respondent the eldest, son of one *Dada Mahadev Naik*, who died on the 13th of July, 1872. *Dada Mahadev*

* 7 Cowell's I. A. p. 181, I L. R. 5 Bom. p. 48

Naik was a son of *Mahadev Narayan Naik*, who died in 1847, leaving another and eldest son called *Hurba*, and seven grandsons, four of whom were sons of predeceased sons, and three, namely, the Respondent, the Appellant, and a younger son, *Keshav*, were the sons of *Dada Naik*. All these persons after the death of *Narayan Naik* constituted a joint and undivided Hindu family, of which *Dada Naik*, his eldest brother *Hurba* being dumb, and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements the other members of the larger family became separate from *Dada Naik* and his three sons, who in the year 1857 were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at *Shahapoor*, in the *Southern Maratha* Country, and of an ancestral business which was carried on partly there, and partly in a *kotee* at *Bombay*, which appears to have been managed by *Gomashtas*. About the year 1858 great dissensions arose between the Respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that in 1858 the father and his two younger sons left the family house, the Respondent remaining there; and afterwards they, in the year 1864, built for themselves with the family funds another house at *Belgaum*.

Between the two last dates, and in March, 1861, the Respondent instituted a suit in the late Supreme Court of *Bombay* against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th of August, 1861, his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

In 1868 *Keshav Naik*, the youngest son, formally separated himself from the joint family, taking Rs.45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th of November of that year is in the Record, and it may be observed that it treats the old family house at *Shahapoor* as still part of the joint family estate.

The father afterwards made a will dated the 30th of October, 1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the Respondent, as having received already more than his share of the estate, gave him only the house at *Shahapoor* and Rs.500, and gave all the rest of the property to his second son, the Appellant. He died, as has been before stated, in July, 1872.

In the following October the Respondent brought this suit against his brother, the Appellant. By it he claims to be entitled to one-half of the joint business and estate as it stood at the death of his father. Various defences were set up by the Appellant, and the issues as finally settled were the following:—

"1. Whether the suit is barred by sect. 2, Act VIII. of 1859"—that is, whether the decision of the Supreme Court on the demurrer amounted to *res judicata*. "2. Whether the suit is barred by clause 13, sect. 1, Act XIV. of 1859"—that is, whether it was barred by limitation under that statute "3 Whether the property in suit is deceased *Dada Naik's* ancestral or self-acquired property. 4. If the former, whether Plaintiff has taken or received so much out of it as could be considered more than what he was entitled to for his share. 5. If the latter, whether the deceased *Dada Naik* made the original of exhibit No. 16, and to what sum is the Plaintiff entitled under it. 6. Whether the property left by the deceased *Dada Naik* is correctly estimated. 7. Whether the plaintiff is restricted in getting his share on any other ground, as alleged by Defendant."

It was admitted at the bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th and 7th of these issues cannot

now be questioned. It must, therefore, be taken that the property in quetion was ancestral; that the Respondent, the Plaintiff, has not received his full share of it; that the *factum* of the will has been established; and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the plaintiff's claim. Again as to the will, it is now conceded that under the *Mitakshara* law, as received in *Bombay*, by which this family is governed, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. It has, however, been contended that inasmuch as under the *Mitakshara* law a father and his sons are during his life joint co-parceners in family estate, and that it has now been decided by the Courts in the South and west of India that one co-parcener may, by act *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of this contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be devided between the brothers to two-thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of *Bombay* in 1861 was that the respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable, though it might be ancestral, property; and that the Supreme Court had no power to make a partition of the immoveable property which was beyond the limits of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th clause of section 1 of Act XIV of 1859, which is as follows:—

"To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, the period of 12 years from the death of the persons from whom the property alleged to be joint is said to have descended or on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

In considering the application of this enactment to the present suit, we may leave out all that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to enforce the right to share in any property moveable or immoveable, on the ground that it is joint family property." The section gives two periods from which the twelve years may be calculated; one is "the death of the person from whom the property alleged to be joint is said to have descended," and the other is "the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate."

It is contended that in this case, which is governed by the *Mitakshara* law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the Statute of Limitations, but the grandfather; on whose death the father and his sons all became co-parceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended, but for the present purpose it may be assumed that the property descended from the grand-father as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice *Holloway* and Mr. Justice *Collett* in the case reported in the 3rd *Madras* High Court reports, p. 99, as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the *Mitakshara* law, though such difficulty would not exist in the case of a like family governed by the law of Lower Bengal. They are not prepared, however, to affirm that in this particular case the father may not be held to be "the person from whom the property alleged to be joint is said to have descended" within the meaning of the Act. The claim is twofold. It is to establish the right of the plaintiff as a co-percener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on his father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of disposition over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitatation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument which the learned Counsel for the Respondent have founded on the possession by the Respondent since 1858 of the family house at *Shahapur*. How do the facts on this part of the case stand? The Respondent was, unquestionably, a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has ever since 1858 been in possession, of the house at *Shahapur*, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the appellant was a party, and also by the father when he made his will, as continuing to be joint family property. The contention of the Appellant and of his father seems to be embodied in the 4th issue in the suit, *viz.*, that the Respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a co-parcener as he would have done upon formal partition. This issue has, however, been found by both Courts in favour of the Respondent, who must, therefore, be taken to be entitled to his full rights as a co-parcener, except so far he may be barred from asserting them by the Statute of Limitation. Now, so far as the immoveable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the Respondent all along been in the enjoyment of part of that property, *viz.*, the house at *Shahapur*, but, under the 14th section of the Act, he is entitled to exclude from the computation of the period of limitation on the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immoveable property, proceeded on the ground of want of jurisdiction over it. There is, therefore, no bar in this case to a suit for the partition of the immoveable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Mr. Justice *Holloway* in the case above referred to, is necessary to lay the ground for the application of the statute at all.

It is argued, however, on the part of the Appellant that the claim is substantially a claim to share in the ancestral business and other moveable property, and that the right to do so has been barred by reason of the Respondent having received no payment there out since 1858. Their Lordships will assume that

the claim as to the moveable may thus be treated as distinct from that as to the immoveable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the Appellant is in this case estopped by the proceedings of the Supreme Court of *Bombay* from setting up the statute as a bar to the respondent's claim. They treat the order of the 30th of August, 1801, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the Respondent was not entitled to sue in his father's lifetime for a partition of the moveable property and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the Appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the *Statute of Limitations* because it was erroneous in point of law, and the Respondent ought to have appealed from it. There seems to their Lordships to be no warrant in law for such a contention. For the above reasons they are of opinion that the plea of limitation cannot be maintained.

The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this appeal, and they have not the advantage of having the judgment of either Indian Court upon it. It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of *Madras* and *Bombay* which have been recognised by this Committee as establishing that one of several coparceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The *Madras* High Court has gone further, and ruled that an alienation by gift or other voluntary conveyance *inter vivos* will also be valid against the non-assentient coparceners. And, assuming this latter proposition to be law, the learned Counsel for the Appellant have insisted that it follows as a necessary consequence that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at *Bombay*. The decisions of the High Court of *Bombay*, notably those reported in the 10 *Bomb.* H. C. R. p. 139, and 11 *Bomb.* H. C. R. p. 76, have ruled that a coparcener cannot without the consent of his co-sharers either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of the testamentary power over the undivided share fails.

Again, the High Court of *Madras*, though admitting that a coparcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by will (see the case reported 8 *Madras* H. C. R. p. 6). Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheopershad Singh* (1), and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged

(1) Law Rep. 6 Ind. Ap. 88; *Ante*, p. 1.

share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at *Madras*, as well as at *Bombay*, is against the proposition of the learned counsel for the Appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* above referred to they observed :—"There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law as established in *Madras* and *Bombay* has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the *Bombay* and the *Madras* High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the *Madras* Court has decided against the power of alienation by will are sound, and sufficient to support that decision. The Appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The costs of the appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.

Solicitors for the Appellant: *Ashurt, Morris, Crisp, & Co.*

Solicitors for the Respondent: *Ramsden & Austin.*

10th, 11th and 22nd June, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature North-Western Provinces at Allahabad.

SOPHIA ORDE and JAMES SKINNER (Plaintiffs). ... } *Appellants,*

and

ALEXANDER SKINNER ... (Defendant). ... } *Respondent*,*

Act VIII of 1859 (Civil Procedure Code), s. 5—what constitutes "dwelling" within the meaning of that section—Commission, under a will, payable to manager of joint estate.

A testator bequeathed the income of his "*altamgha*," "zemindari," and "thikadari lands" situate in the district of Delhi, Hissar, and Bulandshahur, to his five sons in equal shares, and to their issue; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as "*altamgha*" were in the Bulandshahur district, within the local limits of the jurisdiction of the Civil Court of Meerut; and on them an establishment was maintained at the

* 7 Cowell's I. A. p. 196, I. L. R. 3 Alls. p. 91.

expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Delhi. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses "with mutual consent in the *altamgha* and zemindari"; also that certain memorials of the testator were to be retained by the manager at Bilaspur. At this place the manager used to stay, occasionally, though travelling, for the most part, about the estate during the cold weather.

No particular place for rendering the yearly accounts was fixed, either by contract or in practice, but they were rendered by the manager to the sharers at different times and in different places, including Delhi, Bilaspur, and Hansi; at which last place, it being the Sadar station of Hissar, the older records of the estate were kept.

When the suit was brought the manager was actually residing at the hill station of Mussurie, in the Saharanpur district, for the hot weather; and in his answer he stated that the unsettled accounts were open to inspection by the sharers at Bilaspur.

Held that a person might "dwell," within the meaning of Act VIII of 1859, s. 5, at more places than one; and that, on the evidence, this manager so dwelt at Bilaspur as to make him subject to the jurisdiction of the Meerut Court in this suit. It was, accordingly, not necessary to consider whether he was or was not also subject to that court's jurisdiction by reason of the cause of action having arisen within its local limits; nor was it necessary to consider whether he had, or had not, such a dwelling-place at Hansi as would have rendered him subject to the jurisdiction of the Hissar (Punjab) Courts.

Other questions disposed of in the court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing, or varying, the order of the original court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was held to be settled by the indication of the latter mode of calculation in the will.

Appeal from a decree of the High Court, North-Western Provinces (5th April, 1877); reversing the decree of the Subordinate Judge of Meerut (27th June, 1876).

22nd June, 1880.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

This appeal is one of several which have come before this Board in suits concerning the estate of the well known Colonel *James Skinner*, the construction of his will, and the somewhat peculiar relations of his descendants *inter se*. Colonel *Skinner* died in 1841, leaving five sons, besides other children. His public services had been rewarded by a large altamgha grant of land in the district of *Bulandshahar*, which lies within the local jurisdiction of the Judge at *Meerut*, in the Noth-Western Provinces; and he had also considerable landed and other property at *Delhi* and other places which are now, for all civil purposes, annexed to the *Punjab*, and notably an estate called *Haryana*, in the district of *Hissar*, of which the chief or *sadar* station is *Hansi*. Upon the lands constituting the altamgha he built a fort, and that estate seems to have thereafter acquired, if it did not before possess, the name of *Bilaspur*. At the time of his death he was resident at *Hansi*, where the corps of cavalry which he commanded was stationed.

His will bears date the 10th of May, 1841. The material passages of it are the following:—"I leave and bequeath the income of my altamgha, zemindary, and *thika* villages, gardens, and houses to my five sons herein named, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the altamgha or zemindary. One of my sons, whichever is most fit or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income; and he is bound to shew a faithful account current yearly to his brothers. Should they like to live together they may live at *Bilaspur*, and build houses with mutual consent in the altamgha or zemindary. Should my personal property not pay off all my debts, they may sell my house at *Delhi* and my garden at *Trevillian Gunj*; but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five sons."

Then follows a clause providing for the event of any of the sons dying under age

and without issue, and the next material clause is: "I will and declare that it is my intention and meaning that, in the event of all or any of my afore-mentioned sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, dying and leaving issue or children, the shares of the fathers shall devolve on the issue or children, to be by them divided in equal shares." And in a subsequent part of the will is this clause: "All my trophies and presents given by my commanders to be retained by the manager of the estate at *Bilaspur*, as remembrance of me to the survivors of the family."

The Appellants, the Plaintiffs in the suit, are children of *James*, one of the sons who are now deceased; and whatever doubts may at one time have been raised as to their title, it has now been conclusively determined, by the decision of this Board in *Barlow* v. *Orde* (1), that they are entitled in equal moieties to the share and interest of their father under their grandfather's will. The Respondent, *Alexander*, is one of the surviving sons of the testator, and the present manager of the estate under the terms of the will. There can, therefore, be no doubt that in a suit instituted in the proper *forum* he is accountable to the Plaintiffs for their father's one-fifth share in the net income of the whole estate.

The suit, which may be taken to be one to enforce this accountability, was instituted in the Court of the Subordinate Judge of *Meerut* on the 8th of August, 1874. It claimed an account from February, 1863 to 1874, the whole period of the Defendant's management.

The Defendant, by the written statement first filed by him, objected that the Plaintiffs had not observed the provisions of sects. 12 and 13 of Act VIII. of 1859, which relate to suits for land lying within different jurisdictions, and also that the suit was triable only by a Revenue Court, —objections now admitted to be futile; and on the merits, not disputing his general liability to account, he insisted that the accounts had been settled up to the year 1280 Fusli (1872–3), and that the subsequent accounts were then lying for inspection by the sharers in the estate, in the manager's office, which would remain at *Bilaspur* from the 2nd of January to the 2nd of February, 1875.

After the issues had been settled a further objection to the jurisdiction of the Court was taken. In what precise form it was originally taken does not appear, except by the statement of the then Subordinate Judge in his proceeding. That statement is as follows: "Among those pleas there was one to the effect that, as the head office of the estate was at *Hissar*, in the *Punjab*, the suit for the rendition of accounts could not be laid in the *Meerut* Civil Court. On the date fixed, the evidence offered by the parties on that point was received, and after a consideration of the evidence so tendered and received, my predecessor, Mr *Smith*, came to the finding that, to quote his words, 'the *Hansi* office is apparently a mere depôt for the custody of the old accounts and papers relating to the estate. The managers appear to be peripateties, carrying with them their office, and transacting the business of the estate from wherever they happen to be. A manager may choose to store his books wherever he pleases; but the founder of the family specified *Bilaspur* as the family home, and where all insignia of the family are still kept, and consequently a suit for settlement of any account relating to the general estate must fall within the jurisdiction of the *Meerut* Court, under which *Bilaspur* is included.' The above decision was come to on the 20th of April, 1875; and after the determination of that and other preliminary points, the accounts of the estate were examined by a Commissioner appointed for the purpose, and, when after the lapse of several months, and at heavy cost to the Plaintiffs, the examination of the accounts was nearly over, a petition was filed on the part of the Defendant, tendering in evidence a copy of a vernacular proceeding dated the 13th of October, 1860, and a *parwanah* in original from the Deputy Commissioner of *Hissar*, addressed to *Kyali Ram*, agent

(1) 13 Moore's Ind. Ap. Cs. 277; 2 P. C. J. 549.

of the *Skinner* estate, stationed at *Hansi*, dated the 16th of October, 1860, and referring to a book in which copies of *parwanahs* addressed to *Khyali Ram* were kept, and which had been produced in a suit between the parties, or at least some of them, and contending that, as those documents would shew that the head office was at *Hansi*, the suit for rendition of accounts could not lie in the Civil Court of *Meerut*."

The petition here referred to is in the record, and the effect of the final judgment of the then Subordinate Judge upon it, on the 27th of March, 1876, was to affirm the decision of his predecessor, Mr. *Smith*, upon this objection to the jurisdiction. The suit accordingly proceeded before him, the accounts taken being, apparently, by force of the *Statute of Limitations*, limited to the six years immediately preceeding the institution of the suit; and on the 27th of June, 1876, the Subordinate Judge gave his judgment upon the merits. From this it appears that on the face of the accounts rendered there was due to the Plaintiffs, deducting the payments made on account to them, an admitted balance of Rs.7,462. 2*a* 4*p*.; that the Plaintiffs, having been allowed to surcharge and falsify the accounts, had succeeded in raising that balance to the principal sum of Rs.61,427. 11*a*. 10*p*, for which, with the further sums allowed for interest and costs, amounting in all to Rs.94,957. 15*a*. 10*p*., a decree was passed against the Defendant. From this decree he appealed to the High Court of the Noth-West Provinces. The first of his grounds of appeal was that, with reference to sect. 5 of Act VIII. of 1859, the Lower Court was wrong in holding that it had jurisdiction to hear the cause. There were eleven other grounds of appeal, some of which it will be necessary to notice hereafter; but the appeal was heard by the High Court upon the first alone, when, holding that the Lower Court had no jurisdiction to entertain the suit, it reversed the decree and dismissed the suit.

The sole question argued in the first instance before their Lordships was that of jurisdiction; they have already intimated that their opinion upon it is adverse to that of the High Court, and their reasons for that conclusion will now be stated.

It is conceded on both sides that the question turns on the construction to be put upon the 5th section of Act VIII. of 1859; and that it lay on the Plaintiff to shew that either the cause of action arose, or the Defendant at the time of the commencement of the suit was dwelling, within the limits of the jurisdiction of the *Meerut* Court, within the meaning of that enactment.

Their Lordships will first consider whether the Defendant was subject to the jurisdiction of the Court by reason of his dwelling within its local limits. Some evidence was given on this point, and the conclusion of the High Court upon it is thus expressed: "It is admitted that *Alexander Skinner*, at the time the suit was brought, was actually residing at *Mussuri*, in the district of *Saharanpur*. He has there a private house, in which he resides during the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at *Hansi*, sometimes at *Delhi*, and sometimes at *Bilaspur*, in one of the houses which have been maintained at the expense of the estate." One of the witnesses, indeed, went so far as to affirm that the Defendant's sole permanent residence on the plains was at *Hansi*; but the High Court has not acted on that evidence, which their Lordships think is untrustworthy It is not contended that the proper *forum* for the trial of this suit for account was at *Saharanpur*, by reason of the Defendant's residence, at the time of its commencement, at the hill station of *Mussuri*. Such residence was obviously more or less of a temporary character, like that of a man in this country who lives in a house of his own at a watering-place during a portion of the year. And if the Defendant can be said to have had any permanent dwelling-place on the plains and within the ambit of the *Skinner* estate, he would not the less dwell there, according to the proper

and legal construction of the word, because for health or pleasure he was passing the hot season on the hills when the plaint was filed. The question then is, did he not "dwell" at *Bilaspur* within the meaning of the section?

He was not a mere manager, though in this suit he is accountable in that character. He was one of the five original sharers in the estate, and as such he was one of the proprietors of the fort and residence at *Bilaspur*. Their Lordships cannot doubt on the evidence that there was a place of residence there, and are of opinion that the clauses in the will which have been cited shew that the testator and founder of the family contemplated that it might be the principal place of residence of his family. He undoubtedly treated it as the place in which the honourable memorials of himself and his services were to be permanently preserved. Again, their Lordships think it is sufficiently shewn upon the evidence that an establishment of some kind was kept there, and that the Defendant himself, though travelling for the most part during the cold weather about the estate, occasionally resided there, as he had an unquestionable right to do, for periods of time more or less considerable. In his own notice of the 13th of October, 1874, he called upon the other sharers to come and examine the accounts in the manager's office, which "would remain at *Bilaspur* from 2nd January to 2nd February." A man, however, may have more than one dwelling-place; and it is unnecessary to consider whether the Defendant may not have also such a dwelling-place at *Hansi* as would subject him to the jurisdiction of the Courts of the *Punjab*. It is sufficient to decide, as their Lordships do decide, that the Defendant so dwelt at *Bilaspur* as to make himself subject to the jurisdiction of the *Meerut* Court in this suit.

This being so, it is unnecessary to consider whether he is also subject to the jurisdiction of that Court by reason of the cause of action having arisen within the local limits of that jurisdiction, a question which upon this record presents some difficulty.

Their Lordships, however, deem it right to say that they cannot agree with the High Court in its conclusion that the sharers had recognised a particular office for the general business, that office being the one at *Hansi*; and that accordingly the cause of action must be taken to have arisen in the district of *Hansi*, and in the division of *Delhi*. They think that, on the contrary, no particular place for rendering the accounts has been fixed either by contract or practice, and that the evidence, confirmed by the Defendant's own written statement, shews that they were rendered and examined at different times in different places, including *Delhi* and *Bilaspur*, *Hansi* being shewn to be, as Mr. *Smith* found, only the repository of the older and settled accounts.

It follows from their Lordships' decision on this question of jurisdiction, that the decree of the High Court cannot stand. It seemed, however, to them that the Defendant was entitled to have the other objections to the decree of the lower Court which had been taken by his grounds of appeal, argued and determined; and that it would be most convenient to have them, if possible, determined here. Counsel have accordingly been heard upon such of them as have not been abandoned; and their Lordships have now to decide whether, in respect of any of them, there is any sound reason for reversing or varying the decree of the Lower Court.

These objections are comprised in the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh of the grounds of appeal.

The fifth, which is the first of those which have been argued, is perhaps the most important. It is, in terms, that the Lower Court is wrong in holding that the Defendant is not entitled to charge commission upon the gross income of the estate.

The question between the parties was, whether the 10 per cent. commission to which the Defendant was unquestionably entitled was to be calculated upon the gross collections, or upon some larger collections, or, as the Judge has found, and as the Plaintiffs contend, upon the

net income of the estate, being the fund which, subject to that commission, was divisible amongst the co-sharers.

The judgment of the Subordinate Judge (which their Lordships have no hesitation in saying is an extremely careful and well-considered one) has decided that point in favour of the Plaintiffs. He has considered the question with reference both to the construction of the will and to the practice which has prevailed, with more or less variation, during the time of the present and the former managers.

Their Lordships think that, if the question is clear one way or the other upon the construction of the will, that construction should prevail, whatever variations there may have been in practice; and they are of opinion that the construction for which the Plaintiffs contend is the true one. The clause which has already been read deals with the income of the altamgha zemindary and the rest of the estate as one fund. The testator gives that income to his five sons, there named, to share alike. It is obvious, therefore, that the word "income," as used in that passage, means the divisible fund. It was a fund to arise from the net returns from the different estates, on some of which were indigo factories, which were in the nature of trading concerns. An increased profit on one estate might be met by a loss on another; but the profits and losses were all to enter into one account, the balance of which was to constitute the divisible income or fund.

Then that portion of the clause which relates to the manager is as follows:—"One of my sons, whichever is most fitted or whoever I may name hereafter, is to manage the whole concern,"—that is, the whole of the estates,—whatever was to contribute to the divisible fund,—"for which trouble he is to get 10 per cent. from the whole income, and he is bound to shew a faithful account current yearly to his brothers." Their Lordships think there are no grounds for construing the word "income" in this passage in a sense different from that in which it is used in the other; and that there is nothing to support the contention that the manager was entitled to charge commission upon each sum which came to his hands from each separate estate or source of income; still less to charge it upon the nominal rents payable by the tenants or cultivators, irrespective of the costs of collection. They are of opinion that the only way to make the whole will consistent is to hold that the commission was to be calculated upon the net found divisible among the five sharers. Therefore, upon this item their Lordships agree entirely with the finding of the Subordinate Judge.

The sixth ground of appeal related to the disallowance of certain sums amounting in all to Rs.24,147,53, being expenses incurred by the manager which the Judge held he was not entitled to charge against the Plaintiffs, as representatives of one of the co-sharers. The defence of the items impeached which was set up by the Defendant was that the expenses in question, or the major part of them, consisted of the cost of the establishment kept up for the purposes of the estate, the user of which was incident to his office of manager. But the learned Judge has found upon the evidence that the Defendant entirely failed to make out that defence, as a matter of fact; and that the greater part of those expenses would never have been incurred but for his choosing, for his own convenience and enjoyment, to reside during the greater portion of the year at the hill station of *Mussuri*.

Their Lordships, therefore, think there is no ground for interfering with the learned Judge's disallowance of these items.

The seventh and eighth grounds of appeal relate to the house at *Delhi*. The first of them objects to the disallowance of a large sum of money as expenses improperly incurred, so far as the estate was concerned, in repairing, altering, and furnishing that house. The house was the well-known house of the testator at *Delhi*. In his will he directs that, if it should be necessary for the purposes of paying his debts, the house should be sold; but if it were not sold, it should

be let on account of the estate. Upon the evidence it would seem that up to the time of the mutiny the house was neither sold nor let, but, by the common consent of the co-sharers, was kept up more or less for their common benefit as a mansion at *Delhi*. After the mutiny, during which it had been looted and greatly injured, the estate received from the Government, by way of compensation in respect of it, a sum of Rs 18,000. That sum they seem to have agreed, not to lay out upon the house, but to divide as part of the profits of the estate. The house, however, must have been put into some sort of tenantable repair, since it was let first as a mess-house, and afterwards as a hotel for several years. The Defendant then saw fit to put an end to the lease of the keepers of the hotel, and to lay out a very considerable sum of money upon the house in repairs, alterations, and furnishing; and from that time he appears to have occupied it, whenever he was at *Delhi*, more as his own residence than as anything common to the family at large. At all events, no authority whatever has been shewn for the very considerable expenditure incurred upon it, as before mentioned. In these circumstances the Judge below has allowed all that was expended upon necessary repairs, and has disallowed the considerable sums spent in excess of that, treating them as having been laid out by the Defendant on his own account. He has also disallowed whatever expenses of the establishment are attributable to the private purposes of the Defendant as contrasted with the establishment which would necessarily be kept up in the house to protect and preserve it whilst unlet. In that allowance, and that disallowance, their Lordships think he was right.

But then the question is raised by the eighth ground of appeal whether he is right in charging the Defendant with an occupation rent of the house, as if it had been let to him. Their Lordships think that this is consistent with the will, which directs that the house, if not sold, should be let, as was done for a considerable period, and with the justice of the case.

There is nothing in the will which gives the manager the power of taking this house out of the general estate, in order to occupy it as his own exclusive residence.

They are therefore not disposed to allow this objection.

The objections raised by the ninth and tenth grounds of appeal have not been pressed.

The objection, however, to the amount decreed on account of interest, which is raised by the eleventh ground of appeal, has been strongly pressed. That interest should be allowed, to some amount, their Lordships have no doubt. The suit is for an account of what is due to the Plaintiffs in respect of their share. The Defendant has to account for all his receipts on account of the estate, and has a right to set up by way of discharge whatever he can properly claim under that head.

It appears that when the suit was instituted a very large sum was due from him to the Plaintiffs, even upon his own mode of stating the accounts. After the suit was instituted he paid into Court a considerable sum, and reduced the admitted debt to Rs. 7000 odd; but if he has during all this time kept the Plaintiff out of her share, he ought, upon every ground of justice and equity, to pay some interest upon it; and if the admitted debt would carry interest, so the sum of Rs 61, 000, to which that debt has been swollen by the disallowance of items of discharge improperly claimed, ought also to carry interest.

Their Lordships can make no distinction between the claim for commission and the other sums which have been disallowed.

The Defendant was bound to know how his commission was to be calculated.

But then it is contended that the rate of interest allowed is excessive.

What the Judge has done has been to give 12 per cent. interest up to the date of the suit, to give 12 per cent. interest on the principal amount from the date of the institution of the suit up to the date of the decree, and to direct that the decree, when compounded of the principal, interest, and costs, should carry interest only at 6 per cent. It has been argued that the Court rate

of interest is now 6 per cent.; and that the interest decreed should have been calculated throughout at that rate. The only rule or enactment regulating the conduct of the Judge in respect of the allowance of interest to which their Lordships have been referred is the 10th section of the Act of 1861, which says, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of the suit; with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." Of course, the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest.

Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shewn that there has been any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs, interest only at 6 per cent., does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decree, and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, viz., 12 per cent. Hence their Lordships are of opinion that the Judge, in calculating the interest as he has done, has done nothing which he was not entitled to do.

It seems, therefore, to their Lordships that, the objections argued having all failed, they must humbly advise Her Majesty to reverse the decree of the High Court, and to confirm the decree of the Subordinate Judge, with the costs incurred in the High Court; and that the Plaintiffs are also entitled to the costs of this appeal.

Solicitor for the Appellants: *T L Wilson.*

Solicitors for the Respondent: *Barrow & Rogers.*

30th June and 1st July, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On appeal from the High Court for the North-Western Provinces at Allahabad.

KAMAR-UN-NISSA BIBI (Plaintiff) ... } *Appellant,*

and

HUSSAINI BIBI (Defendant) ... } *Respondent.**

Gift—Possession—Dower.

On an issue whether an oral gift of an estate, consisting of certain talooks and manzas, had been made by a mahommadan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by mahommadan law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

The possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration.

Held, on the evidence, that the gift was effectively made.

Appeal from a decree of the High Court of the north-western Provinces (2nd March, 1877), reversing a decree of the Subordinate Judge of Jaunpur (25th February, 1876.)

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* I. L. R. 3 Alla. p. 266.

The question on this appeal was whether or not an oral gift had been made by the appellant's uncle, Mehdi Ali, in favour of the respondent, Hussaini Bibi, his wife. The gift comprehended the whole of the revenue-paying lands of Mehdi Ali in Jaunpur and Azamgarh, and the principal questions which arose below were: was Mehdi Ali of mental capacity to make a valid gift at the alleged date, viz. the 1st May, 1870? If so, did he make it understasding what he was doing and intending to transfer his estate to the respondent? Was possession transferred by Mehdi Ali to the respondent? Was there any such consideration as was alleged, viz., the satisfaction of a due dower of Rs. 51,000

The Court of first instance held that Mehdi Ali, though of very weak intellect, was not proved to be incompetent at that time to make a valid disposition of his estate; and in this view the High Court on appeal substantially concurred. As to the second of the above questions, the opinion of the Subordinate Judge was one that involved his finding against the gift;—viz., that Mehdi Ali had no knowledge of it, and that all the circumstances, connected with the allegation of it, threw suspicion on its authenticity. As to the third question, the Subordinate Judge held that no transfer, or change of possession, in Mehdi Ali's life time, was proved. As to the fourth question, he held that no dower was shown to be then due.

The High Court, differing from the first Court on the second and third questions, was of opinion that Mehdi Ali made the oral gift, understanding what he was doing, and that he then transferred the possession to the respondent. As to the fourth question, relating to dower, the High Court held that they were not called upon to decide it, but that there was some confirmation of "the plaintiff's allegation as to Rs. 51,000 being the real amount."

On this appeal,

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, for the respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH.

The suit out of which this appeal arises was brought by Kamar-un-nissa Bibi, one of the heirs, and a niece of Mehdi Ali, who died on the 24th of April, 1873, to recover a landed estate described in the plaint as the half of certain talooks and mauzas in the districts of Jaunpur and Azamgarh, against the widow of Mehdi Ali, who claims to hold the estate under a gift made to her by her husband in his lifetime. Mehdi Ali died childless. The state of the family, so far as it is material, is this: The father of Mehdi Ali was Shere Ali, who died on the 20th of December, 1830, leaving two sons and a daughter, the sons being Ali Naqui and Mehdi Ali and the daughter Amani Bibi. The appellant, Kamar-un-nissa, is the only daughter of Naqui. It appears that the daughter of Shere Ali, Amani Bibi, had three children—all daughters Two of the daughters were living at the time of the commencement of the suit; the other was dead, leaving a son, Muhammad Hassan. The Court thought it right that those three persons should be made defendants in the suit, Kamar-un-nissa remaining the sole plaintiff. The addition of the e defendants, however, did not change the main issue, which is, whether Mehdi Ali made a gift of the estates in question, or of his share of those estates, to his wife. On the part of the plaintiff, the fact of the gift is denied. It was alleged to be made orally, and the plaintiff asserts that no such gift was ever made. But the plaintiff further contends that, if it were made, Mehdi Ali was in a state of mind in which he could not comprehend the full effect of the act he was doing, and that, in fact, he was imposed upon by his wife, and by her brother, Ghulam Abbas, who, it appears, had for some time managed the estate.

Before going to the evidence relating to the gift itself, it may be convenient to refer to what appears upon the record as to the state of Mehdi Ali's mind. Undoubtedly, it appears that at one time, if

not a lunatic, he was treated by his family as being one, and that he was confined in a lunatic asylum at Benares, his mother, Chand Bibi, being appointed guardian. That state of things continued during the lifetime of Ali Naqui, his brother, who managed the whole estate until his death. Upon the death of Ali Naqui it appears that the Government took charge of the property. It does not appear that there was any regular attachment, but it was taken into the charge of an officer of the Government. Mehdi Ali complained of his being kept out of possession of his share of the property. It may be as well here to state that Shere Ali had in his lifetime made a gift of his property to his two sons, Naqui and Mehdi, in equal shares. On finding the Government in charge, Mehdi Ali petitioned the Government, and prayed that he might be allowed to go and live upon his estate; and thereupon an investigation was made by Mr. Best, the Judge of the district. The following is his report of an interview he had with Mehdi Ali:—"To-day Syud Mehdi Ali, and Jai Mangal Lal, his karinda, having appeared, caused their respective statements to be taken down. It does not appear *primâ facie* from the manner of Syud Mehdi Ali's conversation that he is unable to do his work, though his intellect, owing to his retirement, may not be mature and keen, like the intellect of those who are continually engaged in transacting worldly business." That being his finding, he comes to this conclusion: "As it is necessary to inquire under what law the Revenue Court has thus interfered, it is ordered that a copy of this proceeding be sent to the Officiating Collector, with a request that he will inform me of this after inquiring into the matter After inspecting the house, he should make such arrangements for the residence of Mehdi that he may not be subjected to any inconvenience." It appears that he was permitted to take possession of his property, and to reside in his own house. Mehdi Ali then applied for a mutation of names; to which the present appellant objected, stating that he was of unsound mind; but the Officiating Collector, and the Commissioner upon appeal to him, ordered the mutation as prayed. The present appellant then appealed to the Sudder Board of Revenue, who made this order: "The Board observe that the report of the Commissioner received lately shows that each party is at liberty to manage that portion of the estate of Syud Ali in respect of which his name has been entered in the proprietary column. Kamar-un-nissa has no right to manage the estate of Mehdi Ali, because, under Act XXXV of 1858, no application has been filed to prove that he was not qualified to manage his estate." The appellant, upon that, took no further steps: but Muhammad, the great nephew of Mehdi, and grandson of his sister, took proceedings under Act XXXV of 1858 to obtain a certificate of his lunacy. Without going into the evidence that was then given as to the state of his mind—indeed, our attention has not been called to it by Mr. Doyne, who evidently felt that any Court which had now to decide upon the question of sanity would be very much guided by the reports then made,—their Lordships will proceed to consider what it was that was found upon these inquiries.

The first investigation was made by Mr. Currie. After going through the history of the case, he says:—"On the evidence before it, the Court cannot adjudge Syud Mehdi Ali to be a lunatic and incapable of managing his affairs; and this application is, therefore, rejected." Muhammad, not satisfied with Mr. Currie's decision, appealed to the High Court; and the High Court directed a further investigation, which was made by Mr Edwards, the then Judge of the district. In his judgment, Mr. Edwards enters very fully into the evidence, describes an interview with Mehdi Ali, and gives the result on his own mind of the evidence, and of his interview with Mehdi Ali. The material part of his judgment is this:—"It is clear from the statements of the witnesses that they had free access to him, yet the only acts they speak to are very trivial, and would be

taken as idiotcy rather than insanity; and that he is no idiot is fully proved by reports of both medical men who had full opportunity of judging. No one who saw Mehdi Ali could ever declare him to be an idiot. Agreeing in the suggestion in the proceeding of the High Court, I directed the attendance of the alleged lunatic at my house for a personal interview. The civil surgeon was present. I conversed with Mehdi Ali for a considerable time on various subjects, avoiding those on which he was likely to have been tutored. Neither in appearance, manner, nor conversation did he show any unsoundness of mind. He talked sensibly and to the purpose on any subject introduced, and replied to questions in a way which showed he fully understood them. His memory is evidently good, as he described matters which took place many years ago, such as Mr. William Frazer's murder at Delhi, as well as matters of later date. He is now an old man, of upwards of 60 years of age, I believe; and though he may have no pretensions to be an able or clever man, he is assuredly not a lunatic, nor is he in any way to be termed incapable of managing his own affairs." That is a very strong opinion, not only that Mehdi Ali was at the time of sound mind, but that, though he was not of strong capacity, he was competent to manage his affairs and was fairly intelligent upon the subjects on which he had spoken. It is to be observed that their Lordships' attention has been called to no evidence which in any way contravenes this report. It may be that at an earlier period of his life he was a lunatic, but he had apparently recovered at the time of his brother's death, and in the early part of 1869 he appears to be a man, if not of strong mind, yet competent to deal with the ordinary affairs of life. The sub-registrar who took his acknowledgment of the *mukhtar-nama*, to be hereafter referred to, describes him as whimsical. It appears that he lived a secluded life; that he was a great student of the Koran; and that he did not attend to the practical management of his affairs, but left them very much to be conducted by his managers, the last of whom appears to have been Ghulam Abbas his wife's brother. On the whole, their Lordships have come to the conclusion that he was perfectly able to comprehend such a transaction as a gift of his property to his wife.

We now approach the transaction in question. It is said that on the 1st of May, 1870, Mehdi, in the presence of seven witnesses, made, in the most formal way in which a verbal gift could be made, a gift of the property in question to his wife, who was present at the time. It is said that the words of gift were repeated three times—that is said by some of the witnesses, though not by all—and the wife in a formal manner expressed her acceptance of the gift. The words said to have been used are formal, and probably were purposely formal. It is not alleged that, if what is said to have passed really took place, the gift was not a valid one, supposing that there was either consideration for it, or a transfer of possession. But the fact of the gift was denied, and it was strongly contended that, if it had been intended by Mehdi Ali to give what is, no doubt, a considerable property to his wife, he would have taken the proper and ordinary precaution of having some document in writing as evidence of the gift, and that the fact that there was no such instrument was in itself a strong circumstance against the probability of the gift having been made. It was also said that no relatives were present, and that none of the neighbours in an independent position were called in to witness and sanction the transaction. However, there were seven persons present, including two *mukhtars* and some kariudas. These persons were, no doubt, more or less dependent on the family, but no serious effort was made to impeach their evidence, except so far as the credibility of it is affected by their position. Their Lordships are quite prepared to agree with the Subordinate Judge that the Court is bound to watch with the greatest care, perhaps even with suspicion, the case of a verbal gift set up after the alleged donor's death; and if the case

had rested upon the oral testimony alone, their Lordships probably might not have had this appeal before them. It may have been that, in that case, the High Court would not have dissented from the view of the oral evidence which had been taken by the Subordinate Judge. But the case does not rest on this evidence alone, and it is not a case where an oral gift is set up, after a man's death, which had not been heard of in his lifetime. An instrument was executed by Mehdi Ali, a *mukhtar-nama*, to carry the gift into effect; and publicity was given to the fact of the gift having been made, which drew forth, from the present appellant and others, opposition in the lifetime of the donor. The gift was made on the 1st May, 1870, and about six weeks afterwards a *mukhtar-nama* was executed which contains a reference to the gift, and appoints a *mukhtar* to effect a mutation of names. The terms of the *mukhtar-nama*, and the way in which the gift is referred to, are worthy of great consideration. The gift is not cursorily mentioned, but is described so much in detail, that if the document was read to Mehdi Ali, and if he had intelligence enough to comprehend it, it is impossible that he should not have known that it was intended to carry into effect the gift which it alleged that he had made a short time before. The recital in the instrument is this:—"Whereas I have made a final verbal gift of all my estates mentioned above, which are my own property and possession, without the partnership of any other person, to Mussummat Hussaini Bibi *alias* Mehdi Bibi, my lawful wife, with all the rights appertaining thereto, and subject to all the liabilities for debts due to the creditors and chargeable on the said property; and whereas I have caused the said donee to be put in proprietary possession of the whole of the said property as my representative, under the managership of Syud Ghulam Abbas, my manager and general attorney and brother of the said Mussummat; it is necessary that my (the executant's) name should be expunged from the Government papers, and that the said Mussummat be entered therein as proprietor and possessor of the said property. I, accordingly, for the purpose of filing petitions for the mutation of names in respect of the above-mentioned properties, hereby appoint Lala Jasoda Nand, a vakil of the Court and revenue agent, and Mir Sabit Ali, revenue agent, my *mukhtars*," in order to obtain the mutation of names. This document is proved in as satisfactory a manner as one can possibly expect. The writer of it is examined as a witness. One of the attorneys mentioned in it, who is also called, is a vakil of the Court and is treated by the High Court as a respectable man. He proves that the *mukhtar-nama* was executed. The sub-registrar went to the house of Mehdi Ali, and obtained from him verification of the instrument. His evidence has also been given. The respondent did not rely upon the formal endorsement of registration on the document, but examined the sub-registrar, who proved the manner in which it was taken, and in his evidence states:—"The document was read to him by me; he heard it, and said 'Yes, I have executed it' His conduct at that time did not show that he was not in his senses. I stayed only so long as was necessary for the purpose of registration. Mehdi Ali himself signed the registration endorsement; he did so after having read it." Unless it be held that the sub-registrar is not entitled to credit, or that Mehdi Ali was a man incompetent to understand what he heard and read, it is impossible not to perceive that this document confirms, in the strongest way, the evidence of the witnesses who say that the gift was made

The gift is stated to have been made in consideration of a dower of Rs. 51,000, which remained unpaid. It is said that that dower is exorbitant, and there is positive evidence that the dower actually agreed upon at the time of the marriage was a much less sum; indeed, of a sum which appears to be almost nominal, little more than Rs. 100. In the first place, the Courts do not appear to have given credit to the witnesses who have

stated that the dower was settled at that small sum; and if the persons who proved the gift are worthy of credit, they are entitled to receive credit as to what they prove to have passed with reference to the consideration, as well as with reference to the gift itself. Their Lordships cannot come to the conclusion that dower was not mentioned, or that the sum which the witnesses state was not that which was mentioned. It is unnecessary to affirm that that amount of dower had been agreed upon prior to the marriage. It may be that Mehdi Ali, though the dower might be only nominal at the time of his marriage, may have chosen to declare this large dower to be the consideration for the gift. He may have thought that it would give validity to the gift to declare that the dower was of that amount. It is not necessary by Muhammadan law that dower should be agreed upon before marriage: it may be fixed afterwards. Again, the sum itself, although a large one, is not excessive compared with the property of the donor. That some dower had been agreed upon is acknowledged; and the precise amount, as the High Court says, is not material to sustain the gift, because any amount would be a sufficient consideration for that purpose. No doubt, if their Lordships were satisfied that Mehdi Ali had not mentioned that sum of Rs. 51, 000, it would go far to destroy the credit of the witnesses as to the rest of the transaction. They cannot, however, come to the conclusion that that sum was not mentioned by Mehdi Ali, whether it was the real amount of dower which had been previously agreed upon or not. But if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration.

It appears that the application for mutation of names was opposed by the present appellant, and that ultimately there was an appeal to the Board of Revenue. The appellant in that appeal was the present respondent, the revenue officers having decided against her. The opinion of the Board of Revenue is this:—"The point to be decided is—Is appellant in possession or not? It appears to me that the proofs of her possession are many and strong. She has filed *dakhilas* for payment of Government money given in her name as far back as November, 1870. She paid income tax in 1871 and 1872, for which she holds receipts. She sued a tenant for ejectment in 1871, and obtained a decree. The Civil Court of Jaunpur, on the 19th February, 1869, found that her husband was of sound mind," and so on. The Board allowed the appeal. Then the present respondent granted a *zar-i-peshgi* lease of part of the porperty to secure a sum of Rs 2,000, which she did as owner and being dealt with as owner. Their Lordships have come to the clear conclusion that there was a change of possession, which, even without consideration, would be sufficient to support the gift.

Various proceedings afterwards took place upon the objection of the appellant. The officers, perhaps with reasonable suspicion, declined to effect the mutation of names unless Mehdi Ali came before them and authenticated the *mukhtar-nama*, and petitions presented in his name praying that the mutation might be made. While, undoubtedly, an inference might not unnaturally arise from his non-appearance, either that he did not choose to come forward to support the gift, or that those who had put forward a false gift prevented his appearing, there are circumstances which may explain his absence without making an inference so hostile to the case of the respondent. It is evident that Mehdi was an infirm man, and that he suffered from a painful complaint which made any exertion difficult to him; and, in addition to his physical ailment, he was a man of retired and secluded habits, who would be very reluctant to come before a Court and be examined. On the whole, therefore, their Lordships think that no inference sufficient to overturn the strong case which has been made on the part of the respondent in favour of the gift arises from Mehdi not having appeared before the

officers when summoned on the application referred to It is further to be observed that there is nothing improbable in the fact that Mehdi Ali should make a gift of his property to his wife in his lifetime. His father had made such a gift to his two sons, and Naqui, his brother, had given his property in his lifetime to his wife. Moreover, it was natural that Mehdi should prefer that his property should go to his wife rather than to the members of his own family who had taken or sanctioned the proceedings in lunacy against him.

For these reasons, their Lordships think that the judgment of the High Court is right; and they will therefore humbly advise Her Majesty to affirm it, and with costs

Solicitors for the appellant: Messrs. *W* and *A. Ranken Ford.*

Solicitor for the respondent: Mr. *T. L. Wilson.*

6th and 8th July, 1880.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort Willliam in Bengal.

MAHASHOYA SHOSINATH GHOSE and OTHERS (Plaintiffs) ..... } *Appellants,*

and

SRIMATI KRISHNA SOONDARI DASI (Defendant). } *Respondent.**

Hindu Law—Adoption among Sudras—Execution of Mutual Deeds—Actual giving and taking of Child.

Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.

Appeal from a decree of the High Court of Bengal (5th February 1878), confirming, except as to costs, a decree of the District Judge of *Bhogulpore* (8th February 1876), whereby the suit was dismissed.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The question in this case is whether the Plaintiff has been validly adopted as the son of *Dwarkanath Ghose*, who died on the 30th of June, 1863, by his widow, the Defendant. It is admitted that she had authority from her husband for that purpose, and the adoption is alleged to have taken place on the 11th of June, 1864.

Their Lordships do not propose to go at any length into the facts of the case, which are fully and lucidly stated in the two able judgments that are the subjects of this appeal. It is sufficient to refer to a few of them. It appears that the widow lost no time in seeking to carry out her husband's direction to adopt a son A correspondence, which was carried on chiefly by *Soorjonarain Singh*, her brother, who took the principal part in all these transactions, began in January, 1864; from which it appears that, whatever unwillingness *Srinarain*, the natural father of the Plaintiff, may have felt at first to give his son in adoption, had been overcome before the end of the following May. The record contains only the letters written by *Soorjonarain* during this period; but from them it may be inferred that *Srinarain*, in one or other of his letters that are missing, had stipulated for the execution of deeds and gift of acceptance which, if witnessed as was contemplated by the reversionary heirs of *Dwarkanath Ghose*, would afford evidence against them

* 7 Cowell's I. A. p. 250; I. L. R 6 Cal. p. 381.

of the adoption and of the authority under which it was made. It may also be inferred that at one time it was contemplated that the Defendant should send persons to bring the boy, without his father, to her house at *Bhagulpore* from *Mahta*, his father's place of residence, in order that she might see him before adopting him. Ultimately, however, *Srinarain* himself accompanied the boy, and came to *Bhagulpore* on the 7th of June, 1864; and it may be that there was at that time some notion in the minds of all the parties that the adoption would then take place. However this may be, it is an undisputed fact that the deeds upon the construction of which the determination of this appeal must now depend were executed on the 11th of June, 1864. It is, on the other hand, equally clear, that the boy, instead of remaining with the Defendant in her house, went back with his natural father to *Mahta* on the following day, the 12th of June, 1864. He afterwards returned to the Defendant's house, together with his brothers, who at least were only there on a visit, in September, 1864, whilst *Srinarain* was on a pilgrimage. The brothers went home in November, but the boy remained in the house of the Defendant. There appears to have been on the part of the father some remonstrance as to this, or, at all events, the expression of a wish that the boy should be sent back to him; and accordingly the boy was sent back to his father's house, in December, 1864, as it was expressly stated in the letter which accompanied him on his return, agreeably to his father's order. After that period he never returned to the Defendant's house. Further correspondence ensued, and ultimately, on the 25th of March, 1865, *Srinarain* himself wrote a letter, in which, after stating the boy's repugnance to leave his own home, the repugnance probably being that of his mother to part with him, and the general feeling of the family, he ends by saying: "In this I have no power, as I have already informed you in my previous letter; and now I positively inform you that you all, relinquishing this hope, in consideration of the future, for the preservation of the estate, should make *dattak-grahan* (accepting a son in adoption) or any other arrangement you think fit;" pointing evidently to the adoption of another child by the Defendant.

In this the Defendant appears to have acquiesced; but it was suggested on her part that the deeds which are in question ought to be cancelled, in order to remove the cloud which would otherwise rest on the title of any other boy whom she might adopt. For nearly a year *Srinarain* seems to have thought that this was the right and proper thing to be done, and to have been willing to concur in it; but in March, 1866, he, having probably been advised, during a visit he was then paying to *Calcutta*, that his right to do so was at least questionable, refused to do it, and determined to leave things as they were; not, however, even then insisting on the adoption as complete and irrevocable. Thereupon the suit which has been before their Lordships on a former occasion was brought by the present Defendant, seeking to have those deeds cancelled. In the course of that suit the validity of the adoption came in question; the Courts in *India* pronounced against it, and decided that the deeds should be delivered up to be cancelled. On appeal to Her Majesty, their Lordships were of opinion that the suit was improperly brought, and could not be maintained, being one in the nature of a suit for a declaratory decree, and brought in the absence of the child said to have been adopted; and they finally dismissed it, leaving every question touching the validity of the adoption open.

So matters remained until the Plaintiff came of age, and he then brought the present suit to enforce his rights as an adopted son.

The case made by him, and the case tried in the Courts below, was not that he had a good title by adoption by virtue of the deeds in question alone; but treated the execution of those deeds as contemporaneous with the performance of all the ceremonies incident to an ordinary adoption. There was great conflict of evidence upon the case so set up; and ultimately both the Indian Courts, in extremely

well-reasoned judgments, found that no such formal adoption, as was alleged, ever took place, and dismissed the suit. A suggestion, however, as appears at the end of the judgment of the High Court, was made by one of the counsel for the plaintiff, to the effect that, even if there had been no such formal adoption as was alleged, the deeds themselves operated as a complete giving and taking of the plaintiff; that that was all that was essential in the case of Sudras; and that the adoption was completed by virtue of the deeds alone.

Their Lordships, by their ordinary rule, are precluded from going into the correctness of the findings of the two Courts upon the fact of the formal adoption attempted to be proved. This has been fairly admitted by the learned counsel for the appellants at their Lordships' bar, who have accordingly argued only the latter point, namely, whether the effect of the two deeds was not to make the plaintiff fully and completely the adopted son of *Dwarkanath Ghose*.

It seems to their Lordships that two questions arise upon this point: first, whether, according to Hindu law, an adoption can be effected, even amongst Sudras, by the mere execution, without more, of such instruments as those in question; and secondly, whether it was the intention of the parties, when they put their hands to those two instruments, that such should be the case, or whether the execution of them was not intended to be a mere step in the proceedings which were to result at one time or another in a complete and full adoption. Their Lordships will deal with the last of those questions in the first instance.

The first thing that strikes them is the extreme improbability that it should have been the intention of the parties to make an adoption by the mere execution of the deeds. Yet that such must have been their intention, if there was then a complete adoption, follows from the findings of the Courts that nothing more was done, or, presumably, intended to be done. Such a course of proceeding seems to be in the highest degree repugnant to the ordinary habits, feelings, and usages of two Hindu families both of considerable respectability. That this is so is shown by the circumstance that the plaintiff has thought (as the father in the former suit thought) it necessary to set up a case of formal and full adoption, with all ceremonies, whether necessary or not necessary; being the case which has been negatived by the two Courts. Nor does it appear to their Lordships that the terms of the deeds are necessarily inconsistent with the finding of the High Court that such was not the intention of the parties. The words of the deed of acceptance, no doubt, are strong, and are, as translated, in the present tense. Those words, according to the translation on the present record, are these:—"I take in adoption *Srinarain Nogender Chunder Mitter*, the second son of your third wife, *Srimati Monmohini*, with the consent of all, and according to rule and usage." In the record of the former case before their Lordships there is a somewhat different and more expanded translation of the same passage, the terms of which are:—"I do, with the prescribed rights and ceremonies, adopt as my son *Nogender Chunder Mitter*, your second son by your third wife, *Srimati Monmohini*." The words "with the prescribed rights and ceremonies" are stronger than the words "according to rule and usage;" but, even taking, as their Lordships do, the latter to be the correct translation, it seems to them that the words point to an adoption in the customary and formal manner, and to something being done *ultra* the mere execution of those two instruments.

Great stress has been laid by Mr. *Branson* particularly, upon the immediate registration of the deeds. But as to that their Lordships think that, although the circumstance of registration, as well as that of the execution of the deeds, would, of course, be very cogent evidence upon the main issue which was tried in the case, namely, whether there had been a formal and regular adoption; and might, if the other evidence that was given upon that point had been nicely balanced, have been sufficient to turn the scale; it is of far less weight upon the question whether

it was the intention of the parties, without more, to treat the execution of deeds as an adoption. It shews, no doubt, what is fully admitted, that both parties then supposed that the adoption would take place at some time.

Their Lordships, therefore, see no reason to differ from the conclusion to which the High Court came upon the whole case,—that it never was the intention of the parties that the deeds should operate in the manner contended for. That conclusion, they think, is very much fortified by the subsequent correspondence that took place; the mode in which the child was treated going from one house to the other; and the clear willingness of the father at one time to treat the adoption as simply inchoate, and something which could be given up, so that the Defendant might carry out her purpose of performing the wishes of her husband by adopting another child. The circumstance, moreover, which the Courts have laid great stress upon—that on the occasion of *Dwarkanath's* sradh the boy supposed to be adopted was not present, and took no part in the ceremony—is strongly confirmatory of the notion that all parties then considered that at that time the adoption was not complete, but remained, to some extent, still *in fieri*.

That being so, it is unnecessary for their Lordships positively to decide the first question, namely, whether there can be, according to Hindu law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the *dattaka* form. They desire, however, to say that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law, even in a case of Sudras, by mere deed, without an actual delivery of the child by the father. There is no decided case which shews that there can be an adoption by deed in the manner contended for; all that has been decided is that amongst Sudras no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and on Hindu usage, and it is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the data homan in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Sudras from these twice-born classes; whom in practice, as appears by several of the cases, they imitate as much as they can: adopting those purely ceremonial and religious services which it is now decided are not essential for them in addition to the giving and taking in adoption. It would seem, therefore, that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

For these reasons their Lordships think that no ground has been laid for disturbing the judgment of the High Court; and they will, therefore, humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal, with costs.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitor for the Respondent: *T. L. Wilson.*

9th, 10th and 11th July, and 19th November, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On appeal from the Court of the commissioner of Sitapore in Oudh.

RANEE ANAND KUNWAR and another (Defendants). ... } *Appellants,*

and

The Court of wards, on behalf of CHANDRA SHEKHAR, a minor (Plaintiff). } *Respondent.**

Hindu Law—Adoption by Widow—Contingent Reversionary Heir—Collusion—Party to suit to contest Adoption.

Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal* (1) approved. Reference made to *Kooer Gulab Sing* v. *Rao Kurun Sing* (2).

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue; and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as naturally born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant *bandhu*, and that he had not a vested but at most a contingent interest. And *held*, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated.

Appeal from a decree of the Court of the Commissioner of the Sitapore division of Oudh (15th June 1877), affirming a decree of the Deputy Commissioner of the District of Bara Banki (28th August 1870).

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne* appeared for the appellants.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. D. Mayne* for the respondent.

19th November, 1880.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

The suit out of which this appeal arises was instituted in the Court of the Deputy Commissioner of Lucknow, in the Province of Oudh, by the respondent, the Superintendent of the Court of Wards, on behalf of Rajah Chandra Shekhar, a minor, against Rani Anand Kunwar and Radakishen, the appellants, to set aside an adoption set up by them, by which, as they alleged, the first defendant had adopted the second defendant as the son of her deceased husband, Shunkersahai.

The suit was transferred to the Court of the Deputy Commissioner of Bara Banki in the district of Sitapore.

The minor on whose behalf the suit was instituted is the talookdar of Sesseudi, the talook having descended to him as the adopted son of Rajah Kashipershad, the former talookdar.

By an order of her Majesty in Council made in the year 1873, in pursuance of a

* 8 Cowell's. I A p 14. I L 6 R. Cal. p. 764.
(1) 10 Bom. H. C Rep, A C. J, 351.
(2) 14 Moore's I. A, 187; 2 P. C. J. 722.

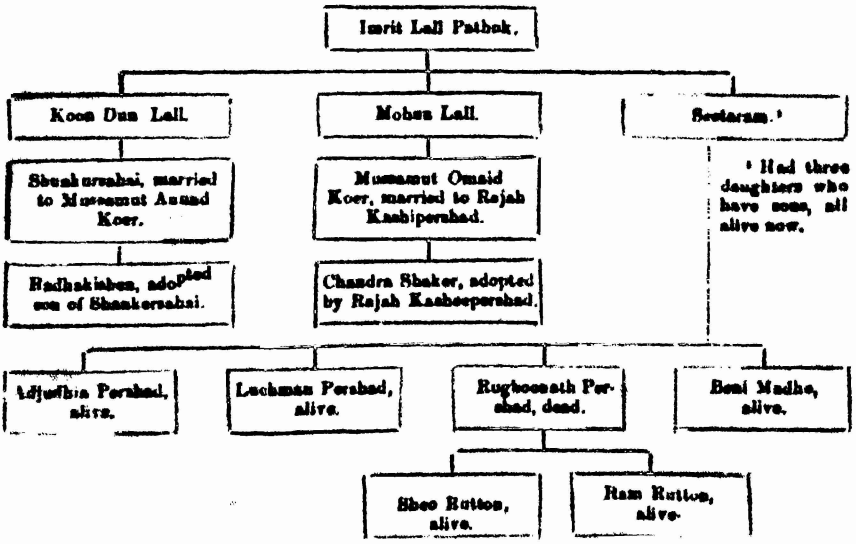
report of the Judicial Committee in an appeal in which the first defendant was appellant and the aforesaid *Rajah Kashipershad* was respondent, the first defendant was declared to be entitled, as the widow and heiress of the aforesaid *Shunkersahai*, to a Hindu widow's estate of inheritance, in four of the mouzas, and to a one-third share of the profits of seven others of the mouzas comprised within the said talook of Sessendi, and to a sub-settlement of the said four mouzas (see the case of the widow of *Shunkersahai* v. *Rajah Kashipershad* (1).

The plaint in the present suit, which was filed on the 8th of July 1875, stated that the suit was brought to set aside the so-called adoption of the second defendant, and also to set aside a decree given under sect. 15, Act VIII of 1859, declaratory of the so-called adoption, obtained by the defendants by fraud and collusion. It alleged that the said Rajah Chandra Shekhar was talookdar of Sessendi; that, at the time of the said decree, the defendant No. 1 was a sub-proprietor of the said talook, and liable to him for the Government revenue demand plus a certain percentage; and that the effect of the so-called adoption and decree, so long as they were not set aside, was to put the so-called adopted son of the first defendant in her place as sub-proprietor, and thus to thrust upon the talookdar, in a method contrary to law, an obnoxious sub-proprietor.

The plaint further stated, that the said Rajah Chandra Shekhar was entitled, in reversion, to the sub-proprietary estate so held by the defendant No. 1, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion; that the said Rajah Chandra Shekhar was further entitled, immediately in reversion, to the sub-proprietary estate so held by the defendant No. 1 as aforesaid, by right of purchase under a deed of sale bearing date the 7th day of November 1862, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion.

The first defendant filed a written statement, in which she set up the adoption as having been made in 1851 in pursuance of the verbal and written authority of her deceased husband. She also set out a genealogical tree of the family, which both parties admitted to be correct so far as it goes, and of which the following is a copy:—

(1) L. R., 4 Ind. Ap., 198; Sup. Vol. 230; 3 P. C. J. 289.



She further stated, that the plaintiff had no *locus standi*, nor had the Superintendent of the Court of Wards any right to institute the suit.

Further, she alleged that the plaintiff had no right to sue, because he was only her husband's uncle's daughter's son, and during the lifetime of her husband's male cousins (the sons of Setaram Pathak) and their sons (to wit, Sheo Rutton and Ram Rutton), and the possibility of an adoption of a son being made by any of them, the plaintiff could not, by any means, be considered the nearest reversioner to her or to her husband.

The Deputy Commissioner held, that the plaintiff was not the immediate reversioner, either by right of his being the talookdar or by inheritance; but that he was a remote reversionary heir, and was kept out of his rights by virtue of the alleged adoption and declaratory decree, and that he had thereby sustained sufficient injury to entitle him to maintain the suit. Accordingly he made a decree that the alleged adoption and the decree declaratory of it be set aside so far as the plaintiff was concerned.

Upon appeal the Commissioner affirmed the decree of the Deputy Commmissioner, but on a different ground. He agreed with the Duputy Commissioner that the plaintiff had not proved the alleged deed of purchase of the 7th of November 1862, upon which he relied; he held that the plaintiff was not a reversionary heir of Shunkersahai, but considered that as talookdar he had a reversionary interest in the sub-proprietory estate which entitled him to maintain the suit.

Their Lordships are of opinion that the first ground upon which reliance was placed on behalf of the plaintiff, and upon which the Commissioner decided in his favour, *viz.*, that as talookdar he had a right to have the alleged adoption and declaratory decree set aside as against him, is wholly untenable. Indeed, the learned counsel for the respondent was obliged to abandon it. The last of the three grounds upon which the plaintiff relied in his plaint,—*viz.*, that he was entitled, by purchase, to the immediate reversion in the said sub-proprietary estate, fails in fact, inasmuch as both the lower Courts concurred in finding that the alleged deed of sale of the 7th of November, 1862, was not proved.

The only remaining question then is, Is the minor a reversionary heir of Rajah Kashipershad, and if so, is he entitled to maintain the suit?

It appears from the genealogical table above set out, and it is not disputed, that the minor is the adopted son of Rajah Kashipershad, who was the husband of Omaid Koer, the daughter of Mohun Lall, who was a brother of Koondun Lall, the father of Shunkersahai. It is unnecessary to determine whether he could, under any circumstances, succeed by inheritance to the property of Shunkursahai, and their Lordships abstain from expressing any opinion upon that point. Admitting, however, for the sake of argument, and only for the sake of argument, that, as an adopted son, he had the same rights as a naturally born son, and that, as a naturally born son of Omaid Koer, he would have been entitled, in default of nearer relations, to succeed by inheritance to the property of Shunkursahai, it could only have been in the character of a distant *bandhu*. It is clear that a son of a daughter of a father's brother is much farther removed in the order of succession than a son of a fathers' brother, or a son of such a son. In any view of the case, the minor had not a vested, but at most a contingent, interest in the property of Shunkursahai during the lifetime of his widow: *Hurrydoss Dutt* v. *Rungunmoney Dasees* (1).

The question then arises, Is the contingent reversionary interest which the minor has, if he has any, sufficient to enable him to maintain the action which is brought to impeach the adoption of the second defendant?

Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary

(1) 2 Taylor and Bell, 279.

heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering They consider that the rule laid down in *Brikaji Apaji* v. *Jagannath Vithal* (1) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue; see *Kooer Golab Sing* v. *Rao Kurun Sing* (2). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

In the present case, the Superintendent of the Court of Wards claims in the plaint a right to sue on behalf of the minor as a reversionay heir, without alleging that there are no others nearer in the line of succession, or that those who are nearer have precluded themselves from suing.

In the course of the argument before their Lordships, it was contended that Adjudhia Pershad and Luchman Pershad, two of the sons, and Sheo Rutton and Ram Rutton, the two grandsons of Seetaram, had precluded themselves from suing to set aside the adoption and declaratory decree mentioned in the plaint; but no such allegation was made in the plaint, nor does the point appear to have been taken in the Courts below.

No issue was raised, nor was there any finding of either of the Lower Courts, in support of that view of the case The point is not even expressly alluded to in the respondent's case or reasons. Their Lordships cannot, at this stage of the case, give any effect to the contention.

Even if it were allowed to prevail, it would not apply to Beni Madho, who was stated to be alive, but not to have been heard of for some time. It does not appear, that he had been unheard of for a length of time sufficient to warrant a presumption of his death. Moreover, there was no allegation of his death, and no issue whether he was alive or dead, nor any evidence of an attempt to ascertain the fact. It must, therefore, be taken that there may be a son of a brother of Shunkursahai's father in existence who is not precluded from suing. Consequently, the minor, who is merely the son of a daughter of a brother of the father, is not, under the rule applicable to such actions as the present, entitled to maintain the present suit.

It must further be remarked that it appears from the genealogical table that Seetaram had three daughters who have sons living. They would be as near in succession to Shunkursahai as the minor plaintiff would have been, even if he had been a naturally born son.

It must also be borne in mind that even if Adjudhia Pershad, Luchman Pershad, Sheo Rutton, and Ram Rutton have precluded themselves from suing to set aside the adoption, the minor plaintiff could not, even if he were a naturally born son, and the adoption of the second defendant should be set aside, succeed to the property of Shunkursahai, if either of the sons or grandsons of Seetaram should survive the first defendant. The minor, admitting him to be a *bandhu*, has merely a very remote possibility of ever succeeding to the property of Shunkursahai. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decisions of both the Lower Courts, and to

(1) 10 Bomb. H. C. R. 251.

(2) 14 Moore's Ind. Apl. Ca. 193.

dismiss the suit, with costs, in both the Lower Courts. The appellant's costs of this appeal must be paid out of the estate of the minor Chundra Shekhar.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *H. Treasure.*

13th and 14th July, 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MAHARANEE RAJROOP KOER (Plaintiff) ... } *Appellant,*

and

SYED ABUL HOSSEIN and others (Defendants). ... } *Respondents.**

Limitation Act (IX of 1871), ss. 24, 27; sched. ii, art. 31, part v—Presumption of Title founded on long continued User—Easement—Obstructing a Watercourse—Continuing Act of Wrong.

More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a *pyne*, or artificial watercourse, on the defendants' land, making compensation to them. The *pyne*, by a channel at one part of its course, contributed to the water in a *tal*, or reservoir, belonging to the defendants; and by a channel at another part, took the water which overflowed from the *tal*, after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the *pyne* in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.

Held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all; but it did not exclude, or interfere with, other titles and modes of acquiring easements. And s. 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. Such a long enjoyment as the plaintiff had proved should be referred to a legal origin, and the long user of the *pyne* and of the superfluous water of the *tal*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstructions in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

Held also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, cl. 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit.

Appeal, by special leave, from a decree of a Division Bench of the High Court of Bengal (23rd February 1877), reversing a decree of the Subordinate Judge of Gya (17th August 1875), and restoring a decree of the Sudder Munsif of Gya (26th August 1874).

Mr. *Woodroffe* for the appellant.

Mr. *C. W. Arathoon* for the respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This was a suit brought by Maharajah Ramkissen Singh Bahadur to establish an asserted right to a *pyne* or artificial watercourse, and also to a *tal*, or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *pyne*. The Maharanee, the present appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main

* 7 Cowell's. I. A. p. 240. I. L. R. 6 Cal. 391.

question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharajah and his ancestors were the owners of Mehal Sunout Purwurya, in the district of Gya; and the defendants were the owners of an estate called Mouza Mora. The system of irrigation claimed by the plaintiff embraces an artificial *pyne* which is fed by a natural river at a point to the south of the defendants' mouza. The *pyne*, which runs from the south in a northerly direction, after traversing other estates, enters Mouza Mora, and runs through it, and afterwards through other lands to the defendants' mehal. There is, branching from the main *pyne*, a channel or smaller *pyne*, which helps to feed the *tal* claimed by the plaintiff. The *tal* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *pyne*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tal* which runs from it and joins the *pyne* at a point near a bridge, described in the Munsif's map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated, but no question now arises with regard to them. The obstructions complained of were 12 in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the *pyne*.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the *pyne* as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the *tal*, except to the overflow after the defendants, as the owners of Mouza Mora, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No 3 is a *khund* or channel cut in the side of the *pyne* at a point below the bridge which has been spoken of. No 10 is a *dhonga*, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *pyne* for the purpose of irrigating the defendants' land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On special appeal to the High Court, the Judges of that Court concurred with the Munsif, and, reversing the decree of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found that the two obstructions were recently made; and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Munsif that the obstructions had existed for two years. If they had not existed for that period, no question on the statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Munsif on the question of fact, and, therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subor-

dinate Judge really did intend to overrule the finding of the Moonsiff upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Moonsiff and the High Court have regarded it, namely, that these obstructions had existed for more than two, but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitations of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part 4 of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right, to such access and use of light or air-way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Moonsiff certainly proceeded; though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Moonsiff that these obstructions had existed for more than two years before the suit he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years, ending within two years before the institution of the suit, and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Moonsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows and the Courts appear to have found, that the *pyne* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *pyne*." This being an artificial *pyne*, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute: and his right, therefore, is not in any degree interfered with by the

provision in the 27th section, upon which the Moonsiff decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Flight* v. *Thomas* (1) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called; namely, on Art. 34 of part V. of the second schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of Art 34 above referred to, their decision is clearly wrong; for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. Indeed, sect. 24 of the Statute contains express provision to that effect. For these reasons their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the *tal*. Mr. Woodroffe has strongly argued that the findings as to the *tal* in favour of the defendants are wrong, and he further endeavoured to show by reference to the judgments that they were not conclusive on that part of the case Their Lordships, however, find that there are distinct judgments of the Moonsiff and of the Subordinate Judge to the effect that the defendants had a proprietary right in the *tal* and to the use of the water in the *tal*, and that the plaintiff had no right to the *tal* or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's *pyne*. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Moonsiff be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Moonsiff's decree with regard to the enjoyment of the water in the *tal* should be modified. Their Lordships, having considered what was addressed to them on the subject and the language of the Moonsiff's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of water in the *tal*, they think that the Moonsiff had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Moonsiff having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially, it amounts to a declaration that the defen-

(1) 10 Ad. & E. 599; S. C. 3 Cl. & F. 231.

dants are entitled to use the water of the *tal* for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships having considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Solicitors for the appellant: *Henderson & Co.*

Solicitor for the respondents: *T. L. Wilson.*

11th November 1880.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On appeal from the High Court of Judicature at Madras.

PEDDA RAMAPPA (Defendant) ... } *Appellant,*

and

BANGARI SESHAMMA (Plaintiff) ... } *Respondent.**

Hindu law of succession to an impartible inheritance among sons of different mothers Primogeniture.

The principles on which is founded the Judgment in *Ramalakshmi Ammal* v *Sivanantha Perumal Ammal* (1) as to the succession to an impartible inheritance apply with equal force whether the first-born son is born of a first married wife or of a wife afterwards married.

The text of *Menu*, chap. ix, v. 125, distinctly shows that among sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother. In v. 122 of the same chapter the words "but of a lower class," added by the gloss of *Culluca Bhatta* (2), are to be read as correctly inserted in the text.

Two wives of a Poligar of an impartible polliam having died before his marriage with a third and fourth wife it was contended that the third being in the position of a first married or "royal" wife, her son was entitled to succeed to his father in preference to an elder son born of the fourth. *Held* that the elder son, though born of the fourth wife, was entitled by primogeniture under the rule above referred to, and that it was, accordingly, immaterial to consider whether or not this third wife was in the position of a first married wife. What might be the effect of one wife being "of a lower class" than another was not in question.

APPEAL from a decree of the High Court of Madras (8th November 1877), affirming a decree of the District Judge of North Arcot (29th March 1877).

Mr. *J. F. Leith*, Q. C., and Mr. *F. H. Bowring* appeared for the Appellant.

Mr *J. D. Mayne* for the Respondent.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This appeal arises in an action brought by Bangari *Seksamma* against his half-brother, *Pedda Ramappa*, to recover possession of the important polliam of Bangari. Several points, which resulted in issues in the Courts below, have been disposed of in a manner which does not render them the subjects of appeal. The facts which relate to the question which alone has been argued before their Lordships are few. It appears that *Ramadasappa* was the Poligar of this polliam. It had been for several centuries in his family, had been resumed by the Government, and had been restored to him, but nothing turns on that resumption and restoration. *Ramadasappa* married four wives; the first two wives died, without issue, before his marriage with his third and fourth wives. The marriage with *Subbama*, his third wife, and with *Venkatamma*, his fourth wife, took place on the same day. There is now no dispute that the marriage with *Subbama* was prior in point of time. The appellant, *Pedda Ramappa*, is the son of the third

* 8 Cowells' I. A. p. 1; I. L. R. 2 Mad. p. 286.

(1) 14 Moore's I. A., 570; 3 P. C. J. 108.

(2) Manava Dharma Sastra, or the Institutes of Manu, according to the gloss of Culluca Bhatta, translated by Sir William Jones.

wife; the respondent, *Seshamma*, is the son of the fourth wife, *Venkatamma*, but was born before his half-brother *Ramappa*. *Ramappa* had an elder brother of the whole blood, *Chandrasekhara*, also junior to *Seshamma*, who, upon his father's death in 1866, was put by the Government into possession of the polliam. He died in the year 1876, having retained possession during his lifetime. Upon his death, Ramappa, the Appellant, was put into possession, and thereupon the present action was brought by *Seshamma*. It is only necessary to mention *Chandrasekhara* in order to account for the possession between the death of *Ramadasappa*, the father, and the bringing of the action. It is conceded that this possession is not material to the question which arises in this case, that question being whether the Respondent, who was first born son of *Ramadasappa*, though by the fourth wife, is entitled to succeed to the father's estate, in preference to the Appellant, who was born afterwards, his mother being the third and senior wife, and being, it was contended, in the same position as a first-married wife, by reason of the two former wives having died before her marriage.

The general question as to the right of succession in the case of sons born of different wives was decided by this committee in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1). It was there held that the elder-born son, though of the junior wife, was entitled to succeed in preference to the younger son born of the elder wife. In that case, however, the question as to the right of a son born of a first married wife did not arise, for there the mothers were both junior wives, and the first-married wife was living at the time of the marriages of the two wives whose sons were disputing the inheritance. In the present case, the first two wives having died before the marriage of the third and fourth wives, it is contended that the third wife is in the position of a first or royal wife, and that her son is entitled to succeed in preference to elder-born sons of junior wives. Undoubtedly that question was left open by the decision of their Lordships in the case of *Ramalakshmi Ammal*. In that case it had been admitted, or was supposed to have been admitted, that in the case of a royal wife the rule might be different from what it would be in the case of wives who were all junior to her. Their Lordships had not to consider that question, and did not think it right to prejudice the decision of it by any premature determination; in fact, the point was not argued. The High Court of *Madras*, from which the appeal came, and in which the admission had been made, had also declined to decide the point.

Their Lordships have felt some doubt whether they are now called upon to decide this question, for in the Court below the claim of the Defendant was rested, not upon the general Hindu law, but upon a special family custom. The fact that his case was so rested implies an admission that he and his advisers did not consider that by the general Hindu law he was entitled to succeed. The custom was found against him, and he did not, on his appeal to the High Court, insist, as one of his grounds of appeal, that by the general law he was entitled, his grounds of appeal being directed only to the other points which had arisen in the case, and to an allegation that the custom ought to have been found in his favour. Their Lordships, however, have allowed the point to be argued, and are prepared to determine it.

The preference which has been given to the first-born son over his brothers, irrespective of the priority of the marriages of their mothers, mainly depends upon the religious rules which guide the Hindu community. It is said in the judgment in the case of *Ramalakshmi Ammal*, "One great rule of religion binding upon every Hindu is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors, and as a consequence naturally flowing from this law the first-born son is throughout

(1) 11 Moore's Ind. Ap., Ca. 570; 3 P. C. J. 108

the books of authority treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges." The principle deduced from the rules above mentioned, and the reasons upon which their Lordships' judgment in the former appeal are founded, apply with equal force to the first-born son of his father, whether born of a first-married wife or of a junior wife; and it certainly lies upon the Appellant to shew some explicit authority to establish the distinction for which he contends.

The argument at the Bar has been rested solely upon some texts in *Menu*, and those texts their Lordships think not only do not support the view contended for by the learned counsel for the Appellant, but are rather opposed to it. The meterial ones are few. The first to which it is necessary to refer is in chap. 9, sect. 106: "By the eldest, at the moment of his birth, the father having begotten a son discharges the date to his own progenitors; the eldest son, therefore, ought, before partition, to manage the whole patrimony." This text simply says "by the eldest" without further description, and it states that the father having begotten him has discharged his debt to his own progenitors. Then the 107th is: "That son alone by whose birth he discharges his duty, and through whom he obtains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure." That section certainly does not help the contention on the part of the Defendant, because in the present case when *Seshamma* was begotten the father had no other son, and his duty was unfulfilled. Two other sections were referred to, which are more immediately applicable to the question under discussion. The 122nd section is, "A younger son being born of a first-married wife after an elder son had been born of a wife last married, *but of a lower class*, it may be a doubt in that case how the division shall be made." The words printed in italics are found in Sir *William Jones*' translation. The words "but of a lower class" are no doubt inserted by a commentator and are not in the original text which had come down. If the text were read without those words, undoubtedly that and the following sections, 123 and 124, would give some support to the argument of the defendant. But their Lordships think that the interpolation of the commentator cannot be disregarded. The early versions of the Laws of *Menu* are very ancient, and it might be doing great mischief to construe the words of the original text literally, unaided by the gloss which has been put upon them by writers and commentators of authority, whose interpretation has been received as authentic. The authority of the commentator who is responsible for the interpolated words is vouched by Sir *William Jones* in the preface to his translation. He says: "At length appeared *Culluca Bhatta*, who, after a painful course of study and the collation of numerous manuscripts, produced a work of which it may perhaps be said very truly that it is the shortest yet the most luminous, the least ostentatious yet the most learned, the deepest yet the most agreeable, commentary ever composed on any author, ancient or modern." *Sir William Jones*, himself a great Oriental lawyer and scholar, says that he had almost implicitly followed the text and interpretation of *Culluca Bhatta*, and had printed his gloss in italics. It is impossible to have higher authority for an explanation of a text. Then the text as interpreted is merely this, that a younger son being born of a first-married wife after an elder son had been born of a wife last married, but of a lower class, in that state of things it might be a doubt how the division should be made. Subsequent sections would seem to shew that in that case *Menu* thought the son of the first-married wife should have the larger share of partible property. If the interpretation is received, then the very expression "but of a lower class" leads to the implication that if the wives were of the same class the distribution would be equal; and sect. 125 is to that effect:—"As between sons born of wives equal in their class and without any other distinction, there can be no seniority in right of the mother, but the seniority ordained by law is according

to the birth." That is a distinct text, and the effect of it would only be uncertain if sect. 122 were read without the words added by the commentator. It is not contended that in the persent case the wives are not of the same class; and their Lordships do not determine what would be the proper rule of succession where the wives are of a different class or caste. That question does not arise.

The only other authority which has been referred to is one which certainly does not support the Defendant's case, if it does not establish that of the Plaintiff. It is the case of *Rajah Rughonath Singh* v. *Rajah Hurrehur Singh* (1). The marginal note correctly states what the case decides: "In the case of an estate in *Manbhoom* in the jurisdiction of the Governor-General's agent at *Hazareebaugh*, it was held that the succession is vested in the eldest son of the deceased Rajah born of any of his wives in preference to the eldest son of the pàt or first Ranee." It would seem that that case was decided not upon the general Hindu law, but upon the law prevailing in *Manbhoom*, and that there was no custom to the contrary. The Judges who formed the majority of the Court in their judgment say, "The ordinary course of succession is certainly shewn by the evidence to be that stated by the Plaintiff"— that is, the order stated in the marginal note. "To establish a contrary practice so as to assume the force of family custom requires the strongest evidence." Therefore the ordinary course of succession in the district of *Manbhoom* was in accordance with what their Lordships find to be the general Hindu law.

The question really comes to this: although it was not necessary to decide in the former case before this Board what was the right of a son of a first-married wife, yet the principles upon which their Lordships hold that the first-born was entitled to succeed apply equally to a son of such wife and sons of other wives; and that being so, it lay upon the Defendant to shew some positive rule of Hindu law, supported either by ancient text or mordern decision, to the contrary effect. Their Lordships think that no sufficient authority for such a rule has been produced They would observe that the reasons on which the precedence and privileges of the first wife over her co-wives are founded are scarcely pertinent to the succession of sons to their father, which is governed by other considerations, as already explained.

The ground on which this appeal has been decided renders it, of course, immaterial to consider whether the third wife, who was not married until after the deaths of the two former wives stood in the position of a first-married wife.

On the whole, their Lordships are of opinion that the Courts below, who concurred in their judgments, have come to a correct conclusion, and they will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss this appeal, with costs.

Solicitors for the Appellant: *Gregory, Rowcliffes & Rowle.*

Solicitors for the Respondent: *Burton, Yeates, & Hart.*

12th November 1880.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BHUBANESWARI DEBEE (one of the Defendants) } *Appellant,*

and

HARISARAN SURMA MOITRA (Plaintiff) ... } *Respondent.**

Evidence—Secondary Evidence of Contents of Document.

By the law of evidence administered in England, wh ch has been in a great measure, with

(1) 7 S. D. A. Rep. 126 new ed. 146.

* I. L. R. 6 Cal. p. 720.

respect o deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original

APPEAL from a decree of the High Court of Bengal (22nd December 1874), modifying a decree of the Subordinate Judge of the District of Rungpore (13th December 1872).

Mr *R. V. Doyne* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondent was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRET COLLIER :—

The facts necessary to the understanding of this case are as follows:—Romanath Lahiri, who died in October 1831, had five sons, and left a widow, who died in the year 1849. One of his sons, Rogboomoni, died in 1842, leaving his widow and heiress Chundramoni, who died in October 1858, leaving Uma Soonderi heiress to her father; she was the plaintiff in this suit. Her son has been since substituted, but it will be convenient to treat her as the plaintiff. She sued as defendants, three members of the family, *viz.*, the widow of Sibnath, the youngest son of Lahiri, who died about May 1861, having been the manager of the property from his father's death to that time; Nilcomul, who was a son of the third son of Romanath Lahiri; and Konuk Tara, the widow of the eldest son of Rommanath Lahiri. Neither Nilcomul nor Konuk Tara appears in this appeal, the only appellant being Bhubaneswari, widow of Sibnath. The claim of the plaintiff was in right of her father to a fifth share of the property of her grand father, and of the accretions to that property which had subsequently accrued during the management of Sibnath. With reference to the property left by the grandfather, she admitted that she had been in possession for some time of a two-anna share Therefore she only claimed the difference between that 2 annas share and the fifth,—that is to say, an one-anna and four-ganda share. With respect to the rest, the subsequent accretions, she claimed the fifth, being 3 annas and 4 gandas. It has been found by both Courts that these accretions consisted of acquisitions made by Sibnath out of the family property, and not, as he contended, out of his separate funds, and therefore they became part of the family property, the family remaining joint, as has been found by both Courts, until the death of Sibnath.

The main defence to the claim of the plaintiff consisted of two deeds set up by the defendants. The first is called a deed of "*anumati patro*," alleged to have been executed by Romanath Lahiri in 1826, wherein he made a distribution of his property somewhat different from that which would have been made by the law. According to that deed, as alleged by the defendants, he retained a 3-anna share of the property for himself, he gave a 3-anna share of it to his eldest son, and a 2¼-anna share to each of his four younger sons; and therefore, under that deed, it was contended by the defendants that the share of the plaintiff, instead of being to a fifth, was to only to a 2¼-anna share. It was further contended that Chundramoni, the mother of the plaintiff, during her widowhood, *viz.*, in 1856, had executed another deed, whereby she had sold to Sibnath one-fifth of her 2½-anna share, that is, a ½-anna share, in consideration of money advanced by Sibnath, and of Sibnath having, as was alleged by the deed, paid a portion of his father's debts out of his own property. With respect to this deed the findings of the Court are as follows:—The Judge of first instance doubted its execution by Chundramoni; he thought that, if executed, the execution was obtained from her by fraud and coercion, and he was further of opinion that no consideration for it had been proved. The High Court agreed with him, at all events on the latter point, and the result is, that, by the judgment of two Courts on what is a question of fact, that deed has no validity, and may be at once disposed of.

The two Courts differ with respect to

the first deed; the Judge of first instance holding that the deed had been properly proved that is to say, that secondary evidence of it was admissible and had been sufficiently given, the deed itself not being produced. The High Court were of opinion, in the first place, that the original deed had not been sufficiently accounted for to admit secondary evidence of its contents; and, secondly, that if secondary evidence were admissible, satisfactory secondary evidence had not been given. It is necessary, therefore, to inquire how the case stands with reference to this deed.

Their Lordships can entertain little or no doubt that a deed of the description which the defendants allege was executed by Romanath Lahiri. Such a deed is referred to in some judicial proceedings. It is referred to in a proceeding in the year 1832, whereby it appears to have been filed by one Kasinath Moitra, who then acted as a solicitor for some of the members of the family. It is also shown to have been filed in 1837 by the same person and returned to him It further appears that what may be assumed to be the same deed was filed in the Court of Goalpara in 1857 by Ramottum Mullik, who acted on behalf of Konuk Tara, widow of the eldest son, and one of the defendants in this suit, though said to be only *pro formâ* a defendant. It appears that Ramottum Mullik, who was the *muktear* of this lady, obtained a copy of this deed; and further that he got back from the Court the original and signed a receipt for it on the 7th December 1857. There may possibly be a question whether Mullik was or was not authorised to act on behalf of this lady, but it appears to their Lordships that, whether he was or not, the custody of the deed is tolerably well shown. If Mullik acted on behalf of the lady, the presumption would be, that he returned the deed to her. If he did not act on her behalf, it is shown to be in his custody, and has not been shown to have come out of it. Under these circumstances it appears to their Lordships that the very first duty of the defendants was to endeavour to obtain the deed from the custody either of Ramottum Mullik or of Konuk Tara, one of the defendants. But no attempt whatever appears to have been made to obtain it from either of them, or even to inquire whether or not it was in their custody, or in whose custody it was. In short, no search for it, or inquiry respecting it, of any kind, has been shown. Under these circumstances, by the law of this country, which has been in a great measure, with respect to deeds, made the law of India, it appears to their Lordships that the first condition of the defendants' ability to give secondary evidence—namely, the accounting for the nonproduction of the original—has not been complied with; and on that ground they are of opinion that the judgment of the High Court was right, and that secondary evidence was not admissible. That being so, it is not necessary to determine whether, if secondary evidence was admissible, the evidence given was sufficient. Their Lordships do not, however, desire to indicate any difference of opinion between themselves and the High Court upon this subject.

It has, indeed, been further argued by Mr. Doyne that the general conduct of the family shows that a family arrangement, such as is contained in this deed, was acted upon and recongnised by the family. But whatever arrangement there was, according to his case, was under a deed, and at the most the evidence which he relies upon, the conduct of the family, could have no greater effect than to corroborate the secondary evidence of the contents of the deed, if secondary evidence were admissible.

The only other aspect in which the conduct of the family could be held to be material would be with respect to the application of the Statute of Limitations, that conduct tending to show that there had been a partition beyond the statutable period. But here again there is a finding of two Courts that there was no division of the family until May 1861, within the period of limitation.

Under these circumstances, their Lordships are of opinion that the judgment of

the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

Solicitor for the respondent: Mr. *T. L. Wilson*.

16th, November 1880.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Madras.

VENKATA RAMA RAO (Plaintiff) ... } *Appellant,*

and

VENKATA SURIYA RAO and another (Defendants.) ... } *Respondents.**

Stridhanam—Testamentary power of widow.

The testamentary power of a Hindu female over her stridhanam being commensurate with her power of disposition over it in her lifetime, and both being absolute, no distinction can be taken as regards a widow's power of disposition by will over immovables in the purchase of which she has invested money given to her by her husband. Such estate is subject to the disposition which the general law gives her the power to make of her *stridhanam*.

A widow who received presents of movable property from her husband from time to time during their married life, after his death purchased immovable estate, partly out of such property and partly with money the proceeds of jewellery forming part of her *stridhanam*.

Held that she could dispose of such immovable estate as her *stridhanam*.

Appeal from a decree of the High Court of Madras (10th August 1877), affirming a decree of the Judge of the Godavari District (19th September 1876).

Mr. *J. D. Mayne* appeared for the Appellant.

Mr. *J. F. Leith* Q. C. and Mr. *R. V. Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

Their Lordships are of opinion that no ground has been made for reversing the Judgments of the Indian Courts in this case. The point, as ultimately stated, is of the narrowest description. It is admitted that upon the facts, as found by the Court, it can no longer be disputed that this mutta, Viraveram, was purchased by Bhavayammal, the grand mother of the Appellant and the Respondents, out of her *stridhanam*. Again, the testamentary power of a Hindu female over such *stridhanam* is admitted by Mr. *Mayne* to be commensurate with her power of disposition in her lifetime, both being absolute. So far the case would have been governed by the decision of this Board, which is reported in the 19th volume of the "Weekly Reporter," page 295, but for the subtle distinction which has been raised. It is suggested that where the funds are shown to have come wholly or in part from the husband, and to have been afterwards invested in land by his widow, the same law which governs in the devolution of immovable estate derived from the husband is to govern that acquisition; but their Lordships cannot find any trace of authority to support such a distinction. It is clearly the law that from the time the funds were given to the widow by the husband they became her *stridhanam*, and that she had full power of disposition over them Years after the death of the husband she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband? Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her *stridhanam*.

* I. L. R. 2 Mad. p. 333.

They must, therefore, humbly advise Her Majesty to affirm the Judgments of the Courts below, and to dismiss this appeal with costs.

Solicitors for the Appellant, Messrs. *Cobbold* and *Wolley*.

Solicitors for the Respondents, Messrs. *Burton*, *Yeates* and *Hart*.

23rd November, 1880.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Ebward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KAMESWAR PERSHAD (Plaintiff) ... } *Appellant*,

and

RUN BAHADUR SINGH (Defendant) ... } *Respondent*.*

Grounds supporting charge on the Inheritance by a Widow for her Debt.

In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor, seeking to enforce a charge on such estate, is bound, at least, to show the nature of the transaction, and to show that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognized necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle, laid down in *Hunoeman Persaud Panday v. Mussumat Babooee Munraj Kooneeree* (1), in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law, has made an alienation of ancestral family estate.

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* 8 Cowell's Ind. Ap. p. 8; I. L. R. 6 Cal. 843.

(1) 6 Moore's Ind. A. p. 393; 1 P. C. J. 552.

APPEAL from a decree of Divisional Bench of the High Court, Bengal (2nd July 1878), varying the decree of the Subordinate Judge of the District of Gya (6th December 1876).

Mr. R. V. *Doyne* and Mr. C. W. *Arathoon* appeared for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR JAMES WILLIAM COLVILE:—

The only material point to be decided upon this appeal arises in a somewhat peculiar manner. The suit was originally brought by the Plaintiff, Appellant, who is a *mahajun* carrying on business in the city of *Benares*, and also at *Gya*, to enforce a bond and mortgage against the late *Ranee Asmedh Konwar*, the instrument being dated the 1st of March, 1872. It appearing, however, that the next reversionary heir was in possession of the property alleged to have been mortgaged under an *ikrarnamah* executed by the Ranee putting him in possession, apparently, of the whole of her husband's estate, he was joined as a party Defendant in the suit; and it was prayed that a decree might be made for the amount sued for, with costs and interest, and that it might be awarded "by sale of the mortgaged and hypothecated properties, and in case the same do not cover the amount by the sale of other properties, and from the person of the debtor." The suit, therefore, was framed for the purpose of obtaining, in case of need, an absolute decree for the sale of the property alleged to have been mortgaged, including the reversionary interest of the second Defendant therein; and, accordingly, the second issue was settled so as to raise the question how far the reversionary estate was bound by the widow's disposition. It is in these words: "Whether or not was the amount claimed taken for a legal necessity; and whether or not is the amount of debt repayable by the property left by the husband of the widow, *Mussummat Asmedh Konwar*, who contracted the debt."

The Subordinate Judge, who tried the case in the first instance, found wholly in

favour of the Plaintiff, and gave a decree for the amount sued for, and a further direction that in case it was not paid, the mortgaged properties should be sold out-and-out. The High Court, upon appeal, so far confirmed the decree of the Subordinate Judge, that it left the widow bound to the extent of being a debtor on the bond for the amount stated on the face of the bond to be due, but determined that the deed had not been properly explained to her; that she did not understand, or was not properly informed, that it was a deed mortgaging the property; and, consequently, that all that could be given against her was a decree in the nature of an ordinary money decree.

The appeal to their Lordships is against the decree of the High Court, so far only as it was adverse to the Plaintiff. After the decree was pronounced, and before the appeal was presented here, the widow died, and the second Defendant, the only Respondent upon the record, became the absolute owner of the property in question.

Their Lordships concur with the High Court in thinking that, upon the evidence, there was a total failure of proof as to the proper explanation of this deed to the lady. It is not necessary for them to say whether, that being so, they should have gone so far as to make the money decree which was made against her. That is not the subject of appeal, and they must assume that so far the decrée was properly made. Nor do they think it necessary to express any opinion whether in point of fact the bond sued upon, upon the face of it, purports to pledge more than the widow's interest. They will assume that it was intended by those who prepared it, to be a pledge of the mouzahs and property which she had inherited from her husband. The only question to be decided on this appeal is, whether the transaction created a charge on the inheritance; whether it made the property in question when in the hands of the Respondent liable to satisfy the bond debt for which a decree has been made against the widow.

In order to establish the affirmative of this proposition, it is necessary, in the first place, to shew that the widow intended to do that which the law allows her to do in certain specified cases; *viz.*, to make a pledge of her husband's estate. But if the High Court was right in supposing that the document was not properly explained to her, there is a failure of proof that she did really intend to do that. The question whether the property was mortgaged at all depends upon the fact whether she intentionally executed a deed containing such a stipulation; and their Lordships have already intimated that, in their judgment, the High Court, dealing as it did with the evidence of *Bishen Sahi* and the other evidence in the cause, was right in coming to the conclusion that there was no such proper explanation of the bond as would bind her in respect of that stipulation.

Again, if this were otherwise, there would remain the question whether the Plaintiff had satisfied the burden of proof which every Plaintiff who seeks to charge the inheritance after the death of a widow, by virtue of a security executed by her, has to sustain. Their Lordships in no degree depart from the principles laid down in the case of *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (1), which has been so often cited. They have applied those principles in recent cases, not only to the case of a manager for an infant, which was the case there, but to transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law, has made an alienation of ancestral family estate. The principle, broadly laid down, is, that although the lender is not bound to see to the application of the money, and does not lose his rights if upon a *bonâ fide* inquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment in that case are: "Their Lordships think that the lender is bound to inquire into the necessities for

(1) 6 Moore I. A. 393; 1 P. C. J. 552.

the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money." And the judgment ends thus:—"Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to shew the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities.

In this case there is hardly any evidence on the part of the Plaintiff to shew what negociations took place with him, and what representations induced him to advance the money; still less is there any proof that, having those representations befor him, he made the necessary and proper inquiries. The chief witness that has been called, *Fakir Chand*, says of himself, that, although he is a village *wasil-baki-nuvis* and writes certain zemindary books, he has nothing to do with the books relating to the *mahajuny* business. It is true that he speaks to having been present when persons purporting to come from the Ranee asked for a loan of money for payment of Government revenue and the like; but one would expect in such a case as this that the *gomashta*, who had the management of the books, and who was responsible for lending money from the *kooti*, would be the person to come forward and shew upon the faith of what representations and after what inquiry he advanced the money. There is no evidence at all of that kind.

Then, again, the servants who are called from the Defendant's establishment give evidence which cuts both ways, because, although *Dost Mahomed*, calling himself one of the *dewans* of the Ranee, professed to have gone to the Plaintiff and to have taken money from him, he shews *primâ facie* that there was no real necessity for the Plaintiff to borrow money under the power which she could exercise only in the case of certain necessities. His evidence goes to shew that the lady was in fact in very easy circumstances, and that she had a net revenue of about Rs 13,000. He says: "The amount of collections used to remain in the custody of the *dewan*. A certain amount, when required, used to be paid to the Ranee. I cannot say off-hand what amount of collection comes to my hands. The expenses of the Ranee, whatever they may be, are restricted to charitable and pious purposes and distribution to people, &c. Besides this, she does not spend anything with a lavish hand." So again *Mahadeo Lal*, who was called on the part of the Defendant, puts her income at even a larger amount, and says:—"The balance, exceeding a lac and thirty thousand, used to be a saving to the Ranee as profit. This amount used to be lodged in the custody of the *dewan*. The necessary expenses used to be supplied to the Ranee. The money would not be lodged in the *cutcherry*."

The evidence of those two persons seems to their Lordships to be consistent with this state of things; that the Ranee's servants, the *dewans*, chiefly managed her affairs: that if they had immediate occasion for a sum of money they may have gone to the Plaintiff's *kooti* and got a temporary loan, but it fails to prove a necessity so serious as would justify a pledge of her husband's estate in excess of the ordinary powers of a Hindu widow, or reasonable grounds for the belief of such a necessity.

Then as to the latest transaction there is little or no evidence at all given by the Plaintiff as to the settlement of the former accounts or the circumstances under which he advanced the small sum which

made up the amount sued for upon the last bond. All that the witnesses state is that one *Baboo Ram Coomar*, who is said to be also a *dewan* of the Ranee's, told the *moonshi* to get this bond signed, some speaking to the making of the bond; but as to the part taken by the Plaintiff in making the last bond, or as to any inquiries made on that occasion, there is no evidence whatever.

It appears to their Lordships that the High Court was right on both grounds in treating the transaction as not binding upon the estate; and they will, therefore, humbly advise Her Majesty to affirm the decree of that Court and to dismiss this appeal.

Appeal dismissed.

Solicitor for the Appellant: *T. L. Wilson.*

30th November, 3rd and 4th December, 1880; and 26th January, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, The Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DINENDRONATH SANNYAL and others (Defendants) ... ... } *Appellants,*

and

RAMCOOMAR GHOSE and others (Plaintiffs) ... } *Respondents.**

Private Sale of Property attached in Execution—Incumbrance created after Attachment—Civil Procedure Code (Act VIII of 1859), s. 240.

The title obtained by the purchaser on a private sale of property in satisfaction of a decree, differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.

In 1858, the respondent obtained a decree against *B*. In 1863, in satisfaction thereof, he caused to be attached a decree for mesne profits made in favor of *B* against the appellants in 1860. In May 1865, the respondent obtained an order for the sale thereof; but instead of proceeding to execution sale, he purchased, in 1866, the whole of the mesne profits due under the decree of 1860, by private sale from *B*. Meanwhile, in September 1865, an order of Court had been made, between *B* and the appellants, on their consent (but without the respondent being a party to it), whereby the decree for mesne profits was set off, *pro tanto*, against a prior decree for a larger amount, which the appellants had obtained against *B*.

Held, that the sale of 1866 having been a private one, and not in process of execution, the respondent only obtained such title as *B* had in the decree of 1860—*viz*, a title subject to the effect of the order of September 1865.

APPEAL from a decree of the High Court (16th March 1877), reversing a decree of the Subordinate Judge of Rajshahye (10th July 1175).

26th January 1881.

The judgment of their Lordships was delivered, after the death of Sir *James W. Colvile*, by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a judgment and decree of the High Court at *Calcutta*, dated the 16th of March, 1877, which reversed an order of the Subordinate Judge of *Rajshahye*, dated the 10th of July, 1875, by which he ordered, amongst other things, that an Execution Case, No. 69 of 1875, instituted by the Respondents against the Appellants should be postponed until further orders.

At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of *Rajshahye* so far as it related to the Execution Case, No. 69 of 1875, and that the Respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this report until after the argument of another appeal in some respects connected

* 8 Cowell's Ind. Ap. p. 65; I. L. R. 7 Cal. p. 107.

with this case in which *Taruck Chunder Bhuttacharjee* is the Appellant and *Byeuntnauth Sannyal* and others are the Respondents.

Their Lordships will now proceed to give their reasons for the report in the first appeal, which will be submitted to Her Majesty at the next Council.

The history of the case is stated by the learned Judges in the judgment under appeal. It appears that in the year 1828 certain persons who are now represented in estate by the Appellants, and whom, as well as the Appellants, it will be convenient to speak of as the *Sannyals*, obtained a decree against certain other persons who as well as the *Bhuttacharjee*, Respondents, may be called the *Bhuttacharjees*, for a sum exceeding Rs. 82,000. It was subsequently held that the judgment carried interest at 12 per cent. from the date of the decree until the realisation thereof. In execution of the decree the *Sannyals* attached, sold, and became the purchasers of certain immovable properties of the *Bhuttacharjees*. and obtained possession thereof, which they retained for many years. After considerable delay the *Bhuttacharjees* instituted proceedings to set aside the sale in execution, and on the 10th of November, 1857, obtained a decree of the Principal Sudder Ameen of *Rajshahye* setting aside the sale and declaring the right of the *Bhuttacharjees* to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sudder Court on the 23rd of May, 1860.

In the interval between the date of the decree of the Principal Sudder Ameen and the affirmance thereof by the Sudder Court, viz, on the 17th of May, 1858, *Anund Mohun Ghose*, the father of the Respondent, *Ramcoomar Ghose*, and who is now represented by him, obtained a decree against the *Bhuttacharjees* for a sum exceeding Rs. 67,000. In execution of that decree *Anund Mohun Ghose* attached, in May, 1863, the *Bhuttacharjees'* right to mesne profits under their decree against the *Sannyals* of the 10th of November, 1857, and on the 26th of May, 1865, an order was issued by the District Court for sale of the decree for mesne profits

The sale in execution of the *Sannyals'* decree of 1828 having, as before stated, been set aside they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were from time to time given by different Courts as to the amounts due to the *Sannyals* and to the *Bhuttacharjees* respectively on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the *Sannyals* under their decree exceeded the amount due by them to the *Bhuttacharjees* under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the *Sannyals* and the *Bhuttacharjees*. It is sufficient to say that, on the 14th of September, 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justices *Kemp* and *Campbell*, stating that it had been arranged, by consent of both parties, that the *Sannyals* should have simple interest only on their original decree from the year 1828 to the date of payment, it being understood that the cross decree of the *Bhuttacharjees* for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges, having then proceeded to modify an order which had been previously made, declared that simple interest only should be calculated on the *Sannyals'* decree from 1828, and that then the decree of the *Bhuttacharjees* should be set off against the gross amount of the *Sannyals'* decree once for all.

It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding in which the *Sannyals* were petitioners, and the *Bhuttacharjees* were judgment debtors. *Ramcoomar Ghose* was not a party to the proceeding. He did not, however, proceed

to a sale under the execution against the *Bhuttacharjees* of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the *Sannyals*, together with all interest due thereon, in lieu of the sum of Rs. 74,506 due him upon the decree obtained against them by *Anund Chunder Ghose*, his father. The arrangement was carried into effect by a deed of sale, dated the 15th of Cheyt, 1272, corresponding with the 27th of March, 1866. It was correctly stated by the High Court that the only question they had to deal with was whether *Ramcoomar Ghose*, by purchasing the *Bhuttacharjees'* claim to mesne profits on the 27th of March, 1866, after their agreement with the *Sannyals* to have their decree adjusted by set-off, recorded in the order of the 14th of September, 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the *Bhuttacharjees'* decree.

The Subordinate Judge had held that *Ramcoomar Ghose*, by privately purchasing the mesne profits from the *Bhuttacharjees*, had destroyed the right which he possessed under his attachment as a decree holder, and stayed his execution against the *Sannyals*. The High Court reversed that decision, and held that the benefit of the attachment was not affected by the private purchase, and that *Ramcoomar Ghose* was entitled, so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent decree between the *Sannyals* and the *Bhuttacharjees* which had been recorded behind his back while the property was subject to his attachment. They, however, limited the right of *Ramcoomar Ghose* to avail himself of the mesne profits freed from the *Sannyals'* right of set-off to the extent of satisfying the amount of his decree against the *Bhuttacharjees* with simple interest to the 14th of September, 1865, the date of the consent order.

Their Lordships are of opinion that the private sale to *Ramcoomar Ghose* was not tantamount to and had not the same effect as a sale in execution of *Ramcoomar Ghose's* decree, under which the mesne profits had been attached, and that *Ramcoomar Ghose*, by virtue of his purchase, acquired no greater interest than the *Bhuttacharjees* had in the decree for mesne profits, and consequently that he was bound by the order of the 14th of September, 1865.

By sect. 201 of Act VIII. of 1859, it is enacted that if the decree be for money (which *Ramcoomar Ghose's* decree was), it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both if necessary. By sect. 205 debts due to the judgment debtor may be attached and sold as property in execution of a decree. By sect. 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court; and then, by sect. 240, in the case of an attachment by written order, any payment of the debts to the judgment debtor after the order shall have been made known in the manner in the said Act mentioned and during the continuance of the attachment, shall be null and void.

It is not necessary to decide whether, if *Ramcoomar Ghose* had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th of September, 1865, the attachment having been issued *pendente lite*, that is to say, pending the proceedings between the *Sannyals* and the *Bhuttacharjees*, in which the question was raised as to the right of set off. It may be admitted for the sake of argument, but only for the sake of argument, that the order of the 14th of September, 1865, made by consent of the *Sannyals* and of the *Bhuttacharjees*, directing the set-off, amounted to a payment of the

mesne profits by the *Sannyals* to the *Bhuttacharjees*, and a receipt thereof by the *Bhuttacharjees* within the meaning of sect. 240. The effect of that section, however, is not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the case of *Anund Lall Dass* v. *Jullodhur Shaw* (1) The private sale, pending the attachment, was binding upon *Ramcoomar Ghose*, and also upon the *Bhuttacharjees*. *Ramcoomar's* decree was satisfied by the sale to him of the mesne profits in lieu of the sum due to him under his decree. He never afterwards could have proceeded to execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached he abandoned his execution, and also the attachment, which was a part of the execution.

There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgement debtor, acquires that title by operation of law adversely to the judgment debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.

The High Court relied upon a case in 6 *Madras* High Court Reports, p. 65. But there is a distinction between that case and the present, for there the property sold was hypothecated to the Plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than the decision under consideration, and their Lordships are not prepared to say that it would have affirmed on appeal.

Their Lordships cannot but regard as lamentable the long, harassing, and expensive litigation to which the *Sannyals* have been subjected in endeavouring to obtain the fruits of their decree of 1828, an object which, although upwards of half a century has elapsed since the date of the decree, they have not as yet attained. It is indeed a subject of deep regret that in the course of that litigation so many contradictory and conflicting judgments have been delivered, sometimes on appeal from an inferior to a Superior Court, and sometimes even by the same Judges in reviewing their own judgments.

Solicitors for the Appellants: *Wrentmore & Swinhoe.*

Solicitors for *Ramcoomar Ghose*: *Oehme & Summerhays.*

(1) 14 Moore's I. A. 549, 550; 3 P. C. J. 81.

26th, January 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, The Right Hon'ble Sir Robert Porrett Collier, and The Right Hon'ble Sir Richard Couch.

TARAKCHANDRA BHUTTACHARJIA. ... } *Appellant,*

and

BAIKANTNATH SANNIAL and another ... } *Respondents.*

THE hearing of the appeal of Tarakchandra Bhuttacharjia *v.* Baikantnath Sannyal and another, having been interrupted by the lamented death of Sir James Colvile, the case was reargued this day before the Committee, and their Lordships' judgment, at the close of the argument, was delivered, in the following terms, by

* I. L. R. 7 Cal., p. 119.

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decision of the High Court was correct as to the construction of the order of the 14th September 1865. That order runs as follows:—

"At the hearing of this case this day by consent of both parties it (torn) arranged that the plaintiff (torn) have simple interest only (torn), original decree from the year (torn), date of payment, it being (torn) that the cross-decrees of (torn), for *wasilat* also bears simple interest from date of ascertainment only. The orders, therefore, for calculating interest on the one hand upon the sum ascertained to be due in 1250, and for setting off the *wasilat* due to defendants year by year is modified, and there will be no annual account to set the two accounts against one another. The simple interest only will be calculated from 1828, when the other decree can be set off against the gross amount once for all. Decree as above, with costs in proportion."

From this judgment, and from the decree which was drawn up upon it, it appears to their Lordships that the intention of the Court was, as the Court have themselves subsequently expressed in the judgment now under appeal, that the interest should be calculated on the *Sannials'* decree from 1828 down to the time of that order, and that interest on the mesne profits, which had been assessed as due to the *Bhuttacharjees*, should be calculated at the same rate of 12 per cent. from the date when those mesne profits were ascertained, down to the time of that order of the 14th September 1865. In point of fact the interest was calculated up to the 31st of December in that year, but in that respect the *Bhuttacharjees*, who were the appellants, have gained a benefit, and the other side have not objected. Their Lordships, therefore, think that the judgment of the High Court, so far as it relates to the calculation of interest, is quite correct.

The decree of the *Bhuttacharjees* has not been set out on this record, but it appears that that decree included other matters than the mesne profits which were alluded to in the order. On the taking of the accounts before the Judge of the lower Court, the *Sannials* admitted a set-off to the amount of Rs 300, 104-0-1. That amount included the sum of Rs 16,324-10-15, in addition to the Rs.2,11,914-11-11, the amount of mesne profits as appears in the Appendix A-1 referred to in the judgment of the Judge of the lower Court. But in the account taken by the officer of the High Court, and in the decree of the High Court itself which was drawn up upon that account, no allusion whatever is made to the sum of Rs.16,324-10-15. No explanation could be given at the Bar of this omission. Their Lordships, therefore, think that the cause should be remanded to the High Court to consider and determine whether or not that sum or any part thereof should be deducted from the sum decreed to the respondents.

In adjusting the accounts between the parties, the High Court has calculated interest on the Rs.291-7 allowed for the Amin's fees from the 28th September 1828, whereas interest on that account should have been calculated only from the 25th June 1844. It is a very small matter, but their Lordships think that the decree ought to be amended in that respect by deducting from the amount decreed to the respondents the excess of interest so allowed.

Their Lordships will, therefore, humbly advise Her Majesty that the decree be varied to that extent, and that the case be remanded to the High Court for the purpose of considering and determining whether the sum of Rs.16,324-10-15, or any part thereof, should or should not be deducted from the sum decreed to the respondents, and that in all other respects the decree ought to be affirmed.

Upon the whole their Lordships think that the appellants ought to pay the costs of this appeal.

Solicitors for the appellants: Messrs. *Wrentmore* and *Swinhoe*.

Solicitors for the respondent Ramkumar Ghose: Messrs. *Oehme* and *Summerhays*.

27th January, 1881.

PRESENT:

Members of the *Judicial Committee* :—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Allahabad.

HAJI MAHOMMED FAIZ AHMED KHAN. (Defendant) ... } *Appellant,*

and

HAJI GHULAM AHMED KHAN and another (Plaintiffs.) ... } *Respondents**

Mahomedan Law—Gift—Ariat—Construction.

One of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one-fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her. By another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows:—"I declare and record that the afore said sister-in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue."

Held that these words did not cut down previous words of gift to what in the Mahomedan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil-ewaz*, or gift for consideration, granting the villages absolutely.

Appeal against a decree of the High Court of the North-Western Provinces (11th July, 1877,) in part reversing and in part affirming a decree of the Subordinate Judge of Aligarh (25th May, 1876).

Graham, Q. C., and *J. T. Woodroffe*, for the Appellant.

Leith Q. C., and *C. W. Arathoon*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH :—

This suit was brought by the two Respondents, *Haji Ghulam Ahmed Khan* and *Haji Inayatullah Khan*, claiming as heirs of their sister, *Mussummat Wali-un-nissa*, to recover two villages, mouzah *Sahauli* and mouzah *Kamalabad*, in zillah *Aligarh*. The original Defendant and Appellant here was *Faiz Hamed Khan*. He has died since the appeal to Her Majesty, and is now represented by his sons, who are his heirs. The question in the appeal turns upon the construction of two instruments. A third was executed to carry the transaction into effect; but the case really turns upon the construction of two instruments, one a deed of gift, and the other an agreement in which the gift is accepted.

In order to understand the position of the parties, who are Mahomedans, it will be necessary to refer to a few facts. *Murad Khan*, who was the taloukdar of *Datauli* and the owner of several villages, having died, his grandsons, *Mohammed Hussain Khan* and the Defendant *Faiz Ahmed Khan*, succeeded to his estates; their father, *Abdulrahman Khan*, having died in the grandfather's lifetime. *Abdulrahman Khan* left a widow, *Mussumut Wazir-un-nissa*, the mother of his two sons, who is still living. *Hussain Khan*, the elder grandson, died on the 31st of August, 1838, leaving as his widow *Mussumat Wali-un-nissa*, the sister of the two Respondents, who now, as her heirs, claim the mouzahs in question.

On the death of *Hussain Khan* his share in the estates which descended from his grandfather would fall, according to Mahomedan law, to his brother, *Faiz Ahmed Khan*, his mother, *Wazir-un-nissa*, and his widow, *Wali-un-nissa*, as co-sharers; the latter, as widow, being entitled to a fourth. The estates had stood in the register in the name of *Hussain Khan*, his brother *Faiz Ahmed Khan* being a minor; but after *Hussain's* death they were placed

* 8 Cowell's Ind. Ap. p. 25; I. L. R. 3 Alla.

in the names of his mother, his widow, and his brother, *Faiz Ahmed Khan*. Although the estates were so placed in the names of the mother and widow, the two ladies did not enter into possession or receipt of the profits of them, but received allowances of money and grain. *Wali-un-nissa*, the widow, received annually Rs. 500 and 100 maunds of grain. In 1856 the two ladies executed a power of attorney authorizing a *mooktar* to expunge their names from the register; and in 1857 the power of attorney was acted upon, but partially only. Their names were expunged from the register with regard to the greater part of the estates, but two villages were left standing in their names, namely, *Datauli Khas* and *Deosaini*; and these villages remained in their names down to the time of the transaction which is in question.

On attaining his majority *Faiz Ahmed* made a pilgrimage to *Mecca*. During his absence there appears to have been some dispute between the manager of the estates and the ladies or those acting for them, and some contest took place during the Government settlement which was then being prosecuted. It is not immaterial to refer to these proceedings, which shew that, though the two ladies were receiving an allowance in money and grain, they had not given up their claim to a share of the estates. What took place is shortly stated, in the judgment of the Subordinate Judge, as follows :—"The revision of the settlement in this district commenced in 1863; and *Wali-un-nissa* then, probably with the advice of *Mohammed Inayat ul-lah Khan* (the cause of which, perhaps, might have been those very disputes), presented applications through her agent for entry of her name in respect of the villages of the estate. But those applications were withdrawn about ten or twenty days after, on the 27th of May, 1863 (as proved by the evidence of *Farzand Ali*, *mooktar*). The disputes were prolonged regarding *Datauli Khas*, in respect of which *Wali-un-nissa's* name had continued to be entered The cause of this appears to have been that in the wajib-ul urz *Faiz Ahmed Khan* had caused the name of *Wali-un-nissa* to be entered in regard to a 1¾ biswa share with receiving Rs. 500 cash and 100 maunds of corn." The Mussummat applied for entry of her name in respect of a 2-anna share, and also stated that the agents of *Faiz Ahmed Khan* had wrongly stated her right to 1¾ biswas and her receipt of Rs. 500 cash and 100 maunds of corn. It thus appears that, although an allowance in money and grain was made, *Faiz Ahmed* or his agents admitted that the widow was entitled to 1¾ biswas; and there is no satisfactory evidence to shew that by taking the allowance she had relinquished her right to a share if she chose to insist upon it These proceedings occurred in the absence of *Faiz Ahmed* at *Mecca*. After the discussion before the Deputy Collector the case was brought before the Collector, who very properly said that the Collectorate had nothing to do with the rights of the parties, and that the whole matter had better stand over until *Faiz Ahmed* returned.

Faiz Ahmed returned from *Mecca* in the year 1866; and steps were then taken to come to an arrangement with his brother's widow, which was carried into effect by the documents which are now to be construed.

The instrument executed by *Faiz Ahmed Khan* bears date the 1st of January 1867. It states that he intended again to go to *Mecca*, and goes on thus:—"The karindas cannot properly meet the requirements of the services due to *Bibi Wali-un-nissa*, my sister-in-law (brother's wife); and whereas from before Rs 500 cash and 100 maunds of grain were fixed on my part for necessary purposes, by way of rendering service to her, therefore I have now, with great pleasure, willingly and voluntarily made a gift of mouzah *Sahali*, assessed at Rs. 1310. 5*a*. 1*p*., and of mouzah *Kamalābad*, assessed at Rs. 281-11*a*. 3*p*., villages appertaining to pergunnah *Atauli*, in the zillah of *Aligarh*, valued altogether at Rs. 10,000, and owned by me without the partnership of any other person, for all the expenses of the said sister-in law, and put in her

possession." If it had stopped here, there could be little doubt that the instrument would contain an absolute gift of the two mouzahs. It goes on :—" I do declare and record that the aforesaid sister-in-law may manage the said villages for herself, and apply their income to meet her necessary expenses and to pay the Government revenue." Those words, it is contended, cut down the previous words of gift, not even to a gift for life, but to what in Mahomedan law is called an ariat or loan, which would seem to be no more than a licence to take the profits of the land, revocable by the donor. Undoubtedly, those words require consideration. They may have been inserted either to shew that and ariat was intended, or merely to shew the motive and consideration of the gift. In order to ascertain which of those two meanings the words properly bear, the rest of the document is material to be considered. It goes on :—" And that I and my heirs shall make no objection or opposition." These words seem to be entirely opposed to the view that an ariat in the sense of a resumable loan or licence was intended. It goes on : " I therefore have written these few words as a deed of gift,"—the grantor here distinctly describes the deed or instrument he is signing as a deed or instrument of gift,—" that it may serve as evidence." Then, written by way of postscript, he says :—"I declare that these villages have been given in lieu of the former Rs.500 cash and 100 maunds of grain, and that henceforth the said money and the grain shall not be given." This, taken in its plain sense, is a statement of one of the considerations for the gift; and it was necessary to be stated, otherwise a claim might have been made for a continuance of the allowance of the rupees and grain in addition to the benefit which the donee took under the deed.

The Mussummat executed an *ikranamah*, dated on the 3rd of January, 1867, but which was, in fact, executed on the same day as the deed of gift; and the two instruments evidently form but one transaction. It contains a recital of her having received the money and grain, and of some of the facts relating to the register and to her name having been upon it and expunged; and then it proceeds thus:—" *Mohammed Faiz Ahmed Khan* has now returned from *Arabia*, but notwithstanding that I had caused my name to be expunged, he gave me mouzahs *Sahauli* and *Kamalabad*, in talooka *Datauli*, for my maintenance and support. I am now satisfied and contented with this property." The word " property " surely implies that she had the estates. The mere right to take the usufruct so long as the grantor pleased could hardly be described as property, nor would it be a provision with which she was likely to be satisfied and contented. Then there is this important relinquishment of claim on the part of the Mussummat : "I do declare that neither I have nor shall have any claim in future respecting the estate of *Datauli Khas*, the villages of the talooka *Datauli*, *Burhansi*, *Deosaini*, the villages in talooka *Malakpur*, and *Rahwara*, and other detached villages, and also respecting the moveable and immoveable property constituting the ancestral estate of *Mohammed Faiz Ahmed Khan*;" that is, she disclaims and relinquishes all her right as a co-sharer to the whole of the ancestral estate ; and it is plain that not only had her name remained up to this time on the register in respect of the two villages, *Datauli* and *Deosaini*, but that she had done nothing which would have amounted to a release of her right as co-sharer in the ancestral property. It is evident that *Faiz Ahmed*, in obtaining from the widow this release of her right, considered that he was getting something valuable ; and undoubtedly she was giving up a valuable right for that which, according to the Appellant's present contention, would not be a fair or reasonable equivalent for it.

The question upon these instruments, as already stated, is whether, read together, as their Lordships think they must be, they constitute a gift by *Faiz Ahmed Khan* to *Wali-un-nissa*, or amount only to an ariat or loan. The allegation in the Appellant's pleading below is that the latter is the true construction. Upon

this question their Lordships have the benefit of an able and learned judgment from a Mahomedan Judge, of whom the High Court says that he enjoys a high reputation as a Mahomedan lawyer. This learned Judge has referred to many books of authority on Mahomedan law, from which he has given extracts and also instances in his judgment. He is clearly of opinion that this instrument contains words which in Mahomedan law have a technical signification as words of gift, and which, when used as they are in it, do by law constitute a gift. He also thinks that the words "that she might maintain herself out of the estates" describe one of the objects of the gift, and do not limit or cut down its operation

Their Lordships do not think it necessary to discuss the authorities cited, but there are two short passages in the judgment of the learned Subordinate Judge that may be usefully referred to. He says:—"There is no reason why the word hibeh should be held to mean an ariat (loan), and why, when it is clearly stated that the mouzahs of *Sahauli* and *Kamalabad* are made a gift of, the context should be construed to mean that the profits of the mouzahs *Kamalabad* and *Sahauli* were given as ariat." It may be observed that if it had been meant to give the profits only the deed might have been so expressed, but the mouzahs themselves are given. Then he concludes his judgment in this way:—"Considering all these circumstances, the opinion of the Court is that both the villages were given to the Mussummat as a gift, and not as an ariat (loan); that the document is clearly a hibehnama (deed of gift) and not an ariatnama (a deed of loan); that both the villages were *Mussummat Wailun-nissa's* property by reason of the gift, and inheritable. According to the Mahomedan law, in an unconditional (mahz) gift a donor is no longer competent to recede from the gift on death of the donee, or, in other words, to get the property back, and in hibeh-bil-ewaz (gift for a consideration) the doctrine is clearer." The gift in this case appears to their Lordships to be a hibeh-bil-ewaz.

Some difficulty was felt by the learned counsel for the Appellant in condescending upon the definition of an ariat. It was pointed out to them that in the written statement of the Appellant the contention was this:—"This mode of giving, where the word acceptance (ejab) denotes the proprietorship of the profits, and not the proprietorship of the area, is called aryat *(commodatum)* in the Mahomedan law; that is to say, the proprietary right of the person who gives is not extinguished, and he can resume (the estate) at any time It is therefore not valid, according to the Mahomedan law, to claim by inheritance to the said Mussummat an estate which she herself did not own." This statement is in accordance with what is said of ariat in the Hedaya, Book 29. The learned counsel, Mr. *Graham*, at first adopted this statement; but feeling how difficult it was to support the instrument as an ariat having this effect, both the learned counsel for the Appellant afterwards endeavoured to construe it as being something intermediate between an absolute gift and an ariat. This was obviously a departure from the view originally taken by those who advised the Appellant in the Courts below, and no authority in Mahomedan law for holding that any such construction could be given to the document has been shewn. Their Lordships are satisfied, as the High Court below was satisfied, that the Mahomedan Judge has come to a correct conclusion that the transaction was a gift for a consideration, and that the words relied on to cut it down to an ariat have not that effect. It is to be observed that the Subordinate Judge cites various instances from books on Mahomedan law in which very similar words, used after words of absolute gift, have been read as being descriptive of the motive or consideration of the gift, and ineffectual to control the operation of technical words of gift.

For these reasons their Lordships think that the judgments below are right; and they will humbly advise Her Majesty to

affirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitors for Appellant *Barrow & Rogers.*

Solicitor for Respondents : *T. L. Wilson.*

4th February 1881.

PRESENT :

Members of the *Judicial Committee* :— The Right Hon'ble Sir Barnes Peacock, The Right Hon'ble Sir Montague Edward Smith, The Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SUDISHT LAL (Plaintiff); ... } *Appellant,*

and

MUSSUMMAT SHEOBARAT KOER (Defendant) ... } *Respondent.**

Mooktarnama—Pardanishin Woman—Extent of Liability—Account stated—Explanation of Document.

In order to charge a pardanishin woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to, and understood by, her.

A *mooktarnama* executed by a pardanishin woman appointed her husband to be her general *mooktar*, and declared that "all acts done by the said *mooktar*, such as giving and taking loans to and from others, executing on my behalf, getting executed in my favor, deed of absolute sale," and so on, "shall be accepted by me."

It was sought to render the principal liable, on an account stated by her husband as her *mooktar* so empowered, for a debt, without proof that the money constituting it had been borrowed on her account.

Held, on the construction of the *mooktarnama*, that the *mooktar* had no authority to bind her by such a statement of account, whatever authority he might have had to bind her by an actual borrowing of money on her behalf.

No implication of authority in the *mooktar* to bind the woman by his stated account had arisen from the carrying on of a course of business.

Accordingly, when the evidence of express authority failed, the statement of account by the *mooktar* was insufficient to render the principal liable.

No evidence was given of the items lent, so as to establish an indebtedness independently of the account stated.

Appeal from a decree of a Division Bench of the High Court of Bengal (25th June 1878), reversing the decree of the Second Subordinate Judge of Zilla Mozufferpore (23rd December, 1876).

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon* for the Appellant.

Mr. *R. V. Doyne* for the Respondent.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH :—

This is an action brought by *Sudisht Lal*, a *mahajun* carrying on his business at *Mozufferpore*, against *Mussamut Sheobarat Koer*, to recover a sum of Rs. 23,470 and interest, upon the footing of a stated and settled account. The plaint is based entirely upon an account which, it alleges, had been settled, not by the defendant herself, but by her husband, *Ajudhya Pershad*, who, it is said, had authority from her to state and settle accounts. In the outset it may be noticed that no evidence was given of the items of the account so as to establish an indebtedness independently of the account stated. This omission seems to have been intentional, for the Plaintiff himself, and two of his *gomashtas*, who might have given that evidence if a debt really existed, were called.

The circumstances which preceded the action may be shortly stated. *Ram Dyal Misser*, who is now dead, carried on a banking business in the same place as the Plaintiff, at *Mozufferpore*. He died in the year 1857, leaving a widow and two daughters, of whom the Defendant is one. His widow died in the year 1860. The elder sister, whose name is *Sheoraj Koer*, had married *Durga Persad Taibaidi*. The Defendant had married the person already named, *Ajudhya*. The banking business of *Misser* was carried on by the widow during her lifetime, and there is some

* 8 Cowell's Ind. Apl. p. 46 ; I. L. R. 7 Cal p. 245.

evidence that it was also carried on after her death by the two daughters, the Defendant being at her mother's death a minor, and the husband of the elder sister, *Sheoraj*, carrying on the business on her behalf and on that of her infant sister. The Defendant, *Mussamut Sheobarat*, became of age in February, 1869, and shortly after her coming of age it appears that the banking account was separated; whatever may have been due at that time from the two sisters to the Plaintiff's firm was divided, and one-half carried to the debit of each of the sisters. Although there is some evidence that the sisters carried on a banking business, there is really no satisfactory evidence that such a business was carried on by the Defendant after the separation, and certainly none that it was carried on with her knowledge and authority. However, it is alleged on the part of the Plaintiff that such a business was carried on, and was managed by *Ajudhya*, her husband, and the account which is sued on is said to have been signed by him as the adjustment of a banking account. The account so signed is set out at length in the record, and begins with this item: "Credit. Former balance, principal and interest, as per former *Chitta*, for the year 1280, Rs. 21,933. 14a. op" There are other items and interest, and some items on the other side of the account, resulting in a balance of Rs 23,405 13a., the amount for which the action is brought, plus a sum of Rs. 50, as to which no evidence whatever exists. The Plaintiff's claim to recover this sum rests entirely upon the admission which was made by *Ajudhya*, the husband, in settling this account. Not only is there no proof of indebtedness independently of the account, but there is not sufficient evidence to satisfy their Lordships that a banking business was carried on by the Defendant; whilst there is some evidence that *Ajudhya* was carrying on business with the Plaintiff's firm on his own account, and that he had purchased with the Plaintiff a saltpetre property which they were working together.

In this state of the evidence it is plain that no authority can be inferred from the fact that a banking business was carried on to the knowledge of the Defendant. The authority, therefore, upon which the Plaintiff must rely as having been supplied to *Ajudhya*, depends entirely upon the *mooktarnama* which has been given in evidence; indeed, that is the authority on which his case has been rested. This *mooktarnama* is said to have been executed by the Defendant shortly after her coming of age. Their Lordships desire to observe that there is no satisfactory evidence that this *mooktarnama* was explained to the Defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by *pardanishin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground. They are disposed to look at the *mooktarnama* which was received by the Subordinate Judge, and was construed by the High Court, although that Court expressed some doubt as to whether, if it ought to have been construed differently from the view they took of it, they should have acted upon it. This instrument is said by the High Court to be very nearly in the terms of the ordinary *mooktarnama* given to *mooktars* to transact business and to bring and defend suits. Undoubtedly there is much in its language which is of the ordinary kind; but there are some special powers conferred by it, and it is upon them that the Plaintiff most relies for the authority of the husband. The document begins with a recital: —"Whereas often cases connected with monetary transactions, as loans, purchase and sale of properties, *atanamas*, *hebanamas*, *ticca pattas* with *zurpeshgi* and without *zurpeshgi*, and realization of decretal money, in which sometimes I, the declarant, am Plaintiff, and sometimes Defendant, remain pending decision, and may be instituted in future in the Civil, Revenue, and Criminal Courts, as well as

in the Calcutta High Court; that is, whereas I, the declarant, am under the necessity to attend to all business, such as monetary transaction, purchase and sale of property, preparation of deeds of gifts and grants, leases with or without *zurpeshgi*, and execution of deeds of absolute sale and recovery of decretal money, *viz.*, all the village and Court affairs—filing answers in appeal cases and taking out execution of decrees in the Courts"—enumerating them—" by engaging pleaders and *mooktars* when required in the cases instituted in the Civil Courts,"—this is very much the language of an ordinary *mooktarnama*. It goes on: —" As also realizing decretal money, and the money covered by bonds from debtors, by executing receipts and acquittances on behalf of me, the declarant, according to the account of the mahajani shop, saltpetre godown, and zemindari villages." The words, "according to the account of the mahajani shop," do not necessarily import a statement that she was then carrying on that business. She was entitled to a share of whatever was due to the old business, and if it became necessary to sue for such debts the *mooktar* would be empowered to sue for them and to give discharges to the debtors. Then the operative part of the instrument is:—" I, the declarant, therefore, of my own free will and accord, appoint my husband, *Ajudhya Persad Sukul*, my general *mooktar*,"—the generality of that language, " appoint my husband my general *mooktar*," must be construed, and if necessary controlled, by what comes afterwards,—" and declare to the effect that all acts done by the said *mooktar*, such as giving and taking loans to and from others; executing on my behalf, getting executed in my favor, deeds of absolute sale," and so on, "shall be accepted by me." The words that are most relied on are:—" and declare to the effect that all acts done by the said *mooktar*, such as giving and taking loans to and from others." If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that under this power of attorney she would be bound by his acts, as being within the scope of his authority. But it would have to be shown, not only that he borrowed the money, but that it was borrowed for her. If it had appeared that it was taken for his own purposes and the Plaintiff who advanced the money knew it, the wife could not be charged with it. In the present case, without any proof that money had been borrowed at all, and certainly with none that it had been borrowed on her account, the Defendant is sought to be fixed with a large debt by a mere statement of account. Their Lordships think upon the construction of the *mooktarnama* that the husband, *Ajudhya*, had no authority to bind her by such a statement, whatever authority he might have had to bind her by an actual borrowing of money on her account. This is the view taken by the High Court.

Their Lordships must not be supposed to lay down that, when an agent is appointed to manage a banking business, and is invested with the powers of a manager of that business, a statement of account made by him in the regular and ordinary way of business would not be evidence against his principal; that question does not arise on this record. It is enough for them to say that, in this case, there is no sufficient proof that the business was carried on with the Defendant's knowledge and by her authority, and therefore no implication founded on the course of business can arise. The evidence of express authority also fails.

Their Lordships will humbly recommend Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Solicitor for Appelant: *T. L. Wilson.*

Solicitors for the Respondent: *Barrow & Rogers.*

9th, 10th February, and 1st March, 1881.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMLAL MOOKERJEE (Plaintiff) ... } *Appellant,*

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL and others (Defendants) ... } *Respondents.**

Hindu Law—Construction of Will—Use of words "putra poutradi krame"—Condition subsequent.

In a will, the words "*putra poutradi krame,*" recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants, and will include female heirs of a female, where by law the estate would descend to such heirs.

The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows:—

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my granddaughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof '*putra poutradi krame.*'

"8. If the death of my wife should take place before my daughter's daughter arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for her life.

"20. If no son or daughter should be born to me, and if my daughter's daughter should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

The will further directed the use of the money by the Government in that event, for certain charitable purposes.

In an administration suit brought by the Secretary of State in Council against the testator's brother, wife, and granddaughter, for the carrying out of the trusts of the will,—

Held, that clause 7, if it stood alone, would confer an absolute estate on the daughter's daughter on the death of the widow;

That the disqualifications in clause 9 must come into operation, if at all, at or before the death of the widow; and that it was unnecessary to decide whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law;

That clause 20 was supplementary to clause 9, and that by it, the gift over to the Government was to take effect, if at all, immediately upon the widow's death, in the event of the granddaughter dying before her without having borne a son, or in the event of the granddaughter being disqualified at the date of such death.

One possible event not having been provided for by the will, *viz.*, that of the granddaughter predeceasing the widow, having borne a son, their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings.

Lady Langdale v. *Briggs* (1), as explained in the *Tagore case* (2), approved.

Appeal from a decree of the High Court of Bengal (3rd March 1879), reversing a decree of the District Judge of Hooghli (29th March 1877) (3).

Mr. *Montague Cookson*, Q. C., and Mr. *Macrae* for the Appellant.

Mr. *Cowie* Q. C., and Mr *Woodroffe* for the Secretary of State for India in Council.

Mr *Graham*, Q. C., and Mr. *Cowell* for *Komoleh Kamini Debi* and *Hori Dasi Debi.*

1st March 1881.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This was an administration suit for the purpose of carrying into effect the trusts of the will of one *Behari Lall Mookerjee*, instituted by the Secretary of State for *India*, in which *Komoleh*

* 8 Cowell's Ind. Ap p. 40; I. L. R. 7 Cal. 304.

(1) 8 DeG. M. & G, 391.
(2) 9 B. L. R, 377.
(3) Reported in I. L. R, 5 Cal., 223, *nom.*, *Hori Dasi Dabi* v. *The Secretary of State for India.*

Kamini Debi, widow of the testator, *Mani Lal Bandopadya*, father and guardian of a minor, *Hori Dasi Debi*, daughter's daughter of the testator, and *Ram Lal Mookerjee*, a brother of the testator, were made Defendants. Two other Defendants were afterwards added, described in the will as advisers of the widow. The plaint concludes in these terms :—

"But as the Defendant No. 3 *Ram Lall Mookerjee*, has impeached the will as a forgery, and as Defendant No. 1, the widow, who has the management of and is in the enjoyment of the profits of the estate under the provisions of the aforesaid will, has omitted to take any action to have the validity of the will determined, or to carry out the charitable bequests therein contained, though the period for carrying out such bequests has expired, and as the rights and interest of this Plaintiff, as well as of other persons interested in the above will, are, thereby seriously endangered, it is therefore prayed that the authenticity and validity of the said will may be declared, and that the said *Komoleh Kamini Debi*, Defendant No. 1, be directed and enjoined to make over to the Collector, or such other trustee or trustees as the Court may appoint, the sum of Rs. (1,50,000), one lac and fifty thousand, in Government securities, for the establishment of the aforesaid school and hospital, and a further sum of Rs. 1000 (*sic*) for the furnishing of the said school and dispensary; and, further, that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded, with such other relief as the Court may think fit to grant"

Behari Lall Mookerjee, a wealthy Hindu, made the will in question on the 9th of August, 1870. He had then a wife living. He had never had a son, but had had a daughter, who had died, leaving an infant daughter, *Hori Dasi Debi*. As he was then not passed middle age, he may have reasonably contemplated having further issue. He died on the 12th of August, 1874, without sons or daughters, leaving his wife and granddaughter him surviving, and a brother, *Ram Lall Mookerjee*, the Defendant, with whom he had not been on good terms. The material parts of the will for the purposes of the present appeal are as follows :—

"2. I have no son at present. If one or more sons should be born to me hereafter, and should have arrived at majority at the time of my death, then he or they shall be entitled to my properties according to the Shastras.

"3. If my son or sons, or any son (of mine), should be a minor at the time of my death, then the whole of my properties shall remain under the Court of Wards until my son, or, in the case of my having more sons than one, until the youngest son has attained majority.

"4. If grandsons or great grandsons of mine should be living at the time of my death, they shall be the owners of my property according to the Shastras.

"5. If no sons, grandsons, or great grandsons of mine should be living at the time of my death, then my wife, *Srimoti Komoleh Kamini Debi*, shall be proprietress of the whole of my properties, according to the Shastras, and shall enjoy the profits thereof during her lifetime.

"6. If one or more daughters should be born to me, then, on the death of my wife, she or they, and, on the death of her or of them, my grandsons (daughter's sons), shall be the owners of my property according to the Shastras.

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my granddaughter (daughter's daughter) *Srimoti Hori Dasi Debi*, shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation.

"8. If the death of my wife should take place before my granddaughter (daughter's daughter) arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards until she arrives at majority and bears a son

"9. If my granddaughter (daughter's daughter) should be barren, or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life."

Here follow bequests for the purposes of establishing a school and dispensary, with respect to which no question now arises. Clause 20 is in these terms:—

"If no son or daughter should be born to me, or if my granddaughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate, which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government, as it thinks proper, in the improvement of the school and dispensary, and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village, and of the neighbouring villages."

After some previous proceedings, which it is not now necessary to refer to, the present suit was instituted on the 19th of May, 1876. All the Defendants, except *Ram Lall*, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ram Lall disputed the *factum* of the will He also maintained that no part of it was effectual except that which gave the estate to the widow for life

On the cause coming on for hearing before Mr. *Prinsep*, the Judge of *Hooghly*, he was of opinion that the making of the will was fully proved; that under its provisions, and subject to the payment of an immediate legacy of Rs. 1,50,000 for charitable purposes, the widow took a life interest in the estate; that on her death, *Hori Dasi*, if not disqualified, would succeed and take a life interest, but that after the death of both ladies, or on the death of the widow, if *Hori Dasi* should be then disqualified, the estate would pass to the next legal heir of *Behari Lal Mookerjee*, a supposed devise to the male descendants of *Hori Dasi* being, in the Judge's view, opposed to the rule laid down in the *Tagore Case* (1), and ineffectual, and the devise to Government coming after it being thus defeated. He also directed that the fund created by the legacy should be vested in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

Against this decision *Hori Dasi* appealed on the ground that her interest had been unduly curtailed.

Ram Lall, on the ground that *Hori Dasi* took nothing under the will, he no longer disputed its *factum*.

The Secretary of State, on the ground that the gift over to the Government, in certain events, ought to have been held good.

The High Court held that *Behari Lall's* intention was to confer on *Hori Dasi*, if she survived, and was, on the widow's death, not disqualified, an absolute estate, and that his intention was effectuated; also that the gift over to the Government, which they interpreted as taking effect in the event of *Hori Dasi* not surviving the widow, or being disqualified at the time of the widow's death, but not in the event of her becoming subsequently disqualified, was good.

The High Court, indeed, observed:—

"The only case not clearly provided for in the will seems to be this: If *Hori Dasi* had a son who survived her, but herself died before the widow, was it intended that the Government should take, or was the son to take? On the one hand, neither of the further events contemplated in the 20th clause would have arisen, *i. e.*, *Hori Dasi* would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification; nor, on the other hand, could *Hori Dasi's* son easily succeed, being a stranger, and not provided for in the will. But we need not occupy ourselves with a case not before us."

(1) 9 Beng. L. R. 377.

A decree was drawn up, which in some points which will be subsequently referred to is not in conformity with the judgment.

No argument has been addressed to their Lordships founded on the first six clauses of the will, which are no more than bequests in accordance with what the testator conceived to be the rules of the ordinary Hindu law of succession. All of these, except the 5th, refer to possible events which did not happen. The 5th describes an ordinary Hindu widow's estate, which would take effect on the death of the testator by operation of law. The argument in favour of the Appellant has been founded on the 7th, 8th, 9th, and 20th clauses.

It was not, and could not be disputed, that since the case of *Srimoti Soorjemoni Dasi* v. *Denobundho Mullick* (1) recognised and confirmed as that case has been in the case commonly called the *Tagore Case, Jottendra Mohun Tagore and Another* v. *Ganendra Mohun Tagore* (2), and in *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdry* (3), a gift by will upon an event which is to happen, if at all, immediately on the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu law, and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on *Hori Dasi* on the death of his widow. But it was argued that the words "putra poutradi krame" (translated in the Record "from generation to generation"), expressed in their etymological sense an intention on the part of the testator to limit the succession to the heirs male of *Hori Dasi*; that the gift, being "stridhan," would descend by law, in the first instance, to her unmarried daughters equally with her sons, and that in its further descent females would have peculiar rights; that, therefore, the testator had endeavoured to create an estate of inheritance in her inconsistent with the general law of inheritance, which endeavour, under the authority of the *Tagore Case*, would render his gift to *Hori Dasi* void, or, at the least, would prevent its operating further than to give her an estate for life. This latter view was adopted by the Judge of first instance. Upon this question the High Court observe,—

"We dissent entirely from the learned Judge, when he holds that the words 'putra poutradi krame' denote an attempt to limit the succession to *Hori Dasi's* male descendants in any manner opposed to the decision in the *Tagore will Case, Tagore* v. *Tagore* (4). The devise and bequest to her are contained in the words 'adhikarini haibek,' and the words added are merely usual words, implying an absolute and heritable estate.

"If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to shew that the estate is to go beyond the life."

The effect of these words is thus spoken of by Sir *Barnes Peacock* in delivering the judgment of the High Court in the *Tagore Case*. (5):—

"A gift to a man and his sons and grandsons, or to a man and his sons' sons, would, in the absence of anything shewing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in *Bengal* are 'putra poutradi krame,' and in the Upper Province 'naslan baad naslan,' the literal meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession."

The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs where, by the law, his estate would descend to females; their Lordships feel no greater difficulty in

(1) 9 Moore, Ind. Ap. Ca 123; 1 P. C. J. 837.
(2) L. R Ind Ap (Sup. Vol.) 47; 3 P. C. J. 82.
(3) Law Rep. 5 Ind. Ap. 138; 3 P. C. J. 815.
(4) 9 Beng L R 377.
(5) 4 Beng L. R 182.

applying them to the female heirs of a female where by law the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognised in *India* and by this Board as apt for conferring an estate of inheritance. They are of opinion that clause 7, it stood alone, would confer an absolute estate on *Hori Dasi* upon the death of the widow.

Clause 8 has been relied upon for enforcing the argument that the testator's object was to benefit the sons of his granddaughter, an object which their Lordships think he might reasonably suppose best effectuated by giving complete power over the estate to his granddaughter. The provision for management by the Court of Wards obviously does not affect *Hori Dasi's* estate.

But it has been further contended that the conditions under which by clause 9 *Hori Dasi* is to take, or, more properly speaking, under which she is not to take, are so uncertain as to render the gift to her void. It has been argued that no time is fixed at which the disqualifications are to operate, that she may become a sonless widow at any period of her life, and that, therefore, it must always remain uncertain whether or not she is capable of taking the gift. In their Lordships' opinion all difficulty as to the question of time is got rid of by reading the clause in conjunction with that which precedes it, and treating the death of the widow as the time when it is, if at all, to take effect. This natural interpretation of the clause gives effect to it, and their Lordships are by no means disposed to give it a forced construction which would defeat its operation. The death of the widow is, in their opinion, the point of time when it is to be ascertained once for all whether *Hori Dasi* takes, or is disqualified from taking.

More difficulty arises in the construction of clause 20.

It has been argued that the words "if my granddaughter should die before she bears a son" are not limited to any point of time, that if this be so, the other disqualifications mentioned in that clause (which are repetitions of those in clause 9) are not limited either, and may take effect at any period of *Hori Dasi's* life, that they are in effect condition subsequent upon the happening of any of which the estate, if it had ever vested in her, would be divested. It has been further argued that the gift over of an estate on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, is void, as contrary to Hindu law.

If, as the High Court have found, their Lordships think rightly that one main object of the testator was to prevent his brother taking his property in any event, it is obvious that clause 9, creating the incapacity, under certain circumstances, of the granddaughter to take upon the widow's death, required to be supplemented by another directing on whom the estate, if such incapacity happened, should devolve. This is the purpose of clause 20, which should be read as supplementary to clause 9, and as if it had immediately followed it. This purpose points to the construction that the gift over was to take effect, if at all, at the widow's death. When providing for the devolution of the estate on *Hori Dasi's* being disqualified to take it, it was natural that the testator should also provide (which he had not done before) for its devolution in the event of her dying before her grandmother. This provision is, by implication, contained in sect 20, and full effect may be given to every part of the clause, without supposing (what their Lordships agree with the High Court is somewhat improbable) that the testator intended the estate, if once vested in his granddaughter, should be liable to be afterwards divested.

Viewed in this light the section would read,—

"If no son or daughter be born to me, or if, on my widow's death, my granddaughter should have died before bearing a son, or should be barren, or become a sonless widow, or otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

This construction, which their Lordships

adopt, makes it unnecessary to discuss whether the disqualifications, if they had been conditions subsequent, would or would not be in violation of Hindu law. It has not been disputed that, if they are to be ascertained on the widow's death, the gift over to the Government is good.

One possible event undoubtedly is unprovided for, viz., the granddaughter predeceasing the widow, having borne a son.

Their Lordships do not deem it necessary to decide what would happen on the occurrence of this event—indeed, no judgment which they could give would affect the rights, if he should have any, of a son yet unborn, in the case supposed. In declining to declare the rights of the parties in this contingent event they are acting in conformity with the rule laid down in the case of *Lady Langdale* v. *Briggs* (1), explained as it was in the *Tagore Case*.

It follows that the decree of the High Court must be amended by substituting for the words "not surviving" as italicized (see *supra*, p. 54), "having died during the lifetime of such widow without bearing a son."

It is further necessary that for the words "or without a living son" as italicized (see 8 Cowell's I. A., p. 54), there should be substituted the words "or a sonless widow." The decree as it stands is neither in accordance with the will nor the judgment.

Subject to these variations, their Lordships will humbly advise Her Majesty that the decree be affirmed. The costs of all the parties to the appeal should be paid out of the testator's estate.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitor for the Secretary of State: *H. Treasure.*

Solicitors for the other Respondents: *Watkins & Lattey.*

(1) 8 D. M. & G. 391.

8th March 1881.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Bombay.

MAHARAVAL MOHAN SINGHJI JEYSINGHJI (Plaintiff,) ... } *Appellant*,

and

THE GOVERNMENT OF BOMBAY (Defendant) } *Respondent.**

Toda-giras hak—The Pensions' Act XXIII of 1871.

In part of Western India annual payments, known as *toda-giras hak*, made by village communities and commuted by them into liabilities to *girasias*, have been recognized as a species of property, however unlawful their origin.

In 1862 a resolution of the Government of Bombay described the position of the *girasias* at the time, and gave them the option of resuming the collection of the *toda-giras hak* formerly levied, resorting only to legal proceedings to enforce their claims, or of receiving, from the Government, allowances of an equivalent amount; the collections, in the latter case, being discontinued on all hands.

The ancestors of the adoptive father of the plaintiff formerly levied *toda-giras hak*; and after 1862 the Government in respect thereof made payments, under the resolution, to three brothers, of whom one was the plaintiff's father; the latter receiving a one-third share, which, on his death in 1865, was no longer paid.

Held that a suit against the Government for payment of this third share with arrears fell under the Pensions' Act XXIII of 1871, sec. 4, which prohibits cognizance, save as in the Act provided, "of any suit relating to any pension or grant of money or land revenue conferred or made by the British, or any former, Government, whatever may have been the consideration for such pension or grant, or whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted."

Held that there was no reason, either in the language of the Act itself, or in any antecedent legislation, for construing these words as applicable only to rights in the nature of pensions.

* 8 Cowell's Ind. Ap. p. 77; I. L. R. 5 Bom. 408.

Appeal from a decree of the High Court of *Bombay* (10th October, 1877,) affirming that of the District Judge of *Surat* (1st December, 1876).

Leith, Q. C., and *R. V. Doyne* for the Appellant.

Scoble, Q. C., and *J. D. Mayne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This is a suit brought by the Appellant in the District Court of *Surat*, claiming, as the adopted son of *Maharaval Jeysingji Bhagavansingji*, to recover from the Government of *Bombay* certain payments in respect of a *toda-giras hak* formerly levied by his ancestors upon certain villages in the *Surat* District. It appears that the Government has for many years made payments on account of this *toda-giras hak* (divided into three parts) to three different branches of the Appellant's family; his adoptive father, through whom he claims, being paid one-third. The father died in 1865, and upon his death the Government either refused to recognise the Plaintiff as the adopted son, or considered that, as an adopted son, he was not entitled to receive the payments, and discontinued them. The action is brought, in consequence of that discontinuance, to recover the arrears from the time of the father's death.

The Government denied the right of the Appellant to bring this suit in the Civil Courts, relying upon the *Pensions Act* of 1871. The Courts below, both the District Judge of *Surat* and the High Court on appeal, have held that the Government is entitled to rely upon that Act, and that the Civil Courts can take no cognisance of the suit.

It is unnecessary to inquire at any length into the origin of these *toda giras haks*. It would appear that they had their origin in arbitrary exactions made by strong and powerful persons, who obtained the name of *girasias*, upon the village communities; that those arbitrary exactions were in some way commuted into fixed payments by the villagers, in consideration of which the *girasias* gave up their claim to make arbitrary exactions, and also undertook to defend the villagers against the exactions of others. The nature of these *haks* has been defined in two cases by this Board, the latter of which only it will be necessary to refer to. In the case of *Maharana Fatesangji Jasvatsinji* v. *Desai Kallianraiji Hekoomutraiji* (1) there in this description of them:—The determination of this question "involves the consideration of the nature of a *toda-giras hak*. A good deal of learning on this subject is to be found in the case of the *Collector of Surat* v. *Pestonjee Ruttonjee* (2), and in the case of *Sumbhoolal Girdhurlall* v. *Collector of Surat* (3) to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the *girasias* from the village communities in certain territories in the west of India by violence and wrong in the nature of black mail, had, when those territories fell under British rule, acquired by long usage a *quasi* legal character as customary annual payments; that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by *inam* villages to fall on the *inamdar*. And since the decision of the before-mentioned case in the 8th volume of Moore, page 1, it cannot be questioned that the *toda-giras haks* of the former class constitute a recognized species of property capable of alienation, and of seizure and sale under an execution." It must therefore be taken, after the two decisions of this Board, that these *haks* have been recognized as a species of property, however unlawful their origin may have been. The plaintiff bases his claim upon that view of the *hak*. The plaint state that his ancestors had certain lands, and "likewise there has continued to us

(1) Law Rep. 1 Ind. Ap. 46; 3 P. C. J. 306.
(2) 2 Morris, S. D. A. Rep. 291.
(3) 8 Moore's Ind. Ap. Ca. 1; 1 P. C. J. 713.

from ancient times the yearly cash *hak* (rights) to *toda-giras* as our private property." Then it goes on: "Some time after the introduction of the English Government the Government made an arrangement *(bandobast)* to pay from the Government treasury in lieu of the *toda-giras haks* which the *girasias* used to collect or levy directly from the village." It seems that there was a resolution of the Government of *Bombay* in 1862, which described the position of the *girasias* at that time, and gave them the option of resuming the collection of the former *haks* from the villages, or of receiving from the Government allowances of an equivalent amount, the Government in that case discontinuing the further receipt of the *haks*. The resolution says:—"It should therefore be publicly declared in every talooka, as the revenue survey settlement is introduced, that the new rates of assessment do not include any such collections, and that the Government will in future not aid or take part in the collection of *giras*. In thus placing the *girasias* in the same position with respect to the village communities which they originally held, the Governor in Council cannot allow them to resort to other than legal means to enforce their claims, and if any village communities decline to accede to the *girasias'* demands the latter must resort to the Civil Courts. At the same time the Governor in Council is not unwilling to make some sacrifice of revenue in order to relieve the *girasias* from resorting to law; and he is prepared whenever the *girasia* may be willing to receive from Government his present income, instead of collecting it direct from the villagers, to continue that income to him, under such reasonable rules and restrictions as it may seem fit to Government to impose." Then:—"The conditions on which this arrangement will be entered into are that the *girasia* shall consent to abandon for the future his claims against the village communities; and in return the allowances he has hitherto enjoyed shall be continued by the State hereditarily *(during good behaviour)* to the male issue of the first person who receives the *giras* from the British treasury." The arrangement with the Plaintiff's ancestors, stated in the plaint, is of the kind described in this resolution, though it appears to have been made before 1862. Payments of money in lieu of the *hak* were made before that year, and were continued by the Government down to the death of the Plaintiff's father, with regard to the three shares, and since that time the Government has apparently continued to pay the two other sharers, though they have discontinued the payment to the Plaintiff.

The nature of *toda-giras hak* having been adverted to, their Lordships have now to refer to the statute upon which the question, and the only question, in the appeal turns. The 4th section is this:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may be the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." It has been shewn that this *hak*, whatever it originally was, had acquired the character of a right, and the plaint bases the claim of the Plaintiff upon its being a right. That being so, it appears to their Lordships that the present suit is one of those which fall directly and plainly within the language of this clause. It is a suit relating to a grant of money conferred by the British Government; and the Civil Courts are prohibited from entertaining any suit relating to such a grant, whatever may have been the consideration for it, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted. There is in this case a grant of money by the Government, and a right for which it was substituted. It, therefore, falls within the language of the fourth clause. The right of the *girasias* was of a peculiar and precarious kind; and allowances in respect of rights of this nature are clearly contemplated by the Act, and intended to be included in it. If there

were any doubt the previous clause, the third, which is explanatory of the expression "grant of money or land revenue," may be looked at. It is as follows:—"In this Act the expression 'grant of money or land revenue' includes anything payable on the part of the Government in respect of any right, previlege, perquisite, or office." Even if the arrangement made by the Government was not strictly a grant, the suit relates to money payable by the Government in respect of a right. It was argued that the construction should be limited to rights *ejusdem generis* with pensions. But there is no sufficient ground for so limiting the language; and it is to be observed that the words of the *Pensions Act* of 1871, which include this case, are not found in the former regulations relating to pensions. There is no reason, therefore, either in the language of the Act itself or in the antecedent legislation, for construing these words as applicable only to rights of the nature of pensions.

It was contended further that this case is founded upon a contract, and it was said that if it is embraced by the Act all contracts for the payment of money must be held to be included in it. But that is not so. The Act applies to grants of money in respect of or in substitution for some right, privilege, perquisite, or office. Undoubtedly, in some sense it may be said that the arrangements made between the Government and the *Girasias* were in the nature of contract; but that contract, if it were one, resulted in the abandonment on the part of the *Girasias* of their claim to make collections from the villagers, and in the allowance of money by the Government in lieu of them. It is that allowance which falls within the operation of the statute.

It was contended in the Courts below, and appears to have been the principal contention there, that the Government were in the position of agents for the Appellant to receive the collections, and were therefore bound to pay over to him the amount of the former *hak*. But this argument entirely fails of foundation, for the Government, since 1862, have abandoned the collection of the *hak* from the villagers; therefore, having received no money, they have nothing to account for to anybody. Their Lordships think it right to observe that this argument was not pressed at the bar to-day, though it appears to have been very strongly relied upon in the Courts below.

This is not the first time that the *Pensions Act* of 1871 has come before this Board. In the case of *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (1), an action was brought to recover certain payments on account of a grant which had been made to a deshmukh in consideration of some ancient dues which his ancestors had received. It seems that the deshmukh was a collector of Government revenue, the office being hereditary, and that the deshmukhs had been accustomed to receive a certain share of the revenue which they collected. The suit was brought against the Government for payments representing the old allowances, which it appears the native Government undertook to make; but the Board held that, by the terms of the Act in question, the Civil Courts were prevented from taking cognizance of the suit. It is said in the judgment:—"Their Lordships are of opinion that whatever the foundation of the deshmukhs' rights originally was, the sunnud must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from ryots went into the coffers of the State, which paid its collectors by salaries; and consequently the restoration of the old allowances by the Peishwa was, in substance, a grant by him of part of his land revenue, and therefore falls within the terms of the 4th section, without the aid of the 3rd, as a grant of money or land revenue conferred by a former government." It seems to their Lordships that this decision very nearly governs this case, if any authority were wanted for an interpretation of the plain language of the Act.

Their Lordships find that the High

(1) Law Rep. 4 Ind. Ap. 119; 3 P. C. J. 701.

Court of *Bombay*, in the case of *Parhudas Rayaji* v. *Motiram Kalyandas* (1), give a like construction to the Act. The observations, however, of the Judges can only be treated as dicta, since they decided the case upon the ground that, the suit having been brought upon a decree obtained before the Act had come into operation, it was not a bar to the suit.

The only case which at all looks the other way is one in the High Court of *Bengal*: *Shahzadee Hazara Begum* v. *Collector of Burdwan and another* (2). The head-note is:—"One *Rajah Anwar Shahad*, a servant of the *Delhi* emperor, having been killed in *Burdwan* while fighting for his master, the emperor built a tomb over his remains and made a grant of land (five mouzahs) to his family for the purpose of maintaining it in the manner usual amongst Mahomedans. This grant was subsequently confirmed to a descendant of *Shahad* and his heirs. Some years later the land came into the possession of the Rajah of *Burdwan*, who paid to the grantees a certain sum of money annually. When the perpetual settlement was made the British Government continued the payment on account of the Rajah, in whose zemindary four of the five mouzahs were incorporated." It seems that the yearly payment was a sum of Rs. 3690 Mr. Justice *Glover* says:—"It is an admitted fact that this annual payment was made by the Rajah on account of these mouzahs,"—that is, the five mouzahs referred to—"and it seems to us that such payment was, to all intents and purposes, the rent of the land transferred." After the permanent settlement the Government continued this payment, whether as of right or as an act of generosity may be a question. However, supposing the payment to have been obligatory, the nature of the obligation is treated by Mr. Justice *Glover* as an obligation to pay rent. He says: "And if the Rs 3690 paid to the family of *Anwar Shahad* by the zemindar of *Burdwan* was the rent of the five mouzahs, how was the payment changed in its nature by being made through the British Government?" Their Lordships cannot help saying that it was a violent assumption that the Government were paying rent for these mouzahs. However, having made that assumption, the learned Judge decided that the payments were not within the Act. The decision, thus explained, does not affect the question in the present appeal.

For these reasons their Lordships think that the judgments below are correct; and they will humbly advise her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Solicitors for the Appellant: *West, King, Adams, & Co.*

Solicitor for the Respondent: *H. Treasure.*

(1) 1 Ind. Law Rep. Bomb. 206.

(2) 23 Suth. W. R. 378.

9th March 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH NILMONI SINGH DEO BAHADUR (plaintiff) — *Appellant.*

and

RAM BANDHU RAI and others (Defendants) ... ... — *Respondents.**

Proceedings under the Land Acquisition Act (X of 1870), ss. 38 and 39—Finality.

In proceedings under the Land Acquisition Act (X of 1870), ss 38 and 39, the persons entitled to take land compulsorily, deal only with those who are in possession of it, or who are ostensibly its owners. It may happen that the real owner, being an infant, or a person otherwise under disability, does not appear, and is not dealt with in the first instance. There is, therefore, a

* 8 Cowell's Ind. Ap. p. 90; I. L. R. 7 Cal. 388.

proviso in s. 40 to the effect that nothing contained in that or the preceding sections "shall affect the liability of any person who may receive the whole, or any part of any compensation awarded under the Act to pay the same to the person lawfully entitled thereto." This applies only to persons whose rights have not been dealt with in adjudications in pursuance of ss. 38, 39, and 40; and does not permit a person whose claim has been disposed of in the manner pointed out in the Act, to have that claim re-opened, and again heard, in another suit.

Appeal from a decree of a Divisional Bench of the High Court of *Bengal* (6th June 1878), confirming a decree of the Court of the District Judge of East *Burdwan* (12th May 1877).

Mr. R. V. *Doyne* appeared for the Appellant.

Mr. *Leith*, Q. C., for the Respondents, was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

The history of this case, as far as it is material to the judgment, is as follows: The Government of *India*, requiring land for a public purpose under the provisions of Act X. of 1870, gave the requisite notices, and proceeded to take fifty-eight bighas of land within the zemindary of the Rajah of *Packete*. These fifty-eight bighas were occupied by persons who held under the title of *jagirdirs*, but were undoubtedly subject to the superior tenure of the Rajah, and may be described as *mal* lands of his zemindary. The Act referred to, No. X. of 1870, contains a number of elaborate provisions applicable to the acquisition of lands and the payment of the purchase-money for them. Under the circumstances of this case it will be enough to refer to three of the clauses. It appears that in certain cases an award of compensation may be made by the Collector, as between the Government and the claimants. Sect. 14 is in these terms: "If the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same;" and there follow provisions that it shall be final. Clause 38 is in these terms: "When the amount of compensation has been settled under sect. 14, if any dispute arises as to the apportionment of the same, or any part thereof, the Collector shall refer such dispute to the decision of the Court." Sect. 39 goes on to say: "When a reference to the Court has been made under sect. 38, the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in such amount." It further provides that: "An appeal shall lie from such decision to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge."

The proceedings in this case were under these sections. Under sect. 14, the Collector made an award for the whole amount of the compensation, which was, in round numbers, Rs. 15,000. There was a dispute between the Rajah and the tenants, as they may be called, with reference to the apportionment of the amount between them. The question was duly referred to a Judge sitting alone to decide the proportions in which the persons interested were entitled to share, and that Judge made a decision in pursuance of such reference, whereby he awarded to the Rajah Rs. 84, and to the other claimants, of whom there are a great number, the rest of the compensation money. The Rajah did not appeal from this decision, as he had a right to do, but he brings the present suit for the purpose of in effect setting it aside. In his plaint he characterises his suit as—"A suit to recover Rs. 13,000, in deposit in the collectorate of this district, on account of compensation for fifty-eight bighas five cottas," and he contends that he is entitled to a far larger amount than that which has been awarded to him. In other words, he brings the suit for the purpose of determining the very question which had been determined according to special statutory process by a Judge from whose decision he did not appeal.

It has been very fairly admitted by Mr. *Doyne* that, unless he can avail himself of sect. 40, the proceedings which have been taken are conclusive as

to the amount and apportionment of the compensation. Sect. 40 is in these terms: "Payment of the compensation shall be made by the Collector, according to the award, to the persons named therein, or, in the case of an appeal under sect. 39, according to the decision on such appeal; provided"—and this is the part of the section on which he relies—"that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act to pay the same to the person lawfully entitled thereto." He contends that, under that provisio, the Rajah is entitled to bring this suit. It appears to their Lordships that the proviso has no such effect. Such a proviso, which appears to have been but a repetition of a provision in a previous Act *in pari materia*, is necessary in this, as in almost all Acts of a similar character. It is necessary for the Government, or the persons or company entitled to take property compulsorily, to deal with those who are in possession or ostensibly the owners; but it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance: and therefore a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money.

Their Lordships are of opinion that the Courts in *India*, who both concur on this point, have rightly held that this proviso applies only to persons whose rights have not been adjudicated upon in pursuance of the sections 38 and 39, and that it has not the effect, which it would certainly not be reasonable to attribute to it, of permitting a person whose claim has been adjudicated upon in the mannar pointed out by the Act, to have that claim reopened and again heard in another suit. Their Lordships are of opinion that the provisions in this Act for the settling of compensation are intended to be final; and that the amount and distribution of the compensation having been settled in this case by a competent Court, and the decision not having been appealed against, the settlement is final, and the present suit cannot be maintained. They will, therefore, humbly advise Her Majesty that this judgment be affirmed, and the appeal dismissed with costs.

Solicitors for the Appellant: *Lambert, Petch, & Shakespear.*

Solicitors for the Respondents: *Barrow & Rogers.*

15th March, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

Motion on an Appeal from the High Court of Judicature at Fort William in Bengal.

THE OWNERS OF The Ship "BRENHILDA" (Defendants) ... } *Appellants,*

and

THE BRITISH INDIA STEAM NAVIGATION COMPANY, (Plaintiffs.) ... ... } *Respondents.**

Practice in Appeals from Vice-Admiralty Court of Bengal—Time for Appealing.

By rule 35 of the Rules respecting appeals from the Vice Admiralty Courts abroad, made and ordained by King William IV. in Council in pursuance of the Statute 2 Will. IV, c. 51, all appeals from the decrees of Vice-Admiralty Courts are to be asserted within fifteen days after the date of the decree.

Held, that the words "after the date of the decree" mean after the date when the decree is pronounced by the Admiralty or Vice Admiralty Court, as the case may be; not the date when the decree is reduced to writing and signed.

On the 23rd July 1880, the High Court in its Appellate Jurisdiction, modifying a decree of the High Court as a Court of Vice-Admiralty in a cause of damage by collision, referred it to the Registrar to assess the damages that had been incurred in reference to one of the ships, both of which were held to be in fault. The parties went, without protest, before

* 8 Cowell's Ind. Ap. p. 159; I. L. R. 7 Cal. 547.

the Registrar for that purpose, the impugnants, also, having taken out process to compel the appearance of the promovents before him, and the damages were assessed with the consent of both parties at a certain amount. On the 2nd September 1880, a notice of appeal was given on behalf of the impugnants, and was recorded as asserted pursuant to rule 35 above referred to.

Held, that the appeal was not within time, more than fifteen days having elapsed after the decree before the appeal was asserted. According to the law laid down in the Vice-Admiralty Courts, the proceedings taken before the Registrar were themselves sufficient also to prevent an appeal as of right.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK :—

This is a motion on the part of the *British India Steam Navigation Company*, the owners of the ship *Ava*, to relax and dissolve the inhibition and citation issued in a certain pretended appeal of the above-named Appellants, and to dismiss or to quash the said appeal for want of competency, or to grant the Respondents leave to file an act of protest on petition against the admission of the said pretended appeal.

The suit came before the High Court in the exercise of its original jurisdiction. It was brought by the owners of the steamship *Ava* against the *Brenhilda* for a collision which took place in the Bay of *Bengal*. The High Court, in its original jurisdiction, held that there was negligence on both sides, and consequently that half the damages which resulted to the owners of the ship *Ava* were to be paid by each of the parties. The damages were assessed at £50,000, which would leave £25,000 to be borne by the owners of the *Ava* themselves, and £25,000 to be paid by the owners of the ship *Brenhilda*. The parties appealed to the High Court in the exercise of its appellate jurisdiction, and that Court affirmed the decision of the first Court so far as it was held that there was negligence on the part of each of the ships; but they thought it right to amend the decree by declaring that instead of the owners of the *Brenhilda* paying the full sum of £25,000, being one half of the damages sustained by the owners of the *Ava*, they should be allowed to deduct half of the damages which they had sustained by the injury to their ship, and that it should be referred to the Registrar of the Court to assess those damages. That decision was pronounced on the 23rd of July, 1880. The parties went before the Registrar for the purpose of assessing the amount, and it appears by the report of the Registrar that the damages were assessed at £3000 with the consent of both parties. On the 2nd of September, 1880, a notice of appeal was given, which was recorded as follows :—"Pursuant to rule 35 of the rules and regulations made and ordained by His late Majesty King *William* IV. in Council, in pursuance of the 2 Will. 4, c. 51, Mr. *Phillips*, Advocate for the impugnment, appears and declares his intention of appealing to the Privy Council against both the decrees made in this cause." The rule referred to is in these words :—"All appeals from the decrees of the Vice-Admiralty Courts are to be asserted by the party in the suit within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in Court, and a minute thereof is to be entered in the assignation book, and the party must also give bail within fifteen days from the assertion of the appeal in the sum of £100 sterling to answer the costs of such appeal." The judgment was delivered on the 23rd of July, 1880, and consequently the notice on the 2nd of September was not an assertion within fifteen days from the date of the decree. It has been urged that the decree was not drawn up in writing and signed by the Court until some considerable time afterwards, and that the parties could not appeal without annexing a copy of the decree to their petition of appeal. But the rule of annexing a copy of the decree to the petition of appeal refers to appeals which are preferred under the *Code of Civil Procedure*, Act VIII. of 1859; it does not apply to appeals preferred or asserted under the 35th section of the rules of *William* IV. The words "after the date of the decree," according to their Lordships' view of the rule, do not mean after the date when the decree is drawn up in writing, but

after the date on which the decree or sentence is pronounced by the Vice-Admiralty or Admiralty Court, as the case may be. The words which are constantly used in Acts which refer to decrees in the Admiralty Court are "the pronouncing of the sentence or decree." Their Lordships, therefore, think that the date of the decree did not mean the date on which the decree was reduced to writing and signed by the Court, but the date on which the High Court delivered their judgment and expressed what the decree was. If the parties intended to appeal, they ought, in accordance with the rule, to have asserted their appeal within fifteen days from the date of the decree, by declaring in Court that they intended to appeal; and that they did not do. It is important in Admiralty proceedings that notice of appeal should be given within a short period. When a ship is sued it is usually arrested, and unless it is released upon bail it is detained by an officer of the Court. It is, therefore, important if a party intends to appeal from the decision of the Admiralty Court, that notice should be given within a certain limited time, and that time with regard to Vice-Admiralty cases is fifteen days from the date of pronouncing the decree.

The collision took place in the Bay of *Bengal*, and therefore it may be a question whether the High Court was exercising Vice-Admiralty or Admiralty jurisdiction; but that is not material, for if the case was tried in the Admiralty jurisdiction the appeal ought to have been asserted, according to the old rules of the Admiralty Court, within fifteen days. The parties have stated in their petition that they asserted the appeal in accordance with the 35th rule of *William* IV. The assertion was too late, and consequently the Appellants had no right to appeal. Further, they appeared before the Registrar for the purpose of carrying out the order of the High Court in assessing the damages which they had sustained by the injury which had been done to the *Brenhilda*, and acted without protest. It is said that they were obliged to go before the Registrar; but they might have appealed and got an inhibition, or if not they might have appeared before the Registrar under protest. The owners of the *Brenhilda* took out the summons to compel the owners of the *Ava* to appear before the Registrar for the purpose of acting under the decree of the High Court in assessing the amount of damage sustained by the owners of the *Brenhilda*. That, of itself, according to the decision to which we have been referred, would be a sufficient ground for preventing the parties from appealing. Their Lordships therefore think that the owners of the *Brenhilda* have not put themselves into a position to appeal, as a matter of right, against the decision of the High Court. The question before their Lordships is not whether they should recommend Her Majesty to grant an appeal as a special matter of favour. That they could do only if a petition were presented to Her Majesty, and referred to the Judicial Committee to report their opinion thereon.

Under these circumstances their Lordships think that the motion ought to be granted, and that the petition of appeal ought to be set aside. It is unnecessary to do more than set aside the petition of appeal; upon that being done, the relaxation of the inhibition will issue as a matter of course. Their Lordships, therefore, will humbly report to Her Majesty that the petition of appeal ought to be dismissed. The Appellants must pay the costs of this motion and of the appeal.

Solicitors for the Appellants: *Lyne* and *Holman*.

Solicitors for the Respondents: *Parker & Co.*

24th, 25th, 29th, and 30th March and 14th May 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicatnre at Madras.

MUTTA VADUGANADHA TEVAR, and others, son and Daughters of RANEE KATTAMA NATCHIAR (Defendants), ... } *Appellants*,

and

DORASINGA TEVAR (Plaintiff). ... } *Respondent* *

Mitakshara—Inheritance—Daughter—Impartibility—Madras—Regulation XXV. of 1802.

The Mitakshara rule that property inherited by a female from a male is taken by her for only a restricted estate and devolves, on her death, in the line, if any exists, of such male, is applicable in the Carnatic.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The appeal relates to the zemindary of *Shivagunga*, an estate situate in the polygar countries of the *Carnatic*, which for fifty years has been the subject of almost incessant litigation in *India* and before this Committee. The judgments delivered here will be found in 3 Moore, Ind. App. Ca. p. 278; 9 Moore, Ind. App. Ca. p. 539; 11 Moore, Ind. App. Ca. p. 50, and L. R. 2 Ind. App. p. 169. The only one which directly bears on the present questions is that which was delivered in the month of November, 1863, and is reported in 9 Moore.

The zemindary appears to have been created in or about the year 1730. At that time, *Kurta Tevar*, Rajah of *Ramnad*, having received valuable services from one of his family, *Sasivarna Tevar*, granted to him two-fifths of the *Ramnad* estate, calling the granted portion a distinct zemindary of *Shivagunga*. *Sasivarna's* position as zemindar must have been recognised by his sovereign the Nabob, who is stated to have established his widow in the zemindary after some disturbance of her possession. *Sasivarna's* lineal descendants became extinct in or shortly before the year 1801. It was in that year that the *East India Company* assumed the actual and direct sovereignty of the *Carnatic*, though for some years before they had undertaken to protect it, and had on that account received peishcush or tribute, and powers of management in case of war. On the failure of *Sasivarna's* line, certain ministers, who it seems had for some time before had the management and control of the zemindary, maintained their position there by force, and broke out into open rebellion. Upon this the *Madras* government issued a Proclamation, dated the 6th of July, 1801, by which they appointed one of the *Tevar* family, a collateral relative of *Sasivarna*, to be zemindar. On the 22nd of April, 1803, a sunnud was issued by the same Government, fixing the assessment of the zemindary in accordance with the permanent settlement effected by *Madras* Regulation XXV. of 1802. It will be necessary hereafter to refer more closely to the tenor of these documents. Their immediate effect was, that the grantee of the Government, who may conveniently be called the istimrar zemindar, was installed into the zemindary, which he appears to have held peaceably during his life.

In the year 1829 the istimrar zemindar died, and the succession to the zemindary was disputed between his immediate family and his collateral relations. He had no son, but left widows and daughters surviving him. His elder brother, however, one *Oiya Tevar*, who held another family zemindary, called *Padamatoor*, and who died in the year 1815, had sons who survived the istimrar zemindar. The eldest of these, representing

* 8 Cowell's Ind Ap. p. 99; I. L. R. 3 Mad. 290.

the *Padamatoor* or elder branch, alleged that the family was undivided, and that he as the eldest nephew of the istimrar zemindar, was the heir to *Shivagunga*. The widows and daughters alleged that the family was divided, and that the heir was the senior surviving wife.

From this dispute sprung up a perfect jungle of lawsuits, into which it would not now be profitable to enter. The way out of it was found by the decision of this committee in the year 1863 (1). They held that the family was still undivided, but that the zemindary was to be taken as self acquired property in the hands of the istimrar zemindar, and that the widows being at that time dead, and also all the daughters except one named *Kattama*, the zemindary devolved upon her. After this decision the elder branch made one attempt to reopen the question, which was finally defeated by this Committee in the year 1866 (2). From that time the younger branch of the *Tevar* family have remained in possession of the zemindary, without disturbance by the *Padamatoor* or elder branch.

In the year 1877 *Kattama* died, and then disputes among the members of the younger branch came to a head. The state of the family with respect to the succession at that time was as follows:—*Dorasinga Tevar*, the Respondent, was the eldest surviving grandson of the istimrar zemindar, by his daughter *Vella*, who was the daughter of his second wife *Rakoo*. *Mutta Vaduganadha*, the Appellant, was the grandson of the istimrar zemindar by his daughter *Kattama*, who was the daughter of his third wife *Vailoo*. The three other Appellants are the sisters of *Mutta Vaduganadha*. These were all the grandchildren of the istimrar zemindar who were living at the time of *Kattama's* death. And with his great-grandchildren we need not now concern ourselves.

The dispute arises in this way. The Respondent says that *Kattama's* interest in the zemindary endured no longer than her life, and that on her death it devolved on the heirs of the istimrar zemindar; that it is an impartible property, which can only be enjoyed by one person at a time; and that he, being the eldest surviving grandson, is that person. The children of *Kattama* say that she took the zemindary as stridhan, and as a heritage transmissible to her own heirs, and then, waiving any question between themselves, they agree that her son shall be preferred. If however that question is decided against them, then they say that the zemindary is not an impartible property, and that at the least *Mutta Vaduganadha* is co-heir with his cousin *Dorasinga*.

Even in *Kattama's* lifetime the nature of her interest in the zemindary did not escape dispute, for a suit was instituted in the year 1869 by *Dorasinga* to obtain a declaratory decree affirming the same title which he asserts now. The Courts in *Madras* were unanimous in granting the decree, but on appeal this Committee reversed their action, not pronouncing any opinion on the title, but thinking that the case was not a proper one for a declaratory decree.

Upon *Kattama's* death *Dorasinga* instituted the present suit, and obtained a decree in his favour from the District Judge of *Madura* on the 3rd of December, 1877. The Appellants, being Defendants in that suit, appealed to the High Court of *Madras*, who on the 31st of January, 1879, affirmed the decree of the District Judge. From the decree of the High Court this appeal is brought.

Other issues were raised in the Courts below and in this appeal, but at the bar the Appellants' counsel practically abandoned all except those which raise the questions above stated. There is another Defendant to the suit, but he is no party to this appeal.

The first questions, then, is whether *Kattama*, the daughter of the istimrar zemindar, took the zemindary as her stridhan, and for an interest transmissible to her heirs. At the date of her father's death she was a maiden. She was afterwards married twice, and in the year 1850, when the surviving widow died, she had

(1) 5 Moore's Ind. Ap. Ca. 50.

(2) 11 Moore's Ind. Ap. Ca. 50.

male issue. These circumstances were relied on as constituting her title to be her father's heir in the year 1863, and it is contended by the Appellants that the same circumstances constitute her a new stock, from whom, and not from her father, the title is now to be deduced.

They rely mainly on the much discussed passage in the Mitakshara (Cap II., Sec. XI., verse 2), where its author, *Vijnaneswara*, adds to the text of *Yajnavalkya* by declaring that the character of stridhan attaches not only to the acquisitions by a woman which the text specifies as such, but also to property which she acquires by inheritance, or in fact by any other mode. It is not necessary now to state in any detail how impossible it is, whether with regard to the authority of other commentators or to other parts of the Mitakshara itself, to construe this passage as conferring upon a woman taking by inheritance from a male a stridhan estate transmissible to her own heirs. The point is now completely covered by authority. In the case of *Mussamat Thakoor Deyhee* v. *Rai Baluk Ram* (1) such an interest was claimed on behalf of a widow in her husband's immoveable property. In the case of *Bhugwandeen Doobey* v. *Myna Baee* (2), such an interest was claimed on behalf of a widow in her husband's moveable property. In the case of *Chotay Lall* v. *Chunno Lall* (3) such an interest was claimed on behalf of a daughter in her father's property. All these cases were governed by the Mitakshara law. And in all it was held that the woman took only a restricted interest, and that on her death the property devolved on the line of the last male owner.

No attempt has been made to distinguish this case from that of *Chotay Lall*, except the suggestion that decisions upon the Mitakshara, as applicable to *Benares*, are not decisions upon the Mitakshara as applicable to the *Carnatic*. But if there be any ground for taking such a distinction it would be favourable to the restriction of *Kattama's* interest in her father's property. For there are two commentaries which are received as authority in the *Carnatic*, the Smriti Chandrika and the Daya-vibhaga by *Madhaviya*, neither of which follow the cited passage of the Mitakshara in assigning to a woman as her stridhan property inherited by her. Their Lordships think then that the Judges of the Courts below were quite right in holding that *Kattama's* interest ceased with her life, and that on her death the root of title is to be sought not in herself but in her father.

That leads to the question whether the zemindary is a partible or an impartible estate. If impartible, the Respondent *Dorasinga* is entitled as sole heir of the istimrar zemindar. If partible, he and his cousin *Mutta Vaduganadha* are joint heirs.

It was much debated at the Bar whether or no the Appellants had formally bound themselves in this suit by agreeing to admit the impartible character of the estate. What they did agree to was, "that all statements and admissions made in original suit No. 2 of 1869, are to be taken as made in this suit also," unless a certain notice to the contrary was given. The statements and admissions made in suit No. 2 of 1869 are to be found in the Record. They embrace a number of family events, such as births, deaths, and marriages, and an agreement "that the judgment in the *Shivagunga Case*, as reported in 9 Moo. Ind. Ap., should be admitted as to the facts set forth in that judgment." The impartible nature of this zemindary was admitted by the parties to the litigation closed by the judgment of this Committee in 1863, and it is so stated in the judgment, though nothing then actually turned on the admission. But their Lordships do not think it necessary for the present purpose to criticise closely the language used in the judgment of 1863. For they think that the question of partibility is a mixed question of law and fact, and therefore does not fall within the terms of the agreement for admissions. Moreover the agreement in this suit was made simultaneously with the settlement

(1) 11 Moore's Ind. Ap. Ca. 139; 2 P. C. J. 231.
(2) 11 Moore's Ind. Ap. Ca. 487; 2 P. C. J. 327.
(3) Law Rep. 6 Ind. Ap. 15; 3 P. C. J. 880.

of issues, and one of those issues, which oddly enough was proposed by the Respondent who now seeks to exclude it, and was objected to by the Appellant who now insists upon it, was this, "whether the Plaintiff is entitled to recover the whole or *any part* of the property in dispute."

But though the question must be decided upon its merits, it is impossible to disregard what has passed, whether in this suit or in others. For half a century this zemindary has been under the harrow of litigation; for many years between the elder and younger branch of the *Padamattur Tevar* family, and again for many years between separate scions of the younger branch. During this long period of discussion and examination, up to the settlement of issues in this suit, everybody has concurred, whether by statement, admission, or assumption, in ascribing to the zemindary an impartible character. Even in the pleadings in this suit partibility is not alleged, and, as already stated, an issue implying partibility was granted against the wish of the Appellants. Against all this family belief is only to be set an extremely ambiguous and evasive answer given by the istimrar zemindar in the year 1822 to some questions put to him by the Collector of the district. Being asked whether it is customary for the zemindar to divide the estate between his children, what would be his motives, and what his authority for a division, he does not answer the first or third questions at all, and merely says that, "from motives of regard to the children, the zemindar divides the estate between them." Nothing can be built on such an answer as this. It is at the utmost a contention that the estate is alienable by the zemindar, and that he has a discretion to divide it; not that it is partible if not divided by him. Since the litigation began it would seem that no definite idea of contending that the zemindary was partible occurred to any one's mind till the parties found themselves face to face before the district Judge in this suit.

That the actual enjoyment of the property has been in accordance with the stream of family tradition is not disputed. It is explained away by reference to the state of the family, which is said to have presented no occasion for partition; but that is not the case with the elder branch, who were in possession for thirty-two years, during which time three descents occurred. There were coparceners in that branch who would have taken shares if the zemindary had been considered as partible; but in fact it was always taken entire by the eldest male representative. It is true that the elder branch were ultimately held to be in wrongful possession, and are now called usurpers. All the same, their dealing with the estate while they had it is evidence of the family traditions and of their practical operation.

Moreover it is certain that other zemindaries closely allied to this are impartible properties. Such is the case generally with the polyams in the polygar countries, as was laid down in the *Naragunty Case*, reported in 9 Moore's Ind. Ap. Ca. 66. It is agreed that the zemindary of *Ramnad*, from which *Shivagunga* is derived, is impartible, and it has been held (1) that the zemindary of *Padamattur*, which is derived by grant from *Shivagunga*, is also impartible.

It was not proved that the grant of *Padamattur* was made by the istimrar zemindar himself, as he on one occasion alleged, and there is reason to suppose that the grant was of earlier date; but, taking it to be so, the evidence that we have of the nature of the *Shivagunga* zemindary is this: that it belongs to a class of possessions which are in the nature of chieftainships, and impartible; that the great zemindary of *Ramnad* out of which it was taken is impartible; that the small zemindary of *Padamattur* which was taken out of it is impartible; that, according to family tradition and belief, it is impartible; and that from its first creation until now it has passed from hand to hand as if it were impartible.

This evidence is irresistible, unless it can be avoided by shewing some dealing with the zemindary which has transmuted

(1) Law Rep. 5 Ind. Ap. 61; 3 P. C. J. 795.

its ancient qualities. The Appellant endeavours to find such a dealing in the transactions of 1801 and 1803, which have been above referred to; and he relies upon the case of the *Nuzvid* zemindary (1), in which this Committee, differing from the Courts below, held that a zemindary created by sunnud in accordance with Regulation XXV. of 1802 was a partible property.

The estate constituting the *Nuzvid* zemindary was formerly part of an old military jagheer in the nature of a raj, and impartible. In the year 1783 the jagheer was confiscated for rebellion, and the next year it was restored on its old footing to the eldest son of the rebel zemindar. In the year 1793 it was resumed by Government for default in payment of revenue; and in that state was it when the permanent settlement of 1802 was enacted. It was never again granted out entire or on its old tenure as a jagheer, but in the year 1803 two new zemindaries were made out of it. The larger of these new zemindaries, called *Nidadavolu*, was granted to the eldest son of the rebel zemindar, and *Nuzvid*, the smaller, was granted to his younger brother. Under these circumstances, it was held that the *Nuzvid* zemindary could not be identified with any estate or title existing prior to the sunnud of 1802, which put it on the same footing with ordinary estates.

But in this case the istimrar zemindar was put in his place by the Proclamation of 1801, and it is to the terms of that document that we must look in order to find the quality of his estate. The *Madras* Government were no doubt in a position to grant out the estate on other than the old terms. The question is, whether they did so.

The Proclamation sets out by stating the creation of the zemindary and the failure of *Sasivarna's* line. It asserts that the zemindary "has positively escheated to the State from which it derives its protection." It asserts that *Sasivarna* was appointed by the Nabob, and advanced by him "to the rank of a feudal lord;" that he owed allegiance to the Nabob; and that the *East India Company* had then become the lawful sovereign of the polygar countries. It then goes on to describe the disturbed state of the district, imputing it to the misconduct of the ministers of a female zemindar, which it thus describes:—"On the return of that Princess they became her principal ministers in the administration of the affairs of *Shivagunga*, and availing themselves of the disqualifications attendant on a female government, established in their own hands an entire despotism and tyranny, as well over the Princess's lineal descendants of the house of *Nalkudi*, as over the collateral branches of that family, and over the inhabitants of *Shivagunga*." *Nalkudi* appears to be a polyam appertaining from ancient times to *Sasivarna's* branch of the *Tevar* family.

The fifth paragraph of the Proclamation runs as follows:—

"Wherefore, the Right Honourable *Edward* Lord *Clive*, Governor in Council of Fort *Saint George* and all its dependencies, having judged it expedient at this time to exercise the legitimate powers acquired to the Honourable Company in settling the affairs of the zemindary of *Shivagunga* upon a permanent foundation, has been pleased to nominate, to appoint, and constitute *Padamattur Udaya Tevar*, collaterally descended from the progenitors of *Sasivarna Tevar* the first zemindar of *Shivagunga*, to be the present zemindar of *Shivagunga*; and the said Governor in Council hereby requires and commands all the inhabitants of *Shivagunga* to respect the rights and authority of the said *Padamattur Udaya Tevar* as the true and lawful zemindar of *Shivagunga*."

The next paragraph weighs the claim of another collateral relation of *Sasivarna*, whom it alleges to be in rebellion against the Company, and of whom it "publicly and formally proclaims the disqualification now and in all times to come to the possession of the zemindary of *Shivagunga*."

The rest of the Proclamation is addressed to the inhabitants of *Shivagunga*, whom

(1) Law Rep. 7 Ind. Ap. 88.

it warns of the approach of a large army under Colonel *Agnew*, and exhorts "while the time yet allows them, to retract their error," and "to acknowledge their allegiance to the lawful zemindar of *Shivagunga*."

The accuracy of some of the remarks in this Proclamation is open to question; but the object of examining it is to get at the intention of the *Madras* Government, which depends upon the impressions they had, and not upon the accuracy of those impressions. It is impossible to doubt what that intention was. From the beginning to the end the zemindary is referred to, not in its proprietary and private, but in its political and public aspect. *Sasivarna* is a feudal lord. He owes allegiance to the State. The troubles are due to the weakness of a female government. The late zemindarni is a Princess. Her agents are Ministers. The Governor in Council intends to settle the affairs of the zemindary on a permanent foundation. For that purpose he nominates one to the post of zemindar, another is rejected for all time to come. The inhabitants are called on to respect the rights and authority of the appointed zemindar, and to acknowledge their allegiance to him.

Everything then points to the installation of the istimrar zemindar not merely as proprietor but as ruler of the district. The policy of the government clearly was to appoint a ruler whom the rebellious inhabitants would obey. And we are told by Mr. *Hughes*, who was attached to Colonel *Agnew's* force, that the appointment completely answered its purpose.

The istimrar zemindar, Mr. *Hughes* says, was installed in state in Colonel *Agnew's* camp, when a hundred head inhabitants, including his elder brother *Oiya Tevar*, held up their hands in homage to him. And he adds that it had the effect of restoring peace and order almost immediately. The whole population turned to the zemindar, and entirely abandoned the rebellious ministers, so a most arduous service was quickly brought to a conclusion. This installation was effected in August, 1801, the month after the Proclamation.

Now the istimrar zemindar having thus been placed in the old position of dignity and authority which his predecessors occupied, it is difficult to see how the *Madras* Government could, by any executive act, alter that position. Whether they had exercised an act of paramount power on the footing of reconquest after rebellion, or whether they were merely supplying a vacancy caused by escheat, they had in July, or at latest in August, 1801, perfected the act of appointment, and they could not undo it. And whether they could or not, there is no evidence that they ever wished to undo it.

It is suggested, indeed, that as early as the year 1795 the directors of the *East India Company* commended to the *Madras* Government the principles of land settlement introduced into *Bengal* by Lord *Cornwallis*, and that one ingredient in that policy was the partibility of estates, as is shewn by Regulation XI. of 1793. The answer is, that the policy of the permanent settlement was applied to *Shivagunga* as well as to other estates; but that if there were any general intention of introducing the principle of partibility, it was certainly not followed in the present instance. Here the policy of the Government required the appointment of a ruler with authority in his hands, and that was accordingly done.

Moreover though the quality of the estate might doubtless be altered by a law, it was not within the scope of regulation XXV. of 1802 to effect any such alteration. It was framed with a view to the land revenue, and not otherwise to infringe on or limit the rights of any body. And in Regulation IV. of 1822 there is a declaration to this effect.

Again, it is said that we must take the Proclamation of 1801, the Regulation of 1802, and the sunnud of 1803, as together constituting one transaction. Reading then the whole together, the Proclamation only designates the individual zemindar, while the Regulation and the sunnud indicate the policy of the Government and the quality of his estate.

If this question was untouched by authority it would be sufficient to answer

this argument by reference to what has already been said on the intention and effect of the Proclamation. But on this part of the case there is an authority very closely in point (1). The *Hunsapore* zemindary, situate in *Behar*, was an ancient impartible estate in the nature of a raj. In the year 1767 it was confiscated upon the rebellion of its owner. From that time till the year 1790, it was let out to farm by the Government. In the year 1790, when the decennial settlement was in contemplation, or in course of being made, Lord *Cornwallis* granted the property to a younger branch of the family which had been dispossessed twenty-three years previously. It seems that no sunnud was issued, and though the decennial settlement, shortly afterwards effected under the Regulations of 1793, proceeds on the footing of certain rights and obligations subsisting between the zemindar and dependent talookdars and ryots, he does not appear to have been appointed a ruler or chieftain as was the case in *Shivagunga*. He did not receive the title of rajah till the year 1837, when the title of maharajah was conferred upon him. Under those circumstances this Committee held that as there was nothing to shew that the quality of the estate was altered by the grant of 1790, it must be taken to possess its old quality of impartibility, and that the Regulations of 1793 could not be imported so as to control the grant of 1790, or to indicate the intentions of Government in making that grant.

The *Hunsapore* case is also an authority for holding that a mode of acquisition which constitutes a property as self-acquired in the hands of a member of an undivided family, and thereby subjects it to rules of devolution or disposition different from those applicable to ancestral property, does not thereby destroy its character of impartibility.

The result is that their Lordships agree in the views taken by the Civil Court of *Madura* and by the High Court; that the appeal fails, and should be dismissed; and that their Lordships will humbly report to Her Majesty Accordingly. The Appellants must pay the costs of the appeal.

Solicitors for the Appellants: *Gregory & Co.*

Solicitors for the Respondent: *Lawford, Waterhouse, & Lawford.*

(1) 12 Moore's Ind. Ap. Ca. 1.

5th April, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DOOLICHAND (Defendant) ... ... } *Appellant,*

and

RAMKISHEN SINGH and others (Plaintiffs) } *Respondents.**

Money paid, but not due, and paid under compulsion.

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.

Held, that this was not a voluntary payment, nor a payment of money equitably due; but one made under compulsion of law, i.e., under pressure of the execution-proceedings. And *held*, that this might be recovered in a suit for a money-decree, the remedy not being confined to the execution-proceedings.

APPEAL from a decree of the High Court of Bengal (July 20th 1878), confirming a decree of the Judge of Patna (July 29th 1876).

Mr. Leith Q. C., and Mr. *Arathoon* for the Appellant.

* 8 Cowell's Ind. Ap. p. 93; I. L. R. 7 Ca. 648.

Mr. *Cowie* Q. C., and Mr *Doyne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH :—

This is a suit brought by the Respondents, *Ramkishen* and others, against *Doolichand*, the Appellant, to recover back a sum of Rs. 78,393 which the Respondents had paid to the Appellant to prevent the sale of a mouzah called *Korina*, which had been attached and put up for sale in execution of a decree obtained by the Appellant against one *Neogi*. The suit claimed, in the alternative, that the amount of Rs. 78,393 should be apportioned between *Korina* and another mouzah of the name of *Nandan*. The point, upon the facts found in the Courts below, is a short and plain one, but in order to make it intelligible, it is necessary to refer to the transactions which took place between the parties, though not at great length.

Ram Rutton Neogi, a zemindar, was the owner of several mehals, and amongst others of two mouzahs called *Korina* and *Nandan*. These mouzahs were mortgaged in the way which will be hereafter described. The first mortgage which appears is of the date of the 3rd of July, 1865, and is a mortgage of *Korina* made by *Neogi* to the *Land Mortgage Bank of India* to secure a lac of rupees. In January, 1867, *Neogi* borrowed from one *Luft Ali Khan* a sum of Rs 10,000, and gave as security a mortgage bond on certain mouzahs, not including either *Korina* or *Nandan*. It is only necessary to refer to this mortgage bond for the purpose of explaining the next mortgage transaction, and also of explaining a reference which is made in the course of the proceedings to the debt due to *Luft Ali Khan*. It appears that *Luft Ali Khan* obtained a decree upon his bond for Rs. 19,416. He did not, apparently, attach the properties included in his mortgage bond, but he attached and was about to sell *Nandan*. In order to prevent the sale of *Nandan*, on the 8th of January, 1870, *Neogi* mortgaged to the Appellant, with several other mouzahs not material to be mentioned, the two mouzahs, *Korina* and *Nandan*, to secure Rs. 38,000. The mortgage of *Korina* was a second mortgage, it being subject to the prior mortgage to the bank; that of *Nadan* was apparently a first mortgage. The next transaction is a mortgage by *Neogi* of *Nandan* and other mouzahs to the Respondents for Rs 5,500. The bank brought a suit on their mortgage and on the 17th of April, 1871, they obtained a decree for the sale of *Korina* and other mouzahs to realise the debt due to them. On the 29th of July, 1872, *Korina* was attached by the bank, and also by another decree-holder creditor, one *Chuttun Singh*. On the 16th of December, 1872, mouzah *Korina* was sold under *Chuttun Singh's* decree, but subject to the bank's mortgage, to the Respondents, for Rs.115. Shortly after the sale the Respondents paid into Court Rs 58,719 to satisfy the mortgage and decree of the bank against *Korina*, and in the following October (1873), were put into possession of that mouzah. They, therefore, were the purchasers of *Neogi's* interest in *Korina*, which had been sold by *Chuttun Singh*, and paid off the prior mortgage to the bank, and the amount so paid is found by the Courts below to have exceeded the value of *Korina*.

Concurrently with these proceedings affecting *Korina*, others were going on with regard to *Nandan*. The respondents, on the 29th of February, 1872, obtained a decree in a suit which they had brought on their mortgage of *Nandan*, and attached it and other mouzahs. On the 5th of August, 1872, the Appellant intervened in the execution proceedings in this suit. He gave notice of his mortgage, and required that it should be notified at the time of the sale; and it was so notified. The sale was made subject to that notification, and of course subject to the mortgage to the Appellant, upon which he at that time claimed that a sum of Rs.1,51,239 was due. It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place

in August, 1872, and the purchaser was one *Dindyal*, the Appellant's brother, the price being Rs.11,710. A certificate of sale and possession were obtained on the 11th of September, 1873. It has been found by both Courts that *Dindyal* purchased benami for the Appellant. The Appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to inquire what was the value of *Nandan*. It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the Appellant's mortgage, and was sufficient to cover not only that amount but the Rs.18,800* due to *Luft Ali Kkan*, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage debt was satisfied by the purchase of *Nandan* and the value of that estate. The Appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied there was an end of any right to resort to the further securities he held. What gives occasion to the present action are the circumstances which will now be stated.

On the 1st of July, 1872, the Appellant sued *Neogi* on his mortgage for principal and interest. The claim he then made was the same he had notified in the suit brought by the Respondents as mortgagees of *Nandan*, to which reference has been already made, namely, Rs.1,51,239. It appears that sum included penal interest, and the Courts reduced it to a sum of Rs. 78,393. In June, 1873, he obtained a decree, and on the 7th of January, 1874, an order to attach *Korina*. At the time he obtained that order he had become the purchaser of *Nandan*, under the circumstances which have been stated; and his obtaining it after his mortgage debt had been thus virtually satisfied was clearly inequitable.

* I. L. R. 7 Ca. (Rs. 19,416).

Korina being attached, the Respondents intervened, as the purchasers of that mouzah, and as representing the first mortgagees of it, the bank, and filed objections to the attachment and sale. The Respondents in this way made the strongest protest that they could against the sale, but their objections did not prevail. The Judge of *Patna* disallowed them, and the High Court upon appeal affirmed the decision of the Judge, stating that the petitioner must be left to his remedy, if any, in a regular suit. The result was that the sale of *Korina* was ordered to take place; and to prevent that sale, and to protect the property which they had purchased, the Respondents paid into Court the sum of Rs. 78,393 to satisfy the Appellant's decree. They at once gave notice in writing that they should seek a refunding of that money in due course of law, and the present suit was brought for that purpose.

It is only necessary to refer shortly to the judgments. Both the Courts have concurred in holding that the Plaintiff is entitled to recover. Certain facts are found clearly and succinctly by the Judge of the District Court. His findings are these: "I find, therefore, that the following facts are established: (1) that mouzahs *Korina* and *Nandan* are both made subject to a lien of Rs 78,393 by the mortgage of January, 1870"—that is, the Appellant's mortgage; "(2) that Plaintiffs have, as owners of mouzah *Korina*, paid off a lien of a date prior to 1870 on mouzah *Korina*"—that is, the bank's mortgage—"exceeding in amount the estimated value of mouzah *Korina* as estimated by Defendant himself; (3) that the whole amount of the lien of Rs 78,393 therefore falls upon mouzah *Nandan*, if its value is equal to the amount of the lien; (4) that the value of mouzah *Nandan* is equal to the amount of such lien even if Rs. 18,393 paid by the Defendant be deducted"—that is, the amount said to have been paid to *Luft Ali*; "that Plaintiffs, having paid this lien, are entitled to recover the amount so paid from the auction purchaser of mouzah *Nandan*; that Defendant No.1 is the auction purchaser of mouzah *Nan-*

dan." It has been shewn that at the time that this payment of Rs. 78,393 was made by the Respondents to the Appellant, the debt had been satisfied by his purchase of *Nandan* under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that in such a case it is inequitable that he should hold the money paid to him, under compulsion, by the Respondents. It is to be observed that the Appellant had only a second mortgage upon *Korina*, but in the view their Lordships have taken of the case it is unnecessary to go into the question of marshalling the securities.

The arguments at the bar were not directed to show that there is any equity upon which the Appellant could retain this money; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouzah which the Respondents had purchased, and was made therefore under compulsion of law; that is, under force of these execution proceedings. In this country, if the goods of a third person are seized by the Sheriff and are about to be sold as the goods of the Defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary: See *Valpy and others* v. *Manley* (1).

It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit; but none were pointed out by Mr. *Arathoon* which would afford a suitable remedy or which would preclude such an action as the present.

Their Lordships think the decree of the Judge of *Patna* is incorrect in declaring that the Plaintiffs are entitled to realize the decretal money by auction sale of mouzah *Nandan*; and that it ought to be amended by striking out that declaration. In the view they take of the case the decree should be a simple money decree. On the whole case, they agree with the Courts below, though not altogether on the same grounds, that the Plaintiffs are entitled to succeed in the action; and they will humbly advise Her Majesty, subject to the amendment above indicated, to affirm the decrees appealed from. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents: *Barrow & Rogers.*

(1) 1 Common Bench Rep. 594.

10th, 11th May, and 13th June, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MUNGUL PERSHAD DICHIT and another (Plaintiffs) ... } *Appellants,*

and

GRIJA KANT LAHIRI (Defendant) ... } *Respondent.**

Limitation applicable to Execution of Decree in suit instituted before 1st April 1873—Staying Sale of Attached Property—Striking off—Limitation Acts (XIV of 1859, s. 20, and Act IX of 1871, s. 1).

An application for Execution of a decree is an application in the suit in which that decree has been obtained. From this, and from the enactment in s. 1 of Act IX of 1871, that nothing contained in s. 2, or in Part II of that Act, shall apply to suits instituted before the 1st April 1873, it follows, that nothing contained in sched. ii of that Act extended to an application for execution of a

* 8 Cowell's Ind. Ap. p. 123; I. L. R. 8 Ca. 51.

decree in a suit instituted before that date. No such application was barred by s. 20 of Act XIV of 1859, if made within three years from the date of a proceeding within the meaning of that section. Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

Where a sale of attached property is stayed by a Court upon the application of the judgment-debtor, on condition of the attachment remaining in force, the subsequent striking off of such application from the file of the Court does not affect the rights of the decree holder.

Appeal from a decree of the High Court (6th January 1879) (1), dismissing an appeal from an order of the Second Subordinate Judge of *Mymensing* (9th May 1878), whereby an application for the execution of a decree of the year 1851 was rejected.

The Appellants held a decree, dated 8th July 1851, obtained by their father against the Respondent's father on a bond of the year 1848.

The amount due on the decree, originally Rs. 9,858, had become, by accumulated interest, Rs. 40, 873. Of this decree the Appellants applied for execution, which was refused on the 22nd September 1877. The present question was, whether or not the decree-holders' rights to proceed in execution had been barred by limitation.

The proceedings taken by the decree-holders between the 8th July 1851 and the 22nd September 1877, are set forth in order in their Lordships' judgment. The order of the 8th October 1874, made by the Subordinate Judge of Mymensing was, "that the attachment process do issue, fixing the 12th December next" The list of property attached, comprising the right of the judgment-debtor in certain lands, was filed by order of the same Judge on the 3rd December; and on a subsequent day it was ordered that the sale should take place on the 20th January 1875. That sale was stayed by order on petition, dated the 21st January, in which the debt was admitted. Afterwards, on the 25th January 1875, on a petition, in which both parties joined, the execution of the decree was stayed on the terms that the attachment should continue upon the property attached. On the 9th February 1875, at the request of both parties, the Court ordered that the case be struck off its file.

On the 22nd September 1877, the decree-holders made the application for execution out of which this appeal arose. The defence was, that the decree-holders had not, within due time, taken proceedings *bonâ fide* for the execution of the decree, and that though certain applications had been made, the period of limitation had elapsed.

The Subordinate Judge held that the execution asked for was barred by limitation. First, because the present application had been made when more than three years had elapsed from the service of notice on this Respondent, which was effected on the 10th September 1874. The Applicants were not relieved from the bar by the acknowledgment of debt made, as it was ineffectual in regard to a decree. Secondly, because, when the application was made, *viz.*, on the 5th September 1874, the right to execute had been already barred by time; and could not by any application, or order, be revived.

The judgment of the High Court (*Morris and Prinsep, J. J.*), dismissing an appeal from the above decision, is reported in the Indian Law Rep., 4 Cal., 708.

On this appeal

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellants.

Mr *J. F. Leith*, Q. C., and Mr. *R. V. Doyne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

On the 22nd of September, 1877, *Ishana Debi*, the mother and guardian of the Appellants, presented a petition to the Subordinate Judge of *Mymensing*, in which she stated that her husband instituted a suit, No. 26 of 1851, against

(1) See *Mongol Prashad Dichit* v. *Shama Kanto Lahiry Chowdhry*, I. L. R., 4 Ca., 708.

Shama Kant Lahiri Chowdry, deceased, and obtained a decree against him on the 8th of July in that year; that, after application to execute the decree, her husband died, and that she, as guardian of the minors, being substituted in the place of her husband, revived the decree against the Defendant, *Shama Kant Lahiri*, and after his death against his son, who was the owner and possessor of the property left by him, and that the property of the judgment debtor was attached; that after the date of the sale had been fixed the sale was stayed on the application of the judgment debtor with the attachment continuing, and the execution case struck off on Monday, the 9th of February, 1875. She, therefore, prayed that the execution case might be restored, and that notice, being first served on *Grija Kant Lahiri Chowdhry*, the son and heir of the said *Shama Kant*, the amount due under the decree might be realized, together with interest for the time of pendency and the costs of execution by sale of the property under attachment.

The facts stated in the petition were correct, and were reported to be so by the *Amlah* to whom the case was referred for report The judgment debtor, having been served with notice, appeared, and contended, amongst other things, that the application was barred by limitation, that the decree was dated the 8th of July, 1851, and that no proceedings had been *bonâ fide* taken from that time to keep the decree alive within the period laid down by Acts XIV. of 1859 and IX. of 1871, and he alleged that the decree holder, actuated by *mala fides*, not having realized the money for such a long time, simply with the desire of increasing the interest, was not entitled, according to law and justice, to enforce it.

The dates of the several applications and proceedings to enforce, or keep in force, the decree are, with one exception, correctly stated in the judgment of the Subordinate Judge.

They are as follows:—

The date of the decree, 8th of July, 1851.

First petition of execution, 3rd of May, 1861.

Notice served, 25th of May, 1861.

Struck off for default of payment of costs of attachment, 27th of June, 1861.

Second petition, 9th of February, 1863.

Struck off for default of payment of costs, 29th of August, 1863.

Third petition, 19th of December, 1864.

Debtor's property attached, 6th of June, 1866.

Struck off at request of parties, 19th of June, 1866.

Fourth petition against *Grija Kant* as heir of *Shama Kant*, now deceased, 8th of May, 1868.

Notice, attachment, sale proclamation, &c., served, after which debtor applied for two months' time, and execution struck off, 19th of August, 1868.

Fifth petition, 26th of July, 1871.

Notice served on the debtor, 7th of August, 1871.

Attachmennt caused, 31st of August, 1871.

Sale proclamation issued, 26th of September, 1871.

Debtor applied for two months' time, 30th of November, 1871.

Struck off for default of payment of sale fee, 31st of January, 1872.

Sixth petition, 5th of September, 1874.

Notice issued, 10th of September, 1874.

Notice served, 23rd of September, 1874.

Decree holders petition to attach properties, 8th of October, 1874.

Sale proclamation issued, 27th of Aughran, 1281.

Petition of judgment creditor to stop sale for seven days, and sale stopped, 21st of January, 1875.

Debtor's petition to stop sale for three months, admitting the debt, and kharijed, 25th of January, 1875.

Seventh, or present petition, 22nd of September, 1877.

Taking those as the correct dates, he held that the application of the 22nd of September, 1877, was barred by limitation, not being within three years from the date of the petition of the 5th of September, 1874, or from the date of the issuing of the notice on the 10th of September,

1874, under sect. 216 of the Code of Civil Procedure (Act VIII. of 1859). In arriving at that conclusion, he treated the case as falling within the *Indian Limitation Act*, 1871 (Act IX. of that year), and he held, amongst other things, that, under clause 5 in the 3rd column of Art. 167 of the second schedule, the date of the issuing, and not the date of the service of the notice, was the date referred to; and that under clause 4 of the 3rd column of the same article, the date of the 6th petition, and not the dates of the subsequent order or proceedings under it, was the date from which the period of limitation began to run. Both of those dates, it will be observed, were more than three years before the 22nd of September, 1877, the date of the petition under consideration.

It was urged on behalf of the petitioner before the Subordinate Judge that the period of limitation ought to be counted from the 8th of October, 1874, the date on which the execution creditor applied to attach other properties of the judgment debtor, but he held that that application was not in accordance with the Code of Civil Procedure, and that consequently, upon the authority of the case of *Gouree Sunker Trebedee* v. *Arman Ali Chowdhry* (1), it was not an application within the meaning of the 4th clause of Article 167. In that case, however, which is not fully reported, it is to be inferred that no order was made upon the application. In the present case, the Subordinate Judge, upon the petition of the 8th of October, 1874, made an order on the same day that the attachment process do issue.

The effect of that order will be presently considered.

The Subordinate Judge also observed that the sixth application was barred by limitation on the 5th of September, 1874, as it was more than three years even from the 7th of August, 1871, the date on which the notice was actually served, and much more so from the date of the fifth application, which was made on the 26th of July, 1871. In support of that view he referred to the case of *Bisseshur Mullick* v. *Maharajah Mahatab Chunder* (1). That case, however, is very different from the present. There, there was merely the service of a notice on the judgment debtor after the decree was barred; but no order was made. Here an order for attachment was made by the Subordinate Judge on the 8th of October, 1874, after notice served on the judgment debtor on the 23rd of September, 1874, to show cause why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.

The Courts below make no reference to the order, or to the attachment under it; and in the list of dates set out by the Subordinate Judge, the order, and the date of it, are wholly ommitted. Admitting, for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made; when the notice was served on the 23rd of September, 1874; and when the petition of the 8th of October, 1874, was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment debtor, still his order, though erroneous, was valid, not having been reversed.

The applicants appealed to the High Court from the order of the Subordinate Judge rejecting the application now under consideration. The High Court considered it unnecessary to determine the questions arising out of the petition and order of the 8th of October, 1874, or of any of the proceedings between the 5th of September, 1874, and the 22nd of September 1877, inasmuch as they considered and held that the decree was barred when the

(1) 21 Weekly Reporter, Civil Cases, p. 309.

(1) 10 Suth. W.R., F. B. R. p. 8.

petition of the 5th of September, 1874, was presented; the Judges said, "A decree once dead no proceeding by means of an application out of time could revive it." But, as already observed, the Subordinate Judge had jurisdiction upon the petition of the 8th of October, 1874, to determine whether the decree was barred on the 8th of October, 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it appears that the cause of action, is barred by limitation. But if instead of dismissing the suit he decrees for the Plaintiff, his decree is valid, unless reversed upon appeal; and the Defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation. Suppose the order for attachment of the 8th of October, 1874, had been affirmed on appeal by the High Court, upon the ground that it was not barred by limitation, it is clear that the Judge of the original Court, when the application for a sale of the property attached under it was made, could not have rejected the application upon the ground that the decree was barred on the 5th of September, 1874, or on the 8th of October, 1874, when the order was made, upon the ground that the decree was dead when the petition upon which the order was made was presented. Yet the order when affirmed upon appeal could have no greater binding effect than the order itself so long as it remained unreversed. Here the judgment debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of January, 1875, by which he prayed that the sale under the attachment might be stayed for three months, and the execution case struck off for the present, with the attachment remaining in force. Upon that petition being presented, the creditor agreed to have the execution stayed in accordance with the petition, "the attachment on the property attached continuing." It appears to their Lordships impossible to hold that, if immediately after the expiration of the three months the execution creditors had made the present application, it could, in the face of the order of the 8th of October, 1874, and the subsequent proceedings, have been reversed, upon the ground that the decree was dead on the 5th of September, 1874, or on the 8th of October, 1874. The present application, having been made within three years after the order of the 8th of October, 1874, is as valid as if it had been made immediately after the expiration of the three months.

Their Lordships think it right to observe that, irrespective of the consideration that the order of the 8th of October, 1874, was binding, the decree was not barred on the 22nd September, 1877, when the application was made. Both of the Courts below have treated the case as governed by the *Indian Limitation Act* of 1871, Act IX. of that year. But their Lordships are of opinion that the present case does not fall within it. The Act was to come into force on the 1st of July, 1871, but it was enacted by sect. 1 that nothing contained in sect. 2, or in part II. should apply to suits instituted before the 1st of April, 1873. By sect. 2, and the first schedule referred to therein, Act XIV. of 1859 was with one exception, which does not affect this case, repealed. By sect. 4 of the Act, which is part of part II., it was enacted that, subject to the provisions contained in sects. 5 to 26 inclusive, none of which appear to affect this case, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefore by the second schedule shall be dismissed, although limitation has not been set up as a defence. One of the applications for which a period of limitation is prescribed by the second schedule, is an application for the execution of a decree or order of a Civil Court not established by Royal Charter. It appears to their Lordships that a thing

which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that as regards suits instituted before the 1st of April, 1873, all applications in them are excluded from the operation of the Act. Nothing therefore contained in sect. 2, or in sect. 4, or in schedule 2, of the Act extends to an application for the execution of a decree in a suit instituted before the 1st of April, 1873. There are many applications mentioned in schedule 2, and for which a period of limitation is prescribed thereby, which are clearly applications in a suit; such, for instance, as those described in numbers 166, 167, and 164. There are also many enactments which show that an application for execution of a decree is an application in the suit in which the decree was obtained. For example, by sect. 207, Act VIII. of 1859, the application may be made by the pleader in the suit. By sect. 212 the application is to contain "the number of the suit." By sect. 216, if the enforcement of the decree is applied for against an heir or representative of "an original party to the suit," a certain notice is to be given. By sect. 15, Act XXIII. of 1861, the application is to be entered "in the register of the suit," and so forth.

The reasons which may be presumed to have induced the Legislature not to apply the new rules of limitation to suits commenced before the 1st day of April, 1873, are of equal force with regard to application for the execution of decrees.

It cannot be disputed that in several cases, such as the case reported in 22 *Weekly Reporter*, Civil Rulings, 155, applications for the execution of decrees in suits instituted before the 1st of April, 1873, have been treated as falling within the provisions of schedule 2 of Act IX. of 1871, but the point was assumed rather than decided.

It was scarcely contended in the argument before their Lordships that the application of the 22nd of September, 1877, was barred, if the case is governed by sect. 20, Act XIV. of 1859. It was within three years from the date of the service of the notice on the 23rd of September, 1874, which was a proceeding within the meaning of the last-mentioned section; also within three years from the date of the petition of the 8th of October, 1874, and of the order of the same date made thereon.

In the face of the applications of the judgment debtor made from time to time to stay the sale of property which had been attached, it cannot be presumed that the decree was ever satisfied, nor was there any finding of either of the Courts below that the several proceedings were not *bonâ fide* for the purpose of enforcing the decree or of keeping it in force. It appears from the return of the *Amlah* of the 12th of November, 1877, that the proceedings under the petition of the 8th of October, 1874, were struck off on the 9th of February, 1875, on account of the decree holders not paying the cost of issuing the notification; but as the sale was stayed on the 25th of January, 1875, for three months upon the application of the judgment debtor, and upon the condition that the attachment should remain in force, the striking off of the case from the Judges' file on the 9th of February, 1875, did not affect the rights of the decree holders. Their Lordships have alluded to this fact, as reference was made in the argument to the effect of strikings off.

For the reasons above stated, their Lordships will humbly recommend Her Majesty to reverse the decrees and orders of both the Lower Courts, and to order the Respondent to pay the costs of the Appellants in those Courts, and further to order that the prayer of the petition of the 31st of Bhadro, 1284, corresponding with the 22nd of September, 1877, be granted.

The Respondent must pay the costs of this appeal.

Solicitors for Appellants: *Watkins & Latty.*

Solicitor for Respondent: *T. L. Wilson.*

12th and 13th May 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJENDRONATH DUTT and others (Plaintiffs) ... *Appellants,*

and

SHAIKH MAHOMED LAL and others (Defendants) ... *Respondents.**

Non-joinder of a Necessary Party—Alienation of Debuttur Lands—Trust for Religious Purposes.

The representatives of three out of four Hindus, who were joint *sebaits*, managing *debutter* property, sued to have an alienation, made by the fourth *sebait* alone, set aside. They did not make the latter a party to the suit; nor did the Plaintiffs ask the assistance of the Court to make him one, under s. 73 of Act VIII. of 1859.

Held, that he was a necessary party. It was not enough that he was a member of the body of *sebaits*; and although indirectly he might have gained advantage from the suit brought by the other *sebaits*, this did not suffice to connect him with the suit as a party to it. No ground of making an exception to the general rule was presented.

Appeal from a decree of a Divisional Bench of the High Court (18th November 1878), in part affirming, and in part reversing, a decree of the Judge of the District of East *Burdwan* (8th September 1876), and thereby dismissing the suit.

This suit was brought by the representatives of three out of four members of a Hindu family who were joint *sebaits*, holding property which had been dedicated for *debseba*. The object of the suit was to set aside an alienation made by the fourth *sebait*, under which the Defendants, the present Respondents, claimed to hold the property. The ground of the suit was, that the property, a mouzah named *Kesubpore*, in East *Burdwan*, was trust-property, to be held in trust for the established worship of certain deities, and was *debutter*.

The fourth *sebait* had not joined in the suit as Plaintiff, nor had he been made a Defendant.

The Court of first instance decreed in favour of the Plaintiffs for part of the land claimed. On appeal, the High Court dismissed the whole claim, on the ground that the fourth *sebait*, under whom the Defendants claimed, was not a party to the suit; and also on the ground of limitation.

In the year 1813 (30th Sraban 1220, Bengali style), five brothers, surnamed *Dutt*, *viz.*, *Manickram*, *Sumbhuram*, *Bissonath*, *Kasinath*, and *Gopinath*, being a joint family, executed an agreement setting apart joint property for *debseba* in their family-house, and also at *Sri Brindaban*. First a portion, and afterwards, as it was stated, the whole of mouzah *Kesubpore*, was included in this trust.

Down to 1849, when *Manickram* died, he continued to be sole *sebait*. *Sambhuram*, *Gopinath* and *Kasinath* had died before him. *Manickram* was succeeded in the office of *sebait* by his widow, *Shokhimoni*, during whose management proceedings were taken by some of the family to obtain a declaration of the trust. *Gopinath's* issue had died. *Sambhuram* had left a son, *Brojonath*; and *Kasinath* had left a son, *Bykantnath*; who afterwards made the alienation, giving rise to the present suit. The surviving brother, *Bissonath*, died in 1845, leaving his son *Horinath*, the father of the Appellant in the present suit, *Rajendronath Dutt*.

The proceedings commenced in the time of *Shokhimoni*, widow of *Manickram*, resulted in an appeal to Her Majesty in Council; and in 1871, it was determined—see *Juggutmohini Dossee* v. *Mussumat Sokheemonee Dossee* (1)—that the lands mentioned in the schedule to the plaint in the suit on that appeal, were dedicated to the religious purposes specified in two

* 8 Cowell's Ind. Ap. p. 99; I. L. R. 8 Cal. 42.

(1) 14 Moore's I. A., 289.

deeds of endowment, dated in 1813 and in 1820, and executed by the five brothers abovementioned. On the 23rd August 1873, the parties to that suit registered a deed of settlement for the management of the trust, by which it was agreed that the office of *sebait* should be held by the representatives of the four svrviving lines of descent (that of *Gopinath* being extinct) in equal shares. *Bykantnath*, the son of *Kashinath*, was thus entitled to a fourth share, and was *sebait* with three others. This deed stated that eleven annas of *Kesubpore* had been included in the *arpannamas*, or original endowments, and that the rest of the mouzah had been afterwards purchased out of proceeds of sales of *debuttur* property.

Meantime, however, in 1871 (26th Falgun 1275 B. S.), *Bykantnath* had executed a document purporting to convey to his sister's son, *Anund Gopal*, the Mouzah *Kesubpore*, holding himself entitled to it under a family partition. *Anund Gapal* then conveyed to the Defendants.

Mr. *C. W. Arathoon* appeared for the Appellants.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH :—

The suit in this appeal was brought by certain persons to recover a mouzah called *Kesubpore*; and the case stated in the plaint is that the predecessors of the Plaintiffs, being five brothers, had dedicated certain lands to family idols; that *Manickram Dutt*, the eldest of the brothers, being the *sebait*, was managing the *seba* of the idols out of the proceeds of the consecrated properties and was superintending the *debutter* properties, and that after the death of two of the brothers he acted improperly with reference to the *debutter* properties, and apportioned out of them a lot called *Pilkhundi* as the share of *Gopinath Dutt*, one of the brothers, and the mehal *Kesubpore*, the subject of the present suit, to *Bykantnath Dutt*, the son of *Kassinath Dutt*, deceased, another of them. The Plaintiffs sue for possession of the whole as *debutter*.

The property which had been so dedicated was the subject of a suit which was commenced in 1857, and ultimately came by appeal before this Board. The nature of the suit is stated in the judgment which was then delivered. The plaint in it is set forth in the record in this suit. It appears to have been brought by *Hurinath Dutt*, the son of one of the five brothers, against all the other members of family. Amongst them was *Bykantnath Dutt*, who is said in the present plaint to have had *Kesubpore* apportioned to him. The Judgment (14 Moore, Ind. Ap. Ca. 299) states that the suit was for possession, but not for possession in the ordinary character of proprietor of lands; that the Plaintiff made title to the possession on the ground that the lands had been dedicated to the religious service of the family idols by virtue of two instruments of dedication in the years 1813 and 1820, which still at the time of the suit impressed on the lands a trust which the Plaintiff by the suit sought to have declared. He also asked to be appointed *sebait* or manager of the lands so dedicated.

It appears from the judgment that, amongst other matters of defence which were set up by the Defendants, was a deed of partition, which was said to have been a deed by which a different arrangement was made of the family property. Certain other property was devoted to the family idols, and the property originally dedicated was divided between the members of the family. Their Lordships, in that case, considered that this was not a genuine deed. They said with regard to it, "The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property It appoints as a *sebait* one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindu family having several and more competent mem-

bers, from the fear of the scrutiny to which it might lead if the creditors of the *sebait* traced the property to his possession. Again, as a dedication in fact was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which the deed seeks to effect. All comparision, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument:" and they proceeded to say, "A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust *prima facie* well established on evidence of a subsequent deed of revocation, not only not proved, but on every examination of it discredited." Their Lordships in the result declared "that the lands specified in the schedule to the plaint"—which included the mouzah *Kesubpore*, and also the lot *Pilkhundi*—"were and continue dedicated, under the instruments of dedication of 1813 and 1820, to the religious uses specified in those instruments of endowment." And they added a declaration that the decree was to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper *sebait*.

A question has arisen as to whether the whole of mouzah *Kesubpore* was dedicated In the deed of dedication only 11 annas were mentioned Subsequently 5 annas seem to have been purchased by *Manickram* the *sebait*, and it would rather appear to have been assumed that the whole 16 annas had become subject to the dedication. In the view which their Lordships now take of the case, it is unnecessary to determine whether this judgment must be considered as a binding decision upon the parties as to the dedication of the entire 16 annas, or only of the 11. What was contemplated is that, the property being shewn to be *debutter* property and dedicated to family idols, a proper *sebait* should be appointed, who might bring a suit, or take other proceedings, to have the trusts so declared enforced, and so this declaration was added.

This judgment was delivered in 1871. The parties appear not to have done anything immediately; but, on the 22nd of August, 1873, they professed to appoint the *sebait*. They executed what they call a deed of settlement for the management of the *seba* of the gods, by which, after reciting that *Gopinath Dutt* had died without any heir, and that as heirs of the remaining four brothers they each held a 4 anna share, they say:—"We do hereby covenant that we, being in possession as *sebaits* of the properties mentioned in the schedules of the two deeds of endowment aforesaid, and besides [the properties mentioned in] the arpannamas of the properties acquired out of the proceeds of the *debutter* properties and of the properties which are used to meet the expenses of the *deb-seba*, and which are embodied in the schedule of the plaint of the former suit, No. 6; and, in addition to these, of those properties which are *debutter* for the expenses of the *deb-seba*—the whole of these being entered in the schedule below—will manage the duties connected with the *seba* of the Jins according to fixed arrangment." They then make a provision for what is to be done with the different moneys, and give particular directions with regard to the appointment of persons to make collection. The result is that all the members of the family, including *Bykantnath*, all the persons who had an interest in the property, or would have had an interest in it if there had been no dedication to the idols, are made *sebaits*. The trust is mixed up with the private interest, and there remains outside no person who would have an interest or duty to see that the trusts were properly executed. All the persons interested are themselves made trustees and managers for the execution of the trusts. That certainly does not seem to have been the kind of appointment which was contemplated by their Lordships.

The objection was taken by the Defendants in the present suit that *Bykantnath*, who, by this deed of August, 1873, was appointed one of the *sebaits*, and took a fourth share of the property as *sebait*, is

not a party to it. The Defendants say he ought to have been joined as a Plaintiff, or, if he would not become a Plaintiff, he should have been made a Defendant. The Plaintiffs say that he would not consent to become a Plaintiff with them. If he would not consent to that, they might have made him a Defendant. The objection being taken in the First Court, the Judge overruled it. He does not appear to have said much on the subject, but he held that it was not necessary that *Bykantnath* should be a party. The Defendants appealed from that judgment, and in their grounds of appeal they distinctly take the objection. The first is:—"For that the Court below ought to have held that there has been no proper appointment of the Plaintiffs as *sebaits*, and that in any event the present suit could not be successfully maintained by the Plaintiffs on the record in the absence of *Bykantnath*." The learned Judge who delivered the judgment of the High Court says with respect to this objection:—"I think that *Bykantnath Dutt* should certainly be a party to this case. The suit is to do away with a sale effected by him, and for which he received full value of the property in suit. Full justice could scarcely be done without having him before the Court in his personal capacity. The Judge below remarks that *Bykant* is substantially a co-Plaintiff, because he is a member of the body of the *sebaits*; but he ought to be on the record substantially as a Defendant in his personal capacity, and answerable for the costs of the proceedings arising out of his alleged misconduct. As it is, he has been allowed to make away with endowed property, appropriate the value of it, and then to be a substantial, but unseen, co-Plaintiff in recovering it from the purchaser, to whom, however, the Lower Court finds that it can award no compensation, because he should get it, if at all, from the vendor in his private capacity, and not from the Plaintiffs, who sue as *sebaits*." The judgment refers to many of the substantial reasons why *Bykantnath* should have been a party to the suit. Their Lordships will mention presently the tarnsactions which are alluded to. It was evidently the opinion of the High Court that he ought to have been made a party to the suit The judges appear to have thought that he might be considered to be a Plaintiff, because he was a member of the body of the *sebaits*; but although he might indirectly gain benefit from the suit, the fact that the other *sebaits* were suing did not make him also a Plaintiff. They do not profess to sue on his behalf. He really was not a party to the suit at all; and no decree could be made in it which would bind him. Whatever might be necessary in order to do complete justice between the parties, so far as it would affect *Bykantnath*, could not be done. It would appear that the Judges of the High Court intended to decide the case in favour of the Defendants upon this objection as well as upon the bar of limitation. They said:—"We are of opinion therefore that, under the circumstances of the case, and regard being had to the sort of *debutter* which is in question and to the fact that the family generally were parties to the division of the *debutter* property, *Bykantnath Dutt* should have been personally a party to the suit; and that if the Plaintiffs be entitled to recover the property from the Defendants, Appellants, they should be required to reimburse them the purchase-money, and that *Bykantnath* should have been saddled with all the costs. And the same consideration would induce us to refuse any decree for mesne profits." They then considered the question of the law of limitation, and held that the Defendants were *bonâ fide* purchasers, and were, therefore, protected by it.

Under those circumstances, the Respondents say, in support of the decision of the High Court, and in answer to the present appeal, that the nonjoinder of *Bykantnath* is not an objection of form only,—that the Court ought, in a suit of this kind, to have him before it, so as to be able to bind him and to do complete justice. The Appellants have not, on any occasion, sought the assistance

of the Court, as they might have done under sect. 73 of Act VIII. of 1859, to make him a party to the suit. It was not the province either of the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, from motives of their own, deliberately abstained from making him a party to the suit. It is certainly not a case in which the Court should make an exception to the general rule which would require him to be a party.

That motives for keeping *Bykantnath* out of the suit existed may be seen from the nature of the previous transactions. He is said in the plaint to have been put in possession of *Kesubpore* by *Manickram*, who was at that time the *sebait*; but it would seem, from the case made in the former suit, that though the deed of partition was discredited in the former appeal, it was under colour of some deed of partition executed between the members of the family that *Bykantnath* obtained the possession of *Kesubpore* as early as 1841, and so through the act of the very persons who are plaintiffs in the present suit. Having thus obtained possession, he subsequently made a conveyance to *Anund Gopal*, his nephew, on the 17th of September, 1861. Whether this conveyance was only a *Benami* transaction, and *Bykantnath* continued to be still the owner of the property, or whether, which is possible, *Bykantnath* sold it for a sum much under its value, as an advancement to or in order to benefit his nephew, is not clear; nor is it necessary now to say which was the real nature of the transaction. There is evidence that *Anund Gopal* exercised acts of ownership, that he made leases of and received rent for some portions of the property, and that he was apparently the owner of it. Being apparently the owner, he, on the 8th of March, 1869, sold a moiety of it to some of the Defendants for Rs. 5,200, and the other moiety to the other Defendants, on the 15th of July, 1871, for Rs. 6,000. It is clear, and is not disputed, that these prices represented the full value of the property. The Defendants gave the full value, and held the property for some time. Then came the appointment of *sebaits* of the 22nd of August, 1873, of the whole family, including *Bykantnath*, by virtue of which this suit is brought. Now, the Defendants having paid the full value to *Anund Gopal*, and there being this case with regard to *Bykantnath*, whose acts could not have been unknown to the Plaintiffs when they appointed him joint *sebait*, that he had parted with the property, which was *debuttur*, and, through his conduct in so parting with it, it had come to be sold to the Defendants, the Plaintiffs, the other members of the family, seek to set aside the transaction—to recover back the property, it is true as *debuttur*, but under circumstances which raise a considerable suspicion whether the object is to treat it when it is recovered as *debuttur*, or to have the benefit of it for themselves. The whole transaction seems to be of such a character that, if there is a case in which it is just and proper to give effect to the general rule that all the parties interested in the subject-matter of a suit should be joined in it, this appears to their Lordships to be one.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed, and the appeal be dismissed; and the Appellants will pay the costs of the appeal.

Solicitor for the Appellants; Mr. *T. L. Wilson.*

Solicitors for the Respondent; Messrs. *Barrow* and *Rogers.*

17th May, and 18th June, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse

On Appeal from the High Court of Judicature at Madras.

VENKATESWARA IYAN and another (Defendants,) ... ... } *Appellants,*

and

SHEKHARI VARMA ... (Plaintiff.) ... ... } *Respondent**

Sthanam lands: Evidence†

A Rajah having made a perpetual lease of Sthanam lands appertaining to the Raj, one of his successors sought to set it aside on the ground that the property was devaswam, or the endowment of temples. That it was devaswam was denied; and after questions of the admissibility of evidence, the construction of documents and the effect to be given to judgments had arisen, the fact was found in the affirmative by two Courts concurrently. Upon an examination of the evidence by the Judicial Committee it was, however, found that the Plaintiff had not proved his case.

Appeal against a decree of the High Court (22nd July 1878) confirming, as to the questions raised in these proceedings, a decree of the Subordinate Judge of *South Malabar* (1st September 1877).

Mr. *J. D. Mayne* appeared for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

This appeal is presented in a suit (No. 1 of 1877) instituted by the Valiya Rajah of *Palghaut* in the Subordinate Court of *South Malabar*. The Plaintiff in that suit died after obtaining his decree; his immediate successor has also died, and the existing Rajah has been substituted as Respondent by order of the High Court of *Madras*. He has not thought fit to appear, and the case has been argued by the Appellants alone.

It appears that in the families of the *Malabar* Rajahs it is customary to have a number of palaces, to each of which there is attached an establishment with lands for maintaining it, called by the name of a sthanam. The *Palghaut* family have no less than nine stanoms. Each stanom has a Rajah as its head or stanomdar. The stanomdar represents the *corpus* of his stanom much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the stanom. The Valiya Rajah appears to be the first in rank of the nine stanomdars, and to be the head of the *Palghaut* family.

The Appellants, who represent the Defendants in the suit, are a branch of the *Iyan* family, and claim certain interests in land granted to members of that family by former Rajahs of *Palghaut* at intervals of time ranging from the year 1832 to the year 1851.

Inasmuch as between the year 1832 and the present time there have been eight successive Rajahs, all apparently bearing the same name, it will be convenient to distinguish them by numbers, beginning with Rajah I. in 1832. It will also be convenient to state the previous dealings between the Appellants or their predecessors in title on the one hand and the Rajahs on the other, before coming to the present suit, which is hardly intelligible without a knowledge of antecedent events.

In the year 1832 Rajah I. executed to *Chitambara Iyan* a kanom of certain lands to secure the sum of Rs. 4 000. A kanom is a species of mortgage, and it has been stated at the bar that it is usually made to endure for a term of twelve years, at the end of which time the parties would enforce their remedies or make a new contract. On these lands there were prior incumbrances, which

8 Cowell's Ind. Ap. p. 143; I. L. R. 3 Mad. 384.

† As to Malabar law relating to the alienability of sthanam lands, see I. L. R., 1 Mad., 88.

were paid off out of the Rs. 4,000 by *Chitambara*.

In the year 1833, *Chitambara* instituted a suit (No. 214 of 1833) against Rajah I. and a number of other persons for recovery of the lands included in the kanom of 1832. Of the frame and effect of this suit it will be necessary to say more hereafter. At present it is sufficient to say that the Plaintiff substantially obtained the decree he asked.

In the year 1843, Rajah II. executed to a trustee for *Chitambara* another kanom of other lands to secure another advance of Rs. 4,000.

The two kanoms in question comprise the whole of the lands which the Rajah seeks in the present suit to recover from the Appellants. The documents themselves are not forthcoming, but their purport, at least to the foregoing extent, is shewn, partly by the allegations of both parties in the litigation prior to the present suit and partly by the register of *Palghaut Cutcherry*. The land has been held by the Appellants or their predecessors in title in conformity with the title so conferred. Whether the advances were made to the Rajahs for the expenses of the stanom is a question which does not appear to have been decided, or precisely raised.

On the 15th of June, 1851, Rajah III. executed to *Sivarama* the son of *Chitambara* an instrument the validity of which has been the main question in this suit. It commences by stating that, including the transactions of 1832 and 1843, the sum of Rs. 12,000 (called 42,000 fanams) has been received. For this sum *Sivarama* is to hold for ever the lands described. The instrument continues thus:—

"We executed to you a document on the 15th of June, 1851, ordering you and your anandravams to hold and enjoy the above lands . . . for ever, without being called on to surrender and without surrendering the same. Deducting out of the rent payable the interest due on your money, and the Government revenue, you should pay annually 200 paras of paddy for the pooja services of our *Simhanada Bhagavathi* (pagoda), and sixty-four paras of paddy on account of *Annabishekam* in the *Neerathi-Kulangara Siva* temple. In addition to what has been ordered above, we have also given our consent to water being taken, as required for purposes of cultivation, from our *Simhanada Bhagavathi's* tank."

It is not disputed that the lands comprised in this instrument are the same as those comprised in the two kanoms.

The precise nature of this instrument, whether it is to be called a kanom or by some other name, whether it confers upon *Sivarama* a redeemable or irredeemable interest, has been a good deal discussed, and in some views of the case the discussion would be very material. For the view now taken it is not material. The material points are: that on the 12th of July, 1851, the instrument was registered as a kanom in the Kanom Registry of the Subordinate Court of the Zillah of *Calicut*; that the *Calicut* Court gave notice of that fact to the District Moonsiff of *Palghaut*; and that on the 20th of August, 1851, the Moonsiff registered the instrument thus:—

"Kanom document, dated the 15th of April, 1851, creating a kanom of 42,000 new fanams over the *Mangattiari Patam*, and other lands in the *Patham* amshan of *Palghaut* talook, to be enjoyed without being caused to surrender and without surrendering."

The possession of the *Iyan* family in accordance with the prior kanoms, is also in accordance with the grant of 1851. The rent of 200 paras of paddy has without doubt been regularly paid to the *Simhanada Bhagavathi Pagoda*. There is dispute about the rent of sixty-four paras, which the Appellants allege to have been regularly paid to a pagoda called the *Tharakat Siva Pagoda*.

Rajah III. died at some time not exactly ascertained, but it was not later than the year 1854. In the time of his two successors Rajahs IV. and V., nothing took place to affect the title. Rajah VI, acceded to the stanom in the year 1862, and it is during his reign that the present disputes arose.

On the 1st of April, 1874, Rajah VI. filed a plaint in the Court of the District

Moonsiff of *Palghaut* against the *Iyan* family, and several other Defendants tenants of the *Iyans*. He sued for recovery of the lands comprised in the kanom of 1832 on payment of the Rs. 4,000 thereby secured, and of Rs.50 for improvements. He took notice that the *Iyans* claimed what he calls "an irredeemable right for a large amount," and he sought to set that claim aside. The lands he alleged to appertain to *Mangattiri* (the name of a district or estate), which again, in his words, "belonged to our Swarupam or Royal Family." He complained that since his coming to the stanom, and since 1038 (A.D 1862-63), no rent had been paid. He alleged as the legal foundation of his case that "No one is entitled to assign lands belonging to the stanom on large rights. Even if such rights have been given, they cannot be valid: they cannot also bind us."

The *Iyans* objected to the jurisdiction of the Moonsiff on the ground of value, contending that the suit, though in form only to redeem the kanom of 1832, was necessarily and in substance one to set aside the grant of 1851. They said that the Rajah, having been inactive for twelve years though aware of that grant, was barred by limitation, and that possession had been held and the reserved rents paid in accordance with the terms of the grant.

The issues framed by the Moonsiff did not raise any question as to the precise nature of the grant. It is there called a perpetual lease, and one of the issues was whether it is valid and binding on the Plaintiff

The Moonsiff dismissed the suit on the first ground of defence, viz., that it was beyond his jurisdiction, but the Subordinate Judge reversed that decision and remanded the suit.

On the 29th of March, 1876, the Moonsiff passed a decree to the effect that the Rajah should redeem on payment of the Rs.4,000 and the value of certain improvements. The ground of his decision was that the absolute alienation by a stanom holder of stanom property in such a way that it could not be redeemed, is highly prejudicial to the stanom. It appeared, he said, by the Defendant's evidence that the Rs.4,000 advanced in 1851 was for the purpose of paying off debts contracted for performing the late Rajah's funeral ceremony, but that, he held, was not a special necessity, and could not be permitted.

On the 1st of July, 1876, Mr. *Wigram*, the District Judge of *South Malabar*, reversed the Moonsiff's decree. He refused to re-open the question of jurisdiction. The only question argued before him was whether the grant of 1851 was binding on the stanom. It was not necessary to decide that. It was sufficient for the disposal of the case that the Defendant had in fact held under the grant ever since June, 1851. Instead of suing to set aside the grant of 1851, of which Mr. *Wigram* held that the Rajah was fully aware, the Rajah sued to redeem only half the lands comprised in it. Mr. *Wigram* held that the whole lands were held under one title, and that they could not be recovered piecemeal without first setting aside the grant of 1851.

The Rajah appealed to the High Court, but on the 8th of December, 1876, his appeal was dismissed. No written reasons appear to have been given on that occasion.

The suit of 1874 having thus failed, the Rajah instituted the present suit on the 9th of June,* 1877. In it he changes his point of attack, and prays for a wholly new kind of relief. He now alleges that the lands in question belong to four devaswams, or religious endowments, belonging to the stanom, viz., *Simhanada Bhagavathi*, *Mangattiri Ayappan*. *Neerat Ganapathi*, and *Shekharipuram Emur Bhagavathi*. He contends that the stanomdar cannot assign in perpetuity, or for an irredeemable interest, the lands of the devaswam, and that the grant of 1851 was not for devaswam purposes. He accounts for his inaction by saying that the grant was collusively obtained and fraudulently concealed, and that it did not come to his knowledge till January or February 1874. He prays to

* January I. L. R 3 Mad. 390.

recover the lands on payment of a small sum for improvements, and without paying what is due on the kanoms of 1832 and 1843. The Defendants named in the plaint are the *Iyans* and their tenants.

In answer to the Rajah's new case, the *Iyans* deny fraud and concealment, and challenge the Rajah's allegation of ignorance. They contend that the cause of action arose on the death of Rajah III, which is there stated to have taken place in October or November, 1853, and they plead the *Statute of Limitations*. They deny that the lands are devaswam property at all.

Among the issues framed by the Subordinate Judge are two to the following effect; whether the Plaintiff was by the fraud of the Defendants kept from the knowledge of the grant of 1851, and whether the land belongs to the devaswams or to the stanom.

On the 1st of September, 1877, the Subordinate Judge decreed that the grant of 1851 should be set aside and the lands recovered on payment of the amount secured by the two kanoms, and of the value of certain improvements. Shortly stated, the grounds of this judgment are, that the land is devaswam property, and that the grant of 1851 was fraudulently obtained and concealed so as to exclude the *Statute of Limitations*.

From this decree both sides appealed, and after some intermediate proceedings, among which was an order for the production of some further evidence, the appeals were heard by the High Court of *Madras* on the 22nd of July, 1878. The Rajah's claim to have the land without redeeming the kanoms seems to have been given up, and on the appeal of the *Iyans* the decree of the Subordinate Judge was substantially affirmed, but modified in favour of the *Iyans* on some points of detail. Again, no written reasons were given, but the views of the High Court are to be gathered from a memorandum made by Mr. Justice *Kindersley* on the 30th of November, 1879. From that it would seem that the High Court agreed with the Subordinate Judge that the land was devaswam property, that they did not agree that the grant of 1851 had been fraudulently concealed, but thought that the *Statute of Limitations* would not apply because the *Iyans* were not purchasers *Bonâ fide* for value. From this decree the present appeal is brought.

The first question, and in the opinion of their Lordships the governing question, on this appeal, is whether or no the lands in dispute are devaswam property. The object of the Rajah in contending that they are so is clear. In the suit of 1874, when all parties treated them as stanom property, the kanoms and the grant of 1851 were defended on the ground that the advances were made for stanom purposes. But if the land is devaswam property, the clearest proof of an advance for legitimate stanom purposes would not avail to support the alienation. By the shewing of the *Iyans* themselves the transactions would be void in their inception, and could only now stand so far as each is protected by the lapse of time. On the other hand the Rajah, having elected to rest his case upon the character of the land as devaswam property, must stand or fall by that election. If the land is not devaswam property, the groundwork of his suit is cut away, and he cannot have any decree at all.

It is true that upon this question there are concurrent decisions of the Courts below. But though the question may be called in its result one of fact, its decision turns upon the admissibility or value of many subordinate facts, and involves the construction of documents and other questions of law. Such was the view taken by the High Court of *Madras* when it granted leave to present this appeal. It is now necessary to examine the principal grounds on which the Subordinate Judge came to the conclusion that the property belongs to the devaswam. Whether or no they are the same grounds on which the High Court rested its opinion, their Lordships cannot tell for want of a written judgment.

He first says that the very old public documents, being certain pymash accounts of the years 1798–99 and 1805–6, most satistfactorily shew that the lands are the

jenm property of the four devaswams named in the plaint. But on looking at these accounts, two observations at once occur. The first is that, putting them at the highest, they are only evidence of possession, having been rendered to Government for the purpose of informing them from whom they were to demand the revenue. The second is that they can hardly be said to be public documents at all; for on the face of them it is stated that they were never confirmed and never acted on. The person who made these returns may have believed that the lands were devaswam property, but his statement to that effect is a mere private opinion, unless and until it is affirmed or acted on in some public way. It is remarkable that in the suit of 1833 a copy of one of these accounts was refused to one of the litigant parties, on the very ground that the account had never been confirmed, and was only granted on its being discovered that a copy had already been given to his opponent. These documents should not have been treated as evidence.

The Subordinate Judge then goes on to say that in the suit of 1833 *Chitambara Iyan* admitted, and indeed maintained, that the land belonged to some devaswam. Now this suit was brought by *Chitambara* against a prior mortgagee and his tenants for redemption and recovery of the land comprised in the kanom of 1832. Rajah I. was afterwards added as a party, and he supported the Plaintiff. At a subsequent stage of the proceedings three other Defendants were brought before the Court. They represented the *Simhanada Bhagavathi* devaswam, and in the year 1834 they brought a suit against the Rajah and *Chitambara* to enforce the claim of their devaswam to the lands. In the record are inserted the answers of the Rajah and of *Chitambara* in the suit of 1834. It does not appear what was decided in that suit upon the devaswam question. Possibly the parties were satisfied with the issue of the suit of 1833, where the same question was raised after the representatives of the devaswam were made parties. It is clear that the two suits were considered, and must now be considered, in combination with one another.

Nothing can be plainer than that in both suits the Rajah and *Chitambara* were in the same interest, and were opposing the claim of the devaswam. On the part of the devaswam it is alleged that the Rajah "has no connection with the land." He, on the other hand, says that "the devaswam does not own lands sowing even one para," and that its expenses are met by his own family funds. He sets forth several acts of ownership by the Rajahs, including the kanom of 1832 and previous kanoms. *Chitambara* alleges that the devaswam itself belongs to the Rajah, and that the lands are not jenm of the devaswam. Admitting that the devaswam is entitled to the rent of 200 paras of paddy under arrangements which the Rajah made with a prior mortgagee, he contends that no claim whatever has thereby been created on the land itself.

Such being the tenour of the pleadings, it is difficult to understand how the Subordinate Judge comes to his conclusion that *Chitambara* maintained the title of the devaswam.

On the 30th of January, 1837, the Pundit *Sadder Ameen* passed a decree in the suit of 1833 in favor of *Chitambara*. On the question raised by the devaswam, his view was that the devaswam itself belonged to the Rajah, and that the Defendants specially claiming to represent it had no title to the land.

The result of these two suits is certainly not in favor of the Rajah's present contention. It may not precisely decide that the land is not devaswam property. But it decides at least this, that, as between the Rajah's grantee on the one hand and the devaswam claiming independently of the Rajah on the other, the Rajah's grantee is entitled to hold the land. Its effect in binding the Rajah is enhanced by the fact that in the year 1835 Rajah I. died, and that Rajah II was then made a party, but did not suggest that his predecessor had done wrong, or raise any fresh case at all.

The Subordinate Judge next says that

the admitted fact of the rent of these lands having been always made payable to the devaswams, and not to the stanoms, is a piece of very cogent evidence in favor of the devaswams. The kanoms not being in evidence, their precise terms cannot be known. But what is made payable to the devaswams by the grant of 1851 is not *the rent*, but only the specified and comparatively small portion of it reserved by the Rajah for the benefit of a family idol, and an idol of a neighbouring village.

Then it is said that in the suit of 1874 the Rajah did not claim the land as belonging to his stanom, but that, inasmuch as he styled it property belonging to *Mangattiri* of my royal family, and as *Mangattiri* is one of the four devaswams as whose trustee he now sues, he really claimed for those devaswams. Now the pleadings in that suit have been stated above, and, except that the grant of 1851 produced by the *Iyans* shows the payments reserved to the pagoda, they say nothing about any devaswam. In the issues and the two judgments of the Courts not a word is said about any devaswam. The property is treated as stanom property throughout. *Mangattiri* is not a devaswam at all, but the name of a locality in which there appears to be a pagoda of the idol *Ayappan* called in the plaint of 1874 the *Mangattiri Ayappan* devaswam.

The foregoing is the whole of the Rajah's case, and it certainly does not bear or nearly bear the burden of proof which lies upon him. It is indeed suggested by the Subordinate Judge that if the kanoms were produced they would show something in the Rajah's favour, and he draws very damaging inferences against the *Iyans* for not producing them. They excuse themselves by saying that the documents were given up to Rajah III. when the grant of 1851 was executed. That seems a very unlikely proceeding. There is nothing to show why the owner of lands should not in *Malabar* as well as in *England* keep all documents of title. And if there were reason to suspect that these kanoms would disclose anything material in favour of the devaswams, there might be some justification for making presumption against the *Iyans*.

But there is no reason for any such suspicion. As regards the kanom of 1832 it is out of the question, for that document was the basis of the suit of 1833 when the *Iyans* got a decree against the claim of the devaswam. As regards the kanom of 1843, there is the notice of it in the *Palghaut Cutcherry*, and the recital of it in the instrument of 1851, which simply point to it as a kanom or bond executed by Rajah II to *Chitambara's* trustee. It is to the last decree improbable that this kanom should be materially different from the several other kanoms affecting the same lands and exhibited in this suit, or should show anything more favourable to the devaswams than the payment of paddy secured by the grant of 1851.

Moreover, the Rajahs have not themselves been free from blame in destroying this evidence. Counterparts of the kanoms were executed to be kept by them, and Rajah VI. is fain to excuse himself for not producing his counterpart in the suit of 1874, by alleging that when Rajah V. died the documents of the stanom were taken away by his nephews who had not given them back to him.

Even then if this were all, the Rajah's case must fail, because the burthen of proof lies on him. But there is a considerable amount of evidence, though principally of a negative kind, bearing in favor of the Appellants' contention that the land is stanom and not devaswam property.

Their positive evidence besides the suits of the 1833, 1834, and 1874, consists of two sets of documents, one set showing that the Rajahs have freely dealt with portions of the lands in dispute as stanom property, the other set showing in the case of other undisputed stanom lands that the Rajahs have been in the habit of demising or granting them, with reservations of specific and limited payments to family pagodas. The Subordinate Judge seems not to have rightly apprehended the purposes for which these exhibits were produced.

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Moreover, in the year 1864 *Sivarama Iyan's* tenants were obstructed in taking water from the *Simhanada Bhagavathi* tank, a right granted by the instrument of 1851. *Sivarama* prosecuted the obstructors, and succeeded in his prosecution. He could hardly have done so without interference by the persons who represented that devaswam, if he was without title. It may be that the obstructors represented the devaswam, but, if so, *Sivarama* appears to have prevailed against it.

The negative side of the evidence is perhaps of more importance. The claim is made on behalf of four devaswams. But no attempt is made to shew when, by whom, or in what way the land was dedicated to them, nor at what time they have had actual enjoyment of it. Nor is there even so much as a statement by the Rajah of the shares or proportions in which they are entitled.

Above all it is clear that the *Iyans* were in possession of all the lands, at least from the month of June, 1851, up to the suit of 1877, and that they paid nothing to the Rajah, and nothing to the devaswams more than the specified quantities of paddy. During that period there were three descents of the stanom. Even if Rajah III. had colluded with the *Iyans* to alienate the property of the devaswams, it is in conceivable that Rajahs IV and V. and up to 1877 Rajah VI., should do so too, or that they and all the managers and priests of the devaswams should keep silence if they were entitled to land sowing 575½ paras, out of which they were only receiving 200, or at most, 264 paras of paddy. According to the only calculation on this point appearing in the record, the sowing para of land is said to yield rent at 7 paras of produce.

The foregoing reasons are sufficient to dispose of the case upon the first step in it. But if the view of the Courts below had prevailed here, it would have been necessary to decide whether the *Iyans* had fraudulently kept from the Rajahs all knowledge of the grant of 1851, so that time should not run in its favour. Accordingly this question has, as regards both evidence and argument, been treated as fully as any other point in the case, and their Lordships have full materials for a judicial decision upon it. And they think it right to pronounce one, because they find that the Subordinate Judge has pronounced upon this point against the Appellants' family, with a great deal of severity which appears to them to be undeserved; and because from the silence of the High Court it is by no means clear what view was there taken of the matter. They will not however travel so much into detail as would have been desirable if they had decided that the property belonged to the devaswams, and that the Appellants could only keep it by help of the *Statute of Limitations*.

The main point relied on by the Subordinate Judge, if it suggests any fraud at all, points rather to fraud in the inception of the grant than in its concealment. He says that whereas by the grant 64 paras of paddy are made payable to the *Neerattu Kulangara Siva* temple, no such temple can be found to exist. The temple, he says, is described in the grant as the Rajah's own temple, viz., "*my* temple." The Rajah's family temple connected with *Neerat* is a Ganapathi temple, not a Siva temple. And though the *Iyans* gave evidence that they have regularly paid the 64 paras for the Annabishekam ceremony to a Siva temple in the village of *Tharakat*, situated some 200 yards from the Rajah's *Neerattu Kulam* tank, it is not to be believed because receipts are not produced. The Subordinate Judge holds that the whole introduction of this temple into the grant is a fraud concocted between the *Iyans* and the Rajah's agent, which continued up to the time when Rajah VI. discovered the grant, which according to his statement was in January or February, 1874.

It is exceedingly difficult to understand what could be the object of such a fraud as the insertion of a non-existent temple in the grant. But, object, or none, there is not in this record sufficient evidence to support a proposition requiring clear proof. In the first place, the grant of 1851, as translated for the record which must be

the guide here, does not correspond with the quotation by the Subordinate Judge. It refers to the *Simhanada* temple as the Rajah's—"my" temple—but when it speaks of the other temple, it is only called "the" temple. If any inference can be drawn from such language, it is that the second temple was not the Rajah's. It seems clear that the *Tharakat Siva* temple was generally known by that name, and by no other. The payments of 64 paras for the Annabishekam ceremony in the *Tharakat Siva* temple are deposed to by the Appellant *Venkateswara Iyan* himself, who was examined for the Rajah, by *Viswanath Pattar*, one of the Rajah's karyastas, or agents, and by one *Javanthi*, an inhabitant of *Tharakat*, who was examined for the *Iyans*, and says that he himself received and gave receipts for the paddy for the Annabishekam ceremony performed for his house's sake in the *Tharakat Siva* temple. Since the decree some documents purporting to be *Javanthi's* receipts have been produced. But *Javanthi* cannot tell what position or authority he had to entitle him to receive the paddy. No one is called from the *Tharakat* temple to deny receipt of the paddy. One of the Rajah's witnesses, a priest in the *Neerat Ganapathi Pagoda* for nine years, says that 64 paras of paddy were paid yearly to him by *Venkateswara Iyan* Upon this state of the evidence the difficulties felt by the Subordinate Judge are far from being cleared away; but it is too much to say that they stamp the transaction as fraudulent.

Whatever obscurity may hang over this portion of the case, the true question is, not whether everything connected with the grant can be explained, but whether the grant itself has been so fraudulently concealed as to exclude the effect of time. Upon that point the Subordinate Judge thinks that the mention and regesitration of it as a kanom has been the means of concealment. But even if a kanom is a wrong appellation, it is not easy to see how that affects the Rajah's knowledge of his right to sue. Whatever interest may be conferred upon the *Iyans* by the grant of 1851, if the land was devaswam land and was wrongfully alienated, the Rajah had a right to set that grant aside.

The fact of registration seems to their Lordships to displace the theory of concealment. Registration at this period was not compulsory, and it is very difficult to supose that a person desiring to conceal an instrument should lodge it in a public office within two months of its execution. The Subordinate Judge says that the registration amounts to nothing, because the place of registry was in *Calicut*, 100 miles from *Palghaut* But the fact is, as above stated, that on the 20th of August, 1851, it was registered in the Court of District Moonsiff of *Palghaut*, in pursuance of a notice from the Subordinate Court of *Calicut*.

Again in the month of July, 1864, a question arose whether or no some lands claimed by the Government under an escheat were really lands included in the grant of 1851. Both the Rajah, who was Rajah VI., and the *Iyans* appeared by their vakeels before the Escheat Officer to maintain their claim. The instrument of 1851 was produced, and a copy taken to be kept in the Escheat Office. The Subordinate Judge says that their is no evidence that either the Rajah or the *Iyans* had notice of the claims preferred by the other, and he thinks that each was acting behind the other's back. That is possible, though not probable. But if it were the case it does not do away with the fact that the *Iyans* openly claimed under the grant of 1851 in a public Court.

The same course was pursued by the *Iyans* in the dispute about the tank, which has been before mentioned. The instrument of 1851 was then produced in Court, and initialled by the Magistrate.

It is observable that in both these cases it would have answered the purpose of the *Iyans* equally well to claim under the previous kanoms, instead of claiming under the grant of 1851. If they had, as suggested, wished to appear to others as claiming only under kanoms while keeping a more absolute title in the background, it is incredible that they should have produced in public the evidences of that more absolute title.

Moreover the Rajah has never given any evidence. In his plaint of 1877 he says that he discovered the grant of 1851 in January or February, 1874. But he does not say, what in such a case is extremely important to know, what was the occasion of such discovery or the circumstances which led to it. Nor in his plaint filed in April, 1874, does he say a word about his then recent discovery or about any fraudulent concealment.

It is clear that ever since June, 1851, at the latest, the Rajah or the devaswams or both have been kept out of a valuable property. Why did they not make inquiries about the cause of so disagreeable an occurrance? It is shewn that they had only to step into the District Moonsiff's Court at *Plaghaut* in order to find notice amply sufficient to guide them to the exact truth. But no word of explanation is given of this extraordinary inaction.

The result is that their Lordships agree with Mr. *Wigram*, and apparently with the High Court, in thinking that there was not only no fraudulent concealment of the grant of 1851, but no concealment at all. They are of opinion that on this issue, as well as on the issue respecting the nature of the property, judgment should go for the Appellants. They will humbly recommend to Her Majesty that the decrees should be reversed, and the suit dismissed with costs in both the Courts below. And the Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Co.*

24th May, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the Court of the Commissioner of Lucknow.

PRINCE SULEMAN KADR (Defendant) ... ... } *Appellant,*

and

DARAB ALI KHAN (Plaintiff). ... ... } *Respondent.**

Mahomedan Law—Construction of Will—Gift.

A testatrix, entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that, after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S. K*, whom she made her principal legatee:—

"I direct *S. K.*, under this will, to pay every month Rs. 644-1-7 (being one-third of Rs. 1,933-5-4, my monthly pay allowed by the Government for notes, which are deposited) to my dependants and personal servants, as detailed below. . . . . Be it known, that the expenses of the imambarra, &c., will be continued for ever; and also the pay of G. K. and M. A. will be defrayed for ever, *i.e.*, generation after generation. The rest of the servants will be paid for life only."

Held, that these words constituted a bequest, and were not merely the expression of a wish. Also, that the bequest was not one of legacies payable out of a specified sum and no other; the statement that the monthly payments to be made amounted to one-third of the sum received monthly by the testatrix, not limiting the source of the legacies.

Quære.—Whether, under the Mahomedan law, the gift made to the testatrix was not a gift to her absolutely, the condition being void?

Appeal from a decree of the Court of the Commissioner of Lucknow (20th June 1876), reviewing a previous decree of the same Court (3rd December 1875), and affirming a decree of the Civil Judge of *Lucknow* (13th April 1875).

* 8 Cowell's Ind. Ap. 117; I. L. R. 8 Ca. 1.

The questions raised on this appeal related to the will of the late *Nawab Malka Ahad*, who died on the 26th August 186[illegible], a widow of the ex-King of *Oudh*. The appeal was in a suit brought by the Respondent, one of the legatees (ten others bringing similar suits), against the Appellant, who was the son and representative of the testatrix, and principal legatee under the will. The claim was made to enforce payment by the latter of Rs. 3,700, on account of a bequest of Rs. 100 per mensem unpaid from the 15th December 1871 to the 15th December 1874. The decree now under appeal was made by the Commissioner of *Lucknow*, in accordance with a decision of the Judicial Commissioner of *Oudh*, dated the 11th March 1876, given in the suit of another legatee—(*Qudrat Ali* v. *Suleman Kadr*). Of the latter suit the record was printed under an order of Her Majesty in Council, together with that of the proceedings in the present case, which was understood to have been taken as a test for the other suits.

Mr. *J. Graham*, Q. C., and Mr. *Herbert Cowell* appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This is one of many actions brought by servants and retainers of one of the widows of the late King of *Oudh*, asserting their right to certain legacies under her will. The Defendant is her only son, and the principal devisee under that will. This may be considered a test action, inasmuch as it is understood that upon its decision the other actions pending, to the number of ten, will depend.

In order to make the case intelligible, a short statement of the facts is necessary. It appears that the late King of *Oudh* desired to have a Government guarantee for the payment of annuities to many persons, and for that purpose he deposited a large sum of money with the Government, obtaining from the Government promissory notes in favour of these persons. It becomes, however, necessary in this case only to refer to the principal of those persons, namely, his Queen. He obtained from the Government a promissory note for four lacs and Rs. 80,000 for the purpose of securing her an annuity of Rs. 2,000 a month. Subsequently, upon the rate of interest being lowered from 5 per cent. to 4 per cent., he deposited the further sum of a lac of rupees, and received a note corresponding in value. He died, and subsequently, the Queen died, having made a will on the 24th of August, 1866, which is in these terms:—"Whereas the life of mankind is altogether uncertain,"—and so on,—"after my death my son, *Mirza Suleman Kadr Sahah Alam Bahadur*, will be my sole heir and proprietor of all my assets, including moveable and immoveable property, groves, company's promissory notes, &c., without there being a participator thereof, and all my relations and Government officers are to recognise him as my son and heir after my death. No one but *Sahah Alam Bahadur* has any right to be my heir after my death." Then comes the important bequest now in question:—"I desire *Mirza Suleman Kadr Sahah Alam Bahadur*, under this will, to pay every month Rs.644. 1*a*. 7*p*. (being one-third of Rs.1,933. 5*a*. 4*p*, my monthly pay allowed by Government for Government promissory notes, which are deposited) to my dependants and personal servants, as detailed below; and they will give their receipts for the same. It will also be the duty of *Mirza Suleman Kadr-Sahah Alam Bahadur* to defray the expenses of the imambara, of mourning assemblies, of illumination of imambara during the Moharram, and of monthly assemblies. *Sahah Alam Bahadur* and all Government officers are to hold this my last will to be of sufficient force for ever, and to carry out its provisions without any alterations. They will not, in the least, contravene the provisions of this will. *Sahah Alam Bahadur* will treat all the dependants and servants with such kindness and affability as will secure him fame and good name, and give satisfaction to the soul of his

deceased father, King *Amjad Ali Sahah*. I have, therefore, executed this will," —and so on. "Be it known that the expenses of imambara, &c., will be continued for ever, and also the pay of *Gumani Khanam* and *Mir Amjad* will be defrayed for ever, *i.e.*, generation after generation. The rest of the servants will be paid for life only." At the end of the will there is a detail of expenses, and first we have:—"Expenses of imambara, assemblies, Koran readers, &c., to be continued for ever under the management of *Darab Ali Khan*, Rs.214. 7*a*. 1*p*." Then there is:—"*Gumani Khanam Sahaba*, my sister, to be paid" Rs.20 per month; then comes the present Plaintiff, who was the principal eunuch, *Mahomed Darab Ali Khan*, Rs.100, and then come the rest of the servants.

The case has been before three Courts. The first and the last Court, that being the Court of the Judicial Commissioner, have held that the legacy sued for was payable out of the whole estate of the deceased Queen, including the Government promissory notes. The second Court held that she had only a life-interest in the promissory notes, and therefore it was not payable out of that fund; but, nevertheless, that it was payable out of her general estate.

This appeal has been preferred by her son *Mirza*. The main grounds which have been contended for are, first, that there is no absolute bequest, but a mere expression of a wish that *Mirza* shall pay the legacies; secondly, that, if there is a specific bequest of the legacies, it is a bequest of legacies to be paid out of a certain specified fund, and no other, viz., Rs. 1,933, which was the actual amount which the lady received from her Government promissory notes; that the lady had only a life interest in that fund, and therefore could not exercise any testamentary power over it. It was contended further that the legacies were only to be paid during the continuance of the services of the servants, but that point has been abandoned.

With respect to the first question their Lordships have no doubt that the words, "I desire *Mirza* to pay, every month, my dependants and personal servants," coupled with the statement at the end, "Be it known that the expenses of imambara, &c., will be continued for ever," and "the pay of *Gumani Khanam* and *Mir Amjad* will be defrayed for ever, *i.e.*, generation after generation; the rest of the servants will be paid for life only," constitute a bequest, and not merely the expression of a wish or a direction.

The next question is, whether these legacies are to be paid solely out of this fund of Rs. 1,933, the income of the Government promissory notes. If the paragraph which has been read had stood alone, viz., "I desire Rs.644 (being a third of Rs. 1,933) to be paid to my dependants and personal servants," there might have been a question whether it was not a legacy to be paid only out of a specific fund; but when their Lordships proceed further, and find that the Queen desires that the expenses of the imambara shall be paid, without specifying out of what fund—and indeed it is but natural to suppose that for a purpose of that sort she would be disposed to appropriate her general estate—and when it is found that the sum of no less than Rs.214. 7*a*. 1*p*. is part of this Rs. 644 which has been mentioned as being a third of the Rs. 1,933, it appears to their Lordships that, taking these portions of the will together, the bequest of the Rs 644. 7*a*. 1*p*. cannot be treated as appropriated entirely, as far as payment is concerned, to that particular sum of Rs. 1,933. The mention of its being a third of Rs. 1,933 appears to their Lordships on the whole to amount to no more than a statement of her belief, that that was the proportion which all the sums mentioned in the schedule bore to her annuity from the Government notes, but did not amount to a specified limitation of the payment from that sum.

This being so, and the rest of the estate being admittedly sufficient to pay all these legacies, the case is disposed of in favour of the Plaintiff. At the same time, their Lordships think it right to guard themselves against it being supposed that they assent to the proposition that,

even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomedan law, in its legal effect, a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for the decision of the case, their Lordships think it enough to say that, for the reasons which they have given, they will humbly advise Her Majesty that this judgment should be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: *Watkins & Lattey.*

Solicitor for the Respondent: *T. L. Wilson.*

14th, 15th and 16th, June 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

FAKHARUDDIN MAHOMED AHSAN CHOWDHRY. } *Appellant*;

and

OFFICIAL TRUSTEE OF BENGAL (No. 34 OF 1878) ... } *Respondent.*

and

FAKHARUDDIN MAHOMED AHSAN CHOWDHRY. } *Plaintiff.*

and

OFFICIAL TRUSTEE OF BENGAL (No. 35 OF 1878) ... } *Defendant.*

ALIMUNNISSA KHATUN ...*Appellant*;

and

THE OFFICIAL TRUSTEE OF BENGAL. ... } *Respondent.*

and

SHA SUFI SUFIULLA ...*Appellant*;

and

THE OFFICIAL TRUSTEE OF BENGAL. ... } *Respondent.**

(Consolidated Appeals, Nos. 38 and 39 of 1878.)

Attempt to enforce Deed—Limitation Act (IX of 1871), sched. ii, cl. 93—Wasilat.

In a suit in which the Plaintiff had obtained a decree and the Defendant had appealed to Her Majesty in council, a third party applied to be

* 8 Cowell's Ind. Ap. p. 197. I. L. R. 8 Ca. 178.

added as a Respondent, on the ground that, by registered deed, the Plaintiff had conveyed to him a share of the property decreed. The Defendant objected that the deed was a forgery; but an order was made that the applicant should be joined as a Respondent, without deciding whether the deed was or was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the Defendant."

Held, that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought, more than three years after the making of that order, by the Appellant against the party so joined as a Respondent, to have the deed set aside as being false and fabricated, was barred by limitation under Act IX of 1871, sched. ii, cl 93.

A decree declared the Plaintiff entitled to the possession of land with wasilat from a date named, directing "the amount thereof to be ascertained on local enquiry," and to bear interest from the date of its ascertainment until payment, without saying more.

Held, that the decree-holder was entitled to wasilat until the date of delivery of possession to him.

Semble.—It was not necessary for the judicial officer who made the enquiry to hold a Court on the spot.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

The circumstances which gave rise to these appeals are as follows:—*Najamunnissa Khatun*, a Mahommedan lady, in 1861 brought a suit against her husband for the purpose of obtaining possession, together with mesne profits, of certain lands which she alleged to have been conveyed to her by her husband by a deed described as a kabinnama in lieu of prompt dower. The First Court decided against her. The High Court, on the 27th of July, 1864, reversed that decision, and gave her what she claimed. She describes her suit as brought "to obtain possession of the zemindaries and putni talooks mentioned in the schedule given below, and the mesne profits thereof"—claiming mesne profits in a very general manner. It is true that, subsequently valuing the suit, and for that purpose describing her claim in the schedule, she speaks of her claim for mesne profits for the period of dispossession, that is to say, some eighteen months before the institution of the suit, as amounting to Rs.48,400. The High Court, in given judgment in her favour, on the 27th of July, 1864, observed:—"It is unnecessary to make further comment on the case of the Plaintiff, which I think fully proved to the extent of the factum of the kabinnama and her right to the absolute possession of the lands therein mentioned, together with wasilat and interest from the commencement of Srabun 1267, when she was taken from her husband's house." The decree is drawn up in pursuance of that judgement, and is in these terms: "It is ordered and decreed by the said Court, that the decree of the Lower Court be and the same is hereby reversed, and the Plaintiff is declared entitled to possession of the land mentioned in the kabinnama with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local inquiry, and to bear interest at 12 per cent. from date of the ascertainment of the amount due to date of paymnent." From that judgment and decree of the High Court the husband, *Ahsan Chowdry*, appealed to this Board; but that appeal did not come on for hearing till the year 1873. In the meantime, the lady being dispossessed, and probably being in pecuniary difficulties, had recourse to a money lender; and on the 17th of July, 1864, ten days before the written judgment, but after an oral judgment had been pronounced, she executed a hibbanama or deed of conveyance to *Pogose*, a money lender, of a 6 anna share in the decree, in consideration of an advance by him, which probably, among other reasons, she would require for the protection of her interests in the appeal. In 1865 *Pogose* applied, upon the strength of this hibbanama, to be admitted as a Respondent in the appeal. That application was opposed by *Ahsan Chowdry*, but finally an order was made in 1866, permitting *Pogose* to be added as a Respondent, but declaring it to be open to *Ahsan Chowdry* to bring an action or any proceeding he may think fit, at any time, for the purpose of setting aside this hibbanama, which *Ahsan Chowdry* disputed.

The appeal then came on before this Board in 1873, and the judgment of the High Court was affirmed. In 1875 *Pogose* appears to have taken some steps to obtain execution of the decree; but he made an assignment for the benefit of his creditors, and, having died not very long after, he was and is still represented in this suit by the Official Trustee, who is now the Respondent. The official trustee in 1876 applied for execution, claiming to be put into possession of a seven-anna share and a little more, and subsequently claiming to be put into possession of a thirteen half-anna share.

It requires to be explained how the rights of *Pogose* had grown from the six annas to the thirteen half-anna share. It appears that the lady, the original Plaintiff, had died; thereupon her property devolved upon her heirs, being her husband, two daughters, and a son. *Pogose* in 1874 bought, by private contract, the share of one of the daughters; he further bought a decree against the mother, which bound her property, and on the strength of that decree he applied for a sale of that portion of it to which the son and the daughter were entitled as heirs of their mother; and under that decree the property was put up for sale in February, 1876. Objections were made to the sale on the part of those who then represented the son and the daughter, on the ground of various irregularities. The first Court found there was no irregularity; but the High Court found there was, and remitted the case to the Court below, for the purpose of ascertaining whether the Plaintiffs had proved that they had sustained material damage on account of this irregularity, which it was necessary for them to prove in order to set aside the sale. Both Courts have found that no such damage was proved. An appeal has been brought from the decision of the High Court upon that question, and it is the subject-matter of the third appeal.

The second appeal arises in this way:—*Ahsan Chowdry* in 1875 brought a suit for the purpose of setting aside the hibbanama of 1864, whereby *Pogose* claimed the 6 annas which were by it conveyed to him. The official trustee appeared as Defendant in that suit, and he was satisfied to rest his defence upon two points of law; one limitation, and the other *res decisa* The latter point has been decided against him; but both Courts have decided in his favour on the question of limitation, and that is the subject of the second appeal.

The subject of the first appeal is this:—It has been decided by the High Court that the Plaintiff, representing *Pogose*, who claimed in right of the original Plaintiff, *Najamunnissa*, was entitled to wasilat or mesne profits up to the time of the delivery of possession, it being contended by the Defendant that he was only entitled in this suit to wasilat up to the time of the commencement of this suit; further questions have been raised as to the amount of the wasilat, and whether there ought not to have been a local inquiry other than that which was instituted. These questions are the subject-matter of the first suit.

Such being the circumstances giving rise to the appeals, it appears to their Lordships convenient to take the last suit first. The only question in that suit, viz., whether or not those who sought to set aside the sale have proved that they have been materially injured by any irregularity which occurred in the notification of it, is a pure question of fact. It has been decided by both Courts, and their Lordships on looking through the judgments of those Courts have come to the conclusion, that no evidence of a satisfactory character was adduced on the part of the objectors to the sale proving what it lay upon them to prove, that they had sustained any material damage or injury. In the absence of any such proof the judgments are right, and their Lordships are of opinion that that appeal should be dismissed.

The question in the second appeal arises on the *Statute of Limitation*, and the point is a narrow one. The deed sought to be set aside, and which is impugned as a forgery, was executed in the year 1864. The suit to set it aside was brought in the year 1875. The question is

whether the suit was in time or not. The Act bearing upon this matter, which was in force at the time of the institution of the suit, namely, in 1874, is Act IX. of 1871, and the part of the second schedule referring to the subject-matter is clause 93, which is in these terms:—"Description of suit: To declare the forgery of an instrument issued or registered or attempted to be enforced;" for which the period of limitation is three years. This suit undoubtedly was a suit of that description, for in the plaint the Plaintiff declares that the deed was false and fabricated. The words applicable to such a suit are: "Time when the period begins to run; the date of the issue, registration, or attempt." "Registration or attempt" must be construed with regard to the words in the former paragraph, that is the date of the registration, or the date of the attempt to enforce the deed. Both Courts have held, and their Lordships think rightly, that when *Pogose*, in the year 1865, set up this deed, and insisted upon it for the purpose of being made a Respondent in the suit, and when that application was opposed by *Ahsan Chowdry*, and, the parties being heard, *Pogose* succeeded in his attempt to become a Respondent, without prejudice, in the words of the order, to any action or proceeding to be brought by *Ahsan Chowdry*, that was an attempt to enforce the deed, and from that date limitation ran. Their Lordships observe further that the words of the section refer also to "the date of registration;" and looking at the deed, they find it was registered two days after it was made. It was made on the 17th, and registered on the 19th: and, therefore, it seems to their Lordships that the *Statute of Limitation* doubly applies. On these grounds, therefore, they will advise Her Majesty that the judgment in this case be affirmed.

The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the Plaintiff intended to claim wasilat up to the time of delivery of possession, although for the purpose of valuation only so much was valued as was then due; but be that as it may, they are of opinion that, under sect. 196 of Act VIII. of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the Plaintiff wasilat up to the date of obtaining possession. Section 196 is in these terms: "When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree holder, with interest thereupon at such rate as the Court may think proper." The words of the judgment are, "The Plaintiff is declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local inquiry" and so on. Wasilat by law is demandable up to the time of possession; and the question is, whether the Court intended to give to the Plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession. The view which their Lordships take of the decree is much confirmed by two cases in the 12th *Weekly Reporter* and in the 22nd *Weekly Reporter*, to which their attention has been called, wherein it would appear that the High Court have, dealing with words identical

or extremely similar, given them the interpretation that possession with wasilat means wasilat up to the time of possession being delivered. Their Lordships cannot but fear that, if they were to hold the contrary they would throw doubt upon many cases which have been decided and acted upon in *India*.

Their Lordships do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been affirmed by this Board; namely, that where a decree is silent on the subject of interest or of wasilat, interest or wasilat cannot be added in the course of execution. But here the decree is not silent on the subject of wasilat. On the contrary, it is expressly mentioned; and the term "possession with wasilat" appears to them reasonably to bear the construction which has been put upon it by the High Court not only in this but in many other cases. Their Lordships are, therefore, of opinion that the High Court were right in deciding as they did, that wasilat is claimable up to the time of delivery of possession.

The course of litigation in this case was this: Some time after the claim for execution on behalf of *Pogose* the matter came before Mr *Geddes*, a local judge, who took the view of the judgment which has been expressed. An appeal was preferred against his ruling to the High Court, and it was confirmed by the High Court. Subsequently Mr *Peterson* took the opposite view, namely, that wasilat was only claimable up to the time of the institution of the suit. The matter was sent back to Mr. *Peterson*, and he was directed to ascertain the amount of wasilat up to the time of the delivery of possession; and his judgment, giving upwards of seven lacs of rupees, was affirmed by the decision now under appeal. The High Court in their judgment state:—"The questions which we are called upon to determine in this appeal are two: firstly, whether the decree holder, that is to say, the person who now stands in the shoes of the original Plaintiff in whose favour the decree has been made, is entitled to recover mesne profits upon the estate which was the subject of dispute, down to the period of obtaining possession, or only for the precise period for which wasilat is estimated in the schedule attached to the original plaint; and the second is whether, supposing that the decree holder is entitled to wasilat for the whole period, the Court below has assessed it upon a proper principal and upon sufficient materials." With regard to the second question there are two concurrent findings of Mr. *Peterson*, the Subordinate Judge, and that of the High Court; and under those circumstances their Lordships have come to the conclusion that the finding cannot be disturbed. However, a third point has been taken before their Lordships, which, as far as appears from the judgment of the Court, was not taken in the argument below, although it is raised in the grounds of appeal. The point is, that although wasilat may be due and obtainable in this suit up to the time of delivery of possession, and the calculation of the amount may be right, still, inasmuch as the decree directed the calculation to be made by a local inquiry, and there has been no local inquiry—that is to say, an inquiry held by a Judge or an ameen sitting within the boundary of the land—the Judgment cannot stand. Whether the Judgment is to be reversed upon that ground, or the case is to be sent back for another local inquiry, has not been very clearly put before their Lordships; but they are of opinion that there is nothing in the point. The Judgment of the High Court undoubtedly directs that the wasilat should be ascertained by local inquiry. An inquiry was instituted by the Judge of the district. The Judge made an order that *Ahsan Chowdry* should appear before him, and should produce his *jumma-wasil-baki* papers, which would show the amount of his receipts and expenditure with regard to this property, and would be the best possible evidence, if trustworthy, which could be obtained, and worth more than the examination on the spot of any number of ryots. He appealed against that order to the High Court; but he made it no ground of appeal that the Judge ought to have gone to the

spot, or have sent a commissioner to the spot, or that he ought to have sat on some portion of his land. He made no objection of that kind, and it appears that he attorned, as it were, to the jurisdiction, and sent in certain papers (which were deemed highly unsatisfactory), thereby taking his chance of a decision in his favour by the Judge. It would be, therefore, too late for him to object to the inquiry being conducted as it was, if he could ever have objected. Their Lordships infer from the judgment that no such point was seriously argued before the High Court, probably because the counsel in *India* felt it to be untenable.

For these reasons, their Lordships will humbly advise Her Majesty to dismiss this appeal, together with the other appeals, with costs.

Solicitor for Appellants: *T. L. Wilson.*

Solicitors for Respondents: *Lawford, Waterhouse,* and *Lawford.*

16th and 17th June 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Allahabad.

CHAUDHRI UJAGUR SINGH (Plaintiff) ... } *Appellant,*

and

CHAUDHRI PITAM SINGH and others (Defendants) ... } *Respondents**

Mitakshara Law—Inheritance of share in village—Interest of son acquired on birth.

A mouzah, of which the proprietary right formerly belonged to one zemindar, the ancestor of the Plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government by purchase. The Government, before the birth of the Plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the Plaintiff's father, who thus obtained possession of a five biswas share *Held* that, whatever interest the Plaintiff, as son, might have under the Mitakshara law, in ancestral property, it could not be said that, at the time of his birth, there was any proportionate share in the mouzah in which he could, by birth, acquire an interest, except this five biswas share.

In this suit the Plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five biswas share only. *Held* that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest.

Appeal from a decree of the High Court of the North Western Provinces (30th April, 1878), reversing a decree of the Subordinate Judge of *Mainpuri* (29th September, 1877).

Mr. *Leith* Q. C., and Mr. *Doyne* for the Appellant.

Mr. *Cowie* Q. C., and Mr. *Cowell*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This suit was brought to obtain possession of two and a half biswas of a mouzah called *Takha*, pergunnah *Barthana*, out of the five biswas which were said to have belonged to *Musammat Gulab Kunwar*, deceased, the wife of *Sunder Singh*, and for a declaration of right in respect of two and half biswas out of five biswas of the Defendant *Musammat Sahib Kunwar*. After the plaint was filed *Musammat Sahib Kunwar* died, and it was amended by making it a claim for the possession of those two and a half biswas also. The property was originally that of *Anand Singh*, who had five sons, *Chatar Singh*, *Durjan Singh*, *Sunder Singh*, *Desraj*, and *Chatarpat*. *Chatar Singh* died without issue, and the surviving four brothers then became entitled to it in four equal shares. Each became entitled to five biswas. *Durjan* died in 1823, leaving a son, *Chakarpan*; *Sunder Singh* died in

*3 Cowell's Ind. Ap. p. 190; I. L. R. 4 Alla. 120.

1826, leaving a widow, *Musammut Gulab Kunwar*, who died in 1860; *Desraj*, the third son, died in 1852, leaving a son, *Gandharb Singh*; and *Chatarpat*, the fourth surviving son, died in 1829, leaving a widow, *Musammat Sahib Kunwar*. *Chakarpan*, the son of *Durjan*, had three sons, who are the Respondents. *Gandharb Singh* had two sons, one being the present Appellant; and the other, *Madho Singh*, being a minor, was not joined in the suit.

It appears that after the death of *Chatar Singh* the estate was recorded as being held by the four survivors, *Durjan Singh*, *Sundar Singh*, *Desraj*, and *Chatarpat*. On the death of *Durjan*, *Chakarpan* was entered as the holder of the estate, and after the death of *Sundar Singh* and *Chatarpat*, the name of *Desraj* appears to have been recorded. Subsequently to this the names of the widows were entered as the holders of the shares of their deceased husbands. It is said, on the part of the present Appellant, the Plaintiff in the suit, that this was done for the purpose only of giving them maintenance; but whether it was so or not does not appear to their Lordships to be material. The fact is that they were entered for a time as the holders of the shares; but subsequently, in 1842, the widows being still alive, the names of *Ajudhia Pershad* and *Budh Singh*, two of the sons of *Chakarpan*, appear to have been substituted for the names of the widows. It is said that in the document in which this appears there has been an interpolation, and that at the time when that document was authenticated by the acknowledgment of the parties those names were not in it. However, whether that be so or not, the estate fell into arrears, and it was sold by the Government at auction for arrears of revenue. After the sale a lease for twelve years was made of the property to *Chakarpan*, *Desraj*, *Ajudhia Pershad*, and *Budh Singh*. Before that lease, which was made in 1844, expired, the Government appear to have come to the conclusion that it would be better to make a regrant of the property, and certain proceedings were taken which are very material in the consideration of the case. They appear to have been begun by a proceeding of the Collector of the 14th of April, 1853, in which it is stated that a letter had been received from the Commissioner of Revenue, dated the 2nd of April, in reply to a previous letter of the Collector, together with a letter of the Secretary of the Board of Revenue, dated the 22nd of March, 1853, containing a direction that "The Collector should submit a special report of this village,"—therein called *Takha*, pergunnah *Sakatpur Ayrwa*,—"stating full particulars in regard thereof, in order that Government orders may be obtained in behalf of the former zeminder. A full report should be submitted. It should contain other accounts of the settlement, such as what sum has fallen due as arrears, and in what years. It should likewise state whether the zemindars agree to take the property on the condition of paying the sum of Rs.3,810 or more—whatever sum might be considered proper to be taken from them, and nothing should be left out." The Collector made an order that a parwana should be issued to the tehsildar, directing him to furnish a report, "stating what persons are heirs of *Desraj*, the deceased farmer and former zemindar, and how are *Ajudhia Pershad* and other farmers related to *Chakarpan* and *Desraj*, former zemindars." The parwana was issued, and is dated the 21st of April, 1853, and upon that the tehsildar made his report, dated the 27th of April, 1853, in which he says: "In reply to the parwana dated the 21st of April, 1853, No. 271, I beg to say that, from an inspection of the khewat for 1249 Fasli, it appears that, in respect of the zemindary of this village the names of *Chakarpan* and *Desraj* are entered as lambardars, and those of the wives of *Sundar Singh* and *Chatarpat* are entered as pattidars. It appeared from the statement of the kanungoe of the mehal that *Sundar Singh* and *Chatarpat* were real brothers of *Desraj* and the real paternal uncles of *Chakarpan*. After the death of *Sundar Singh* and *Chatarpat*, the names of their wives were entered in the khewat; and

afterwards this village was, on account of revenue arrears, sold by auction, and purchased by the Government." This their Lordships find was correct. "No one had any proprietary right left therein excepting the Government. But, at the time of the revised settlement, the settlement officer, in consideration of the rights of the former zemindars, farmed out the village to them, and the names of the said *Desraj* and *Chakarpan*, and those of *Ajudhia Pershad* and *Budh Singh*, sons of *Chakarpan*, were entered." Then comes what is most material: "The reason of the names of *Adjudhia Pershad* and *Budh Singh* being entered,"—shewing that at that time the names were actually entered, because he says he had inspected the khewat,—"appeared from the statements of *Chakarpan* and *Gandharb Singh*, son of *Desraj*, to be this, that the wives of *Sundar Singh* and *Chatarpal* made a gift of their shares to *Ajudhia Pershad* and *Budh Singh*, and, having executed the deeds of gift, got them witnessed by the kanungoe of the mehal. This was also corroborated by the statement of the kanungoe. *Chakarpan* stated that the deeds of gift, &c., were filed in the Revenue Court. *Desraj* has no other son but *Gandharb Singh*, nor any other heir; nay, ere this, after the death of *Desraj*, the name of *Gandharb Singh* has been entered in the place of *Desraj*, deceased. *Ajudhia Pershad* and *Budh Singh* are the sons of *Chakarpan*, and are grandsons to *Desraj* in point of relationship. I have sent *Chakarpan*, *Ajudhia Pershad*, *Budh Singh*, and *Gandharb Singh*, the four farmers under a separate chalan, to you, with *Jalub-uddin*"—a peon; shewing that he did not, as was suggested in the argument, make this report merely upon an inspection of records, but that he had the parties before him—including *Gandharb*, the Plaintiff's father—and that he also gave to the person to whom he made the report the means of examining them himself. Upon this report proceedings appear to have been taken by the Government. On the 8th of July, 1853, a letter was sent by the Secretary to the Board of Revenue, by whose direction these proceedings were taken, to the Secretary to the Government, saying: "I am directed by the Sudder Board of Revenue to request that you will submit for the consideration and orders of the Honourable the Lieutenant-Governor the accompanying file of correspondence regarding mouzah *Takha*, the property of Government." It is to be observed that the Government treats it as at that time absolutely its property, and which it could deal with it as it thought fit. The letter states the reasons why the Government thinks that the re-grant should be made:—that the village broke down in consequence of the famine, and the revenue was not properly paid. It continues: "*Chakarpan*, the farmer who has continued till the present time in occupation, is the ex-zemindar, and, in consideration of his having failed only on account of the assets being inadequate to the demand, it is proposed to restore the proprietary right to him on condition that he pay up Rs.3,810. 2*a*. 6*p*., the amount of balances which accrued under his own management, and not under kham tehsil. These are detailed in the margin. The Board of Revenue are of opinion that a good case is made out for the old proprietors, and they recommend that the proposed measure may receive his honour's sanction, subject to the conditions that, preliminary to reinstatement, a full and complete compact for future management be excuted and recorded." Upon that there is a letter from the Officiating Assistant-Secretary to Government, dated the 22nd of July, 1853, in which he says:—"I have the honour to acknowledge the receipt of your letter No. 353, dated the 8th instant, with its enclosures, and am directed by the Honourable the Lieutenant-Governor to inform you in reply that he has been pleased to confer the proprietary right in mouzah *Takha*, a Government estate in pergunnah *Sakatpur*, zillah *Farukhabad*, on *Chakarpan*, the farmer and ex-zemindar, on the conditions proposed by the Board."

It is clear that *Chakarpan*, where he is spoken of as the ex-zemindar, was not intended by the Government to be the

only person who was to have the benefit of the grant. This, indeed, has not been suggested. He was to have it for the persons who are spoken of as the old proprietors. Then who were the persons that the Government considered to be the old proprietors? They had in the report which was before them, and upon which they acted, a statement that the old proprietors and the persons who had been in possession under the lease were *Chakarpan*, *Gandharb Singh*, *Ajudhia Pershad*, and *Budh Singh*; and the only construction that can be put upon these letters, which are in fact the grant by the Government, is that the intention was that the Government, being, by reason of the sale for arrears of revenue, the absolute owner of the property, and so considering itself, resolved to make a grant to them in four shares.

What took place subsequently is this: On the 5th of April, 1855, two years afterwards, *Chakarpan* and *Gandharb Singh*, the father of the Pliantiff, and *Ajudhia Pershad* and *Budh Singh*, appeared, and caused to be recorded what is called a village administration paper, in which it is stated that they were entitled to this property in the shares of five biswas each. It appears that on the 3rd of April, two days previously, an inquiry was made, in which *Chakarpan* and *Gandharb Singh* stated that, at the time of the settlement, they were the two lambardars, and that it was arranged that they should continue to be appointed lambardars, and *Ajudhia Pershad* and *Budh Singh* should remain pattidars. The patwari was examined, and he stated that the shares which they had stated were correct—the shares of five biswas each—and he went on to say: "All the four persons are in possession as usual, and, besides these four shares, there is no other co-partner and co-sharer." There is evidence, therefore, that the possession followed the grant by the Government, and was in accordance with the view which their Lordships take of it. That possession appears to have continued without any dispute, as far as their Lordships can see, down to November, 1864, when the parties made an agreement for an arbitration for making a partition. After that had been proceeded with some little way, *Gandharb Singh* set up a claim to five biswas, in addition to the five of which he had been in possession. His claim was that the property was the family property, and that upon the death of the widows he became entitled to half of the share of each of them. In consequence of this, the arbitrators refused to proceed. They considered, and properly, that they had no authority to try such a question, and the arbitration came to an end. Then, in 1867, *Gandharb* brought a suit claiming the five biswas, which was compromised, and the present Plaintiff has brought a similar suit, claiming to be entitled not only to the share of the five biswas which clearly belonged to his father *Gandharb*, but to the other five biswas, and to set aside the compromise. The suit by *Gandharb* did not proceed to trial, but he agreed to a decree by which he acknowledged that he was entitled only to the five biswas. He did, however, obtain by the compromise a decree for partition, but their Lordships consider that it is not necessary for them to give any opinion as to the effect of the compromise upon the right of the present Plaintiff. He, at the time of the grant by the Government, was not living; he was not born until the 24th of February, 1855, and, whatever rights he may have under the Mitakshara law to ancestral property, it cannot be said that at the time of his birth there was any ancestral property of which he could acquire a share except the five biswas. The grant being, in their Lordships' opinion, a grant by the Government—which, as has been said, had the absolute power to dispose of the property in any away it thought fit—only of five biswas, that was all the interest which *Gandharb Singh* had, and his son could not acquire a share in any other. It has been said that *Gandharb* was imposed upon; that he was led by the false representations of *Chakarpan* to assent to the entry of the names of the two sons of *Chakarpan*, and to allow it

to appear to the Government that they were proprietors. Supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be—whether it could be enforced by a suit or by a representation to the Government—it does not come within the rule of the Mitakshara law which gives a son, upon his birth, a share in the ancestral estate of his father.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the High Court, and the Appellant will pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents: *W. & A. Ranken Ford.*

22nd and 23rd June, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature at Fort William in Bengal.

POLOKDHARI RAI and others (Judgment-Debtors) ... } *Appellants,*

and

RAJAH RADHA PERSAD SINGH (Decree-Holder) } *Respondent.**

Execution of Decree—Appealable Order—Civil Procedure Code (Act X of 1877), ss. 244 and 588, cls. (j) and (r).

An order for attachment and sale of property in execution of a decree, is an order "of the same nature with" an order made in the course of a suit for attachment of the debtor's property. The latter order is appealable under s. 588 cl. (r) of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is [according to the requirement of s. 588, cl. (j)] "of the same nature with appealable orders made in the course of a suit;" and therefore is appealable under that section.

Appeal from a decree of the High Court (1st April 1879) (1), dismissing an appeal from an order of the Subordinate Judge of *Shahabad* (31st August 1878).

The question arising on this appeal was, whether, under the Code of Civil Procedure, s. 588, an appeal would lie from an order of a Court disallowing objections made to the execution of a decree, and in effect granting an application for the attachment and sale of certain property belonging to the judgment-debtor. The decree had been obtained by the father of the present Respondent in 1856, in the Court of the Judge of *Ghazipore*, for the possession, with mesne profits, of lands then situate in that district. Having been modified by the High Court of the North-Western Provinces, the decree was affirmed on appeal to Her Majesty in Council in 1867. While the appeal was pending, the Government of *India*, in January 1867, issued an order, whereby the boundary between the districts of *Shahabad* and of *Ghazipore* was altered, and the lands in suit were thenceforth within the *Shahabad* district.

Mr. *T. H. Cowie*, Q. C., and Mr. H. *Cowell* for the Appellants.

Mr. *J. F. Leith*, Q. C., and Mr. *Doyne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The appeal to the High Court in this case was from an order of the Subordinate Judge of *Shahabad* made upon an application for execution of a decree, praying that an attachment and sale of the judgment-debtor's property specified in the application should be had for the purpose of satisfying the decree. A question arose as to whether the *Statute*

* 8 Cowell's Ind. Ap. p. 165; I. L. R. 8 Cal. 28.

(1) I. L. R., 5 Cal., 51.

of Limitations was a bar to that application, and the Subordinate Judge held that the debtor's plea of limitation should be disallowed, with costs. He did not go on to say that the attachment be issued; but their Lordships treat the order as substantially an order that the debtor's plea of limitation should be disallowed, and that the application should be granted. The case was appealed to the High Court, and that Court dismissed the appeal upon the ground that the order was not an appealable order within the meaning of the 588th section of Act X. of 1877. The section says:—"An appeal shall lie from the following orders under this Code, and from no other such orders," and then a number of orders are enumerated; and amongst them are the orders specified in clauses J. and R. Clause J. is:—"Orders under sect. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit;" and one of the orders in clause R. is an order under sect. 485, by which property of the Defendant sufficient to satisfy any decree which may be passed in the suit may, under certain circumstances, be attached in the course of a suit, and need not, according to the provisions of sect. 490, be re-attached in execution of such decree. The question then is whether an order for attachment and sale in execution of a decree is an order "of the same nature" as an order made in the course of a suit for attachment of the debtor's property. Their Lordships think that the nature of the order in both cases is an order for attachment of property, and that an order for attachment of property in execution of a decree is an order of the same nature as an order for attachment of property in the course of a suit. Indeed, the only appealable order in the course of a suit at all resembling an order for attachment of property in execution of a decree is an order under sect. 485. Their Lordships, therefore, are of opinion that, taking the order under appeal as substantially an order for attachment and sale of the property in execution of the decree, it was an appealable order within sect. 588. The learned Judges of the High Court have not very clearly stated their reasons, but the learned Chief Justice, Sir Richard Garth, does state that the order in this case was substantially, and in fact, an order to grant an application for attachment and sale; and in that remark their Lordships concur. They therefore think that the order of the High Court ought to be reversed, so far as it says that the order is not appealable. Their Lordships being of that opinion have heard the appeal.

The grounds of appeal are frivolous. The suit was originally commenced in the Court of the Judge of *Ghazipore*. The case was appealed to the High Court, and ultimately to the Queen in Council. The judgment was affirmed, and was sent back to the Judge of *Ghazipore* for the purpose of being executed; but in the meantime an order had been made by Government for changing the boundaries of the districts of *Ghazipore* and *Shahabad*, and by virtue thereof the lands which were the subject of the suit, and which were originally in the district of *Ghazipore*, had become lands in the district of *Shahabad*. The Judge of *Ghazipore*, therefore, could not execute the decree, and it was necessary for him to send the decree to the Judge of *Shahabad* for the purpose of being executed. The Judge of *Ghazipore* did not do it himself, but he referred it to the Subordinate Judge, and directed him to send a certified copy of the judgment to the Judge of *Shahabad* to be executed.

It was contended that, inasmuch as the judgment which got to the *Shahabad* Court for the purpose of being executed was sent by the Subordinate Judge instead of by the Judge himself, the Judge of *Shahabad* when he got it, had no power to execute it. Their Lordships think that that is not an objection which can be maintained.

Then it was urged that when the Judge of *Shahabad* got it, he, instead of executing it himself, referred it to the Subordinate Judge for the purpose of being

executed, and that he could not legally do so; but when their Lordships look at Act VIII. of 1859, s. 287, they think that the Judge of *Shahabad* clearly had the power of referring the decree to the Subordinate Judge, for the purpose of its being executed by him. The 287th section of that Act enacts as follows:—"The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district, be executed by such Court, or any Court subordinate thereto to which it may entrust the execution of the same." It seems clear that, under the very words of sect. 287, the Judge of *Shahabad* had a perfect right to entrust the execution of the decree to the Subordinate Judge.

Their Lordships, having heard the appeal upon the merits, are of opinion that it ought to have been dismissed and the decree of the First Court affirmed. Arriving, therefore, at the same conclusion as the High Court did, though for different reasons, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the First Court. The Appellants must pay the costs of the appeal.

Solicitors for Appellants: *Barrow & Rogers.*

Solicitors for Respondent: *Burton, Yeates, Hart, & Burton.*

23rd, 24th, June, and 9th July, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature at Fort William in Bengal.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Denfendant). ... ... } *Appellant*

and

RANEE ANUNDMOYI DEBI (Plaintiff). ... } *Respondent.**

Assessment of land formerly occupied for Government. Salt Works—Reg. I of 1824.

Upon the relinquishment by the Government of lands, within the ambit of a permanently settled zemindari, continuously used before and since the perpetual settlement as salt works, from the commencement of salt-making by the Government, until after the passing of Reg. I of 1824, the provisions of that Regulation are applicable to the mutual rights of the zemindar and of the Government.

Such lands were held by the officers of the Salt Department, in terms of cl. 11 of that Regulation, "free of rent" and "under a perpetual title of occupancy," whether belonging to a permanently-settled estate or not. The force of the Regulation and the right of the Government to assess such lands, are not affected by 'khalari' payments having been made, among other compensations, by the Government to the zemindar; and cl. 11 appears to contemplate some such payment. On a settlement of the relinquished lands, 'khalari' payments, being "sums remitted to the zemindars and to be allowed in perpetuity," within the meaning of the 4th clause of s. 9 of Reg. I of 1824, must be continued to the zemindar; or, if a settlement should be made with others, he should be assessed only for the land retained by him.

Appeal from a decree of a Divisional Bench of the High Court (15th September 1879) altering a decree of the Officiating Judge of the *Midnapore* district (7th July 1876), made after a remand order of a Divisional Bench of the High

* 8 Cowell's Ind. Ap p. 172; I. L. R. 8 Cal. 95.

Court (20th January 1875), whereby a decree of the Judge of the *Midnapore* district (8th August 1873) dismissing the suit, was reversed.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellant.

The Respondent did not appear

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

The present appeal arises thus. The Government of *India* determined to relinquish the manufacture of salt in the lands the subject-matter of this suit, and, in persuance of a power which it conceived itself to possess under Reg. I. of 1824, offered, in the year 1865, to settle these lands with the Plaintiff, within the ambit of whose zemindary they were situated. The Plaintiff declined the offer, denying the right of the Government so to deal with them, whereupon they were temporarily settled with two other persons. The Plaintiff has brought the present suit for a declaration that a moiety of the lands in question, amounting to 16,665 begahs, are part of the mal lands of his permanently settled estate, viz, three pergunnahs, *Dakhin Mal Bahirimootha*, and *Bhaitgurh*, for possession of them, and to set aside the temporary settlements.

The 1st Defendant is the Collector of the zillah of *Midnapore*, who represents Her Majesty's Government. The Defendants Nos. 2 and 3 are the grantees of the temporary settlements. The 4th, the widow of the Rajah *Koar Narain Roy*, is described as a *pro formâ* Defendant, entitled to half of the land sued for.

The judgment of the High Court was in favour of the Plaintiff, and from that judgment the Collector has appealed.

The Government of *India* has always claimed, as indeed the Native Governments to which it succeeded had done, the sole right to all salt produced within its territory, and the revenue derived from salt has always been treated as quite distinct from that derived from land. Before the year 1780 the Government had been in the habit of letting the salt-producing districts, which were commonly unfit for agricultural purposes, to farmers, who might or might not be the owners of the adjacent lands, and it was only in the latter part of the last century that some preferential claim to a lease of such districts was admitted on behalf of the zemindar within whose zemindary they were situated.

In the year 1780 the Government determined on assuming what is called in the Regulations a monopoly of salt, but which may be more correctly described as the exclusive right to manufacture it. They accordingly took all salt-producing lands into their own hands, working them by agents commonly called salt agents. The zemindars who were thus deprived of their lands were compensated by certain remissions and allowances. To require a zemindar from whom a portion of his land had been taken, to continue to pay rent for that portion would have been obviously unjust. So much rent therefore as he would probably have obtained for the land if he had kept it in his possession, and which was usually estimated on the footing of 1½ anna per head on the men who would probably be employed in the salt manufacture, was remitted to him. The remission was thus carried into effect. He was still assessed on the whole zemindary, but the estimated rent of the "khalari," or salt land, was treated as payable by the Salt Department, and debited to them. This payment or debit was assumed to enure for the benefit of the zemindar, and he was credited with it; the effect of this arrangement being that, although he was nominally charged with the *jumma* due on all the land geographically within his zemindary, he was in reality charged only with so much of the *jumma* as appertained to that land which he retained in possession. A further allowance called *mushahara* (monthly allowance) was sometimes made to him in respect of profits which he might have derived over and above rent, and sometimes a further allowance of salt itself.

In the present case we have an authenticated extract from the decennial settle-

ment in 1801 of the three pergunnahs in suit with the ancestors of the Plaintiff.

It will be enough to take the entries relating to the first named, pergunnah *Dakhin Mal*. No. 220 is described as consisting of certain farms, *Harripore*, &c, "engaged for by the proprietor in perpetuity," and a sudder *jumma* of Rs. 3,012. 1. 19. is assessed upon them. No. 221 is described as "khas" without any statement that it was engaged for in perpetuity, probably in conformity with Reg. 8 of 1793, s. 100, which declares that the rules for settling with proprietors do not apply to salt districts held khas by Government, which are to continue khas and be assessed from year to year. Under the head of "farms, &c., mehals," there is entered "khalari rents" and the sudder *jumma* is stated as Rs. 393. 11. 7., which added to the former figure makes a total *jumma* of Rs. 3,405. 13. 6. 1.

The manner in which the Rs. 393. 11.7. is dealt with appears from several purwannahs to the same effect as the following, of the 14th of February, 1856, relating to a portion of it.

"C. B., Salt Agent.

"To Rajah *Gojendro Narain Roy* (minor), and Baboo *Koar Narain Roy*, zemindars.

"You are hereby informed that this purwannah is given to you as a certificate of the fact that the rent of the khalari for the year 1262 B S., as given below, has been duly debited in the office of this agency, and credited to your account under the collectorate head of zillah *Midnapore*, and that a statement of the same has been forwarded to the Collector of the said district. Dated the 14th of February, 1856, corresponding with the 4th Falgoon 1263 Willaity.

Description.	Amount.
"Khalari rent for kist Magh 1262, for 3 annas' share of pergunnah *Dakhin Mal* and others . . .	R A. P. 232 13 5

"Total, two hundred and thirty-two rupees thirteen annas and five pie only.

"*Jodoonath Bose*, Mohurrir."

It thus appears that the zemindar, who was treated as liable for the gross *jumma*, was relieved from the payment of the khalari portion of it, that portion being debited to the salt agency and credited to him. *Bakirimootha* is settled in exactly the same form as *Dakhin Mal*, but in the case of *Bkaitgurh* no khalari rent is mentioned.

These being the main facts, it is convenient now to refer to Reg. I. of 1824, s. 9, by the construction of which the rights of the parties are determined.

Clause 2 refers to the rules and regulations following for the government of the officers of the Salt Department.

Clause 3 of the section is in these terms:—

"The principle upon which remissions were originally made from the *jumma* of zemindars, on account of khalari rents, or the like, upon the assumption of the salt mehal, is hereby declared to have been to relieve those to whom they were granted from an assessment upon assets which were transferred to Government on the establishment of the system of exclusive manufacture, with the rights and interests attached to the possession of the mehal."

The 4th is as follows:—

"All zemindars and others, where claims to remission were allowed in the first instance, that is, on account of rents collected by them previously to the year 1188 B. S., shall be considered to fall within the class of land renters who received an abatement of what they then ceased to collect, upon the principle above laid down; consequently, it is hereby declared that the sums remitted to them will be allowed in perpetuity."

Clause 7:—

"The remission allowed on account of rents collected previously to 1188 will still be retained in the revenue books, and will be carried to the debit of the Salt Department."

But the further levy of such rents is discontinued.

The 11th clause, on which the Government mainly relies, is in these terms:—

"Salt works worked by the Salt Department from the time of the assumption of

the monopoly to the present day, or otherwise assumed and held before and since the perpetual settlement (although originally belonging to an estate for which a permanent settlement has been formed), shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy, and shall be considered to be, and to have been, liable to assessment by the revenue authorities, when relinquished by the officers of the Salt Department, in the same manner as if they had been farmed by an individual from Government, and had been open to resettlement on the expiration of his lease."

Clause 12 runs thus:—

"Salt lands, upon which salt-works have been established, whether before or after the perpetual settlement, shall, provided they have been worked for twelve years without claim on the part of any one to receive rent or compensation for the use of the same, be deemed to be the absolute property of the Government."

The short history of the litigation is as follows:—

The case first came before Mr. *Lance*, the Judge of *Midnapore*, who dismissed the Plaintiff's suit, on the ground that Reg. I. of 1824, sect. 9, cl. 11, gave to the Government the power which they claimed.

On appeal to the High Court the case was remanded in order that it might be tried whether or not some portion of the land claimed was "julpai," that is to say, land on which the right of the Government was to collect fuel, not manufacture salt, and which consequently was not affected by clause 11.

Mr. Justice *Ainslie*, the Senior Judge, seems then not to have dissented from the view of the Regulation taken by Mr. *Lance*, and to have remanded the case only on this ground. Mr. Justice *Mitter*, indeed, took a different view of the clause, appearing to think that the words in parenthesis, "although originally belonging to an estate for which a permanent settlement had been formed," narrowed the meaning of the previous words, limiting it to such an estate only, and that the estate in question was not such an estate.

Their Lordships are of opinion that the words have no restricting effect, but are intended to prevent restrictions, and mean that whether the salt lands worked did or did not belong to a permanently settled estate, the same consequences would follow.

The case on being remanded came before Mr. *Tottenham*, who had succeeded Mr. *Lance*, and instead of confining himself to the comparatively simple question on which the case had been remanded, he retried it from the beginning on a number of issues, which, in their Lordships' judgment tended rather to obscure than to elucidate it.

He gave judgment for the Plaintiff with respect to the two first mentioned pergunnahs, mainly on the ground, as their Lordships understand, that the khalari payment was, properly speaking, rent paid to the Plaintiff for the land, a subject on which there had been much controversy. He gave judgment for the Defendant with respect to the third, *Bhaitgurh*, mainly on the ground that the Government had not paid rent for that.

On cross appeals the High Court affirmed the judgment so far as it was in favour of the Plaintiff, and reversed it so far as it was against him.

In their Lordships' opinion the case is resolved by giving to the words of the Regulation their plain meaning. Clause 3 clearly applies to this case, and was probably drawn with the intention of its being applicable to such cases. A salt mehal was assumed by the Government, a remission was made from the *jumma* of the zemindar on account of khalari rent, in order to relieve him from assessment on an asset which was transferred to the Government. Clause 7 points to the course which the settlement paper and the perwannahs shews to have been followed. The applicability of clause 11 depends wholly on whether or not the lands in question came within the first words of it, "Salt lands worked by the Salt Department from the time of the

assumption of the monopoly to the present day," the alternative which follows need not be considered, nor the parenthetical words.

Their Lordships understand the Courts to have found in substance that the lands in suit (including *Bhaitgurh*) have been so worked, and they adopt this finding. This being so, the Legisture declares that they shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy. Their Lordships agree with Mr. *Lance* that, these being the words of the Regulation, it is quite immaterial whether the khalari payments are called payments, or rents, or remissions. As has been before intimated, they seem, properly speaking, remissions within the meaning of clause 3, but their being called or treated as "rents" would not affect the force of the Regulation, which enacts that the lands shall, in contemplation of law, be held by the Salt Department rent free, and when relinquished by that department shall be liable to assessment just as they would have been if held under a lease which had expired. The effect of the decisions of the Courts is to import limitations into the Regulation which are not to be found in it, and to fritter away its plain words. It may be further observed that, if there had been no "khalari rent" or compensation, the Government would, under clause 12, have acquired a title in twelve years. Clause 11, as distinguished from clause 12, seems to contemplate some such rent, or payment, remission, and it is not improbable that the words "shall be considered free of rent" were inserted with the intention of rendering impossible the contention which has been raised.

For these reasons their Lordships are of opinion that the Government have the right which they claim to resettle these lands. They think it right, however, to refer to the concluding words of the 4th clause,—"It is hereby declared that the sums remitted to them (the zemindars) will be allowed in perpetuity." Their Lordships assume that the khalari allowance will be continued to the Plaintiff, or, what is the same thing, that if the relinquished salt lands be settled with others he will be assessed only for so much of the talook as was settled with his ancestors as proprietor in perpetuity in 1801, and which he retains; to assess him for land which he can no longer occupy would be clearly unjust.

For these reasons, their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, and the suit dismissed, each party to pay its own costs in the Court below. Any payment which may have been made in respect of costs to be refunded.

Solicitor for Appellant: *H. Treasure.*

29th, 30th, June; and 12th November, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PUDMA COOMARI DEBI and others (Plaintiffs) } *Appellants,*

and

THE COURT OF WARDS and another (Defendants) ... } *Respondents.**

Adoption—Termination of Authority to Adopt—Succession of Adopted Son to Collaterals in Gotra not that of Father by Adoption.

An instrument of permission (anumati patra) to a Hindu wife to adopt should she be left a widow, provided that "dattaka (adopted) son shall be entitled to perform your and my shradh and that of our ancestors, and to succeed to the property." The husband and wife had a son born, who survived his father, succeeded to the property, and died before his mother, leaving a widow, who, as heir, took possession of it for her widow's estate. The mother then professed to exercise the above power, and in the suit arising thereupon—*Massa-*

* 8 Cowell's Ind. Ap. 229; I. L. R. 8 Cal. 302.

mut Bhoobunmoyi Debi v. *Ramkishore Acharj Chowdhry* (1)—it was decided that the son's widow, having acquired a vested interest, a new heir could not be so substituted for her.

Held, that although such a substitution might have been disallowed without the adoption being held invalid for all other purposes, the above decision had determined that, upon the vesting of the estate in the widow, the power of adoption was incapable of execution, and was at an end; and that this would have been the conclusion if the question of the validity of the power had been raised without any previous decision upon it.

An adopted son occupies the same position in the family of the adopter as natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, governing authorities in the Bengal school.

An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption.

Sumbhoochunder Chowdhry v. *Naraini Dibeh* (2) referred to and followed.

Held in this case, that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter's, was an heir nearer to him than such maternal grandfather's grandnephew.

Appeal from a decree of the High Court (6th May 1879), affirming a decree of the Second Subordinate Judge of *Mymensing* (10th August 1876).

The principal questions on this appeal related two to adoptions by widows, either of which, if held good, would defeat the claim of the Appellant *Padmakumari*. She claimed as the widow of the grandnephew (deceased since the commencement of this suit, in which he was a Plaintiff) of the maternal grandfather of *Bhowanikishor*, who died in 1840. The estate in dispute was the ancestral property of *Gourkishor Acharjia Chowdhry*, a zemindar of the *Acharjia* family of *Muktagachia*, in Zillah *Mymensingh*, who died in 1821, leaving a widow, *Chandraboli*, and one son, *Bhowanikhishor* abovenamed *Gourkishor*, in his lifetime, had executed to *Chandraboli* an '*anumatipatra*,' empowering her to adopt a son, which power she professed to exercise in 1844 by adopting the late *Ramkishor Chowdhry*, whose son, *Jagatkishor*, a minor, was represented by the Court of Wards, the first Respondent on this appeal.

The other of the adoptions now questioned had been made by the widow of the father of *Chandraboli* as far back as 1810, when *Gogunchandra*, second Respondent on this appeal, was adopted. He, accordinly, was wife's brother to *Gourkishor*, and maternal uncle to *Bhowanikishor*.

In reference to the adoption made by *Chandraboli*, it was questioned whether her power remained in force after the succession of *Bhowanikishor*, followed by that of his widow, had altered the state of things in the family. And, in connection with this, the correctness of the construction placed by the High Court on the judgment in *Mussamut Bhoobunmoyi Debi* v. *Ramkishore Acharj Chowdhry* (1) was disputed.

As to the other adoption, the principal question was, whether the adopted son of the maternal grandfather of the deceased, not having been adopted into the gotra of the latter, but into the gotra of his mother's father, could succeed as an heir nearer than the maternal grandfather's grandnephew.

The judgments given by the High Court (*L. S. Jackson*, *McDonell*, and *Mitter*, *JJ.*), upholding the dismissal of the suit by the first Court, the Second Subordinate Judge of *Mymensingh*, are given in the report of the case before the High Court (2), where the facts of the case also fully appear.

Mr. *J. F. Leith*, Q. C., Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon* for the Appellants.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* for the Respondent, the Court of Wards.

Mr *J. D. Mayne* for the Respondent *Gogunchandra Chowdhry*.

12th November 1881.

The judgment of their Lordships was delivered by

(1) 10 Moore's I. A., 279 2 P. C. J. 111.

(2) 3 Knapp. P. C., 55; S. C., 1 Suth. P. C. Judgments, 25.

(1) 10 Moore's I. A., 279 2 P. C. J. 111.

(2) I. L. R., 5 Cal., 615.

THE RIGHT HON'BLE SIR RICHARD COUCH :—

The suit in this case was brought by *Joy Kishore Surma Chowdhry* against *Ram Kishore Acharjia Chowdhry* and *Gogun Chunder Chowdhry*, for the possession of certain zemindaries, talooks, and other properties mentioned in the schedules to the plaint, which formerly belonged to *Bhowani Kishore Acharjee Chowdhry*, who died without issue on the 28th of August, 1840, leaving a widow, *Bhoobunmoyi Joy Kishore* having died during the suit, his widow, the first Appellant, was made a party to it in his place

The property in dispute originally belonged to *Gour Kishore*, who died in 1821, leaving *Bhowani Kishore*, his only son, and a widow, *Chundraboli*, the mother of *Bhowani Chundraboli* was the daughter of *Krishnanath* and graddaughter of *Ramchunder Chowdhry*. The Plaintiff, *Joy Kishore*, was the great grandson of *Ramchunder*, and he claimed to succeed as the heir of *Bhowani Kishore* on the death of *Chundraboli*, who had succeeded to the estates on the death of *Bhoobunmoyi* in 1867, and died in April, 1870.

In 1808 *Gour Kishore*, being then childless, executed a deed of permission to *Chundraboli* to adopt a son. *Bhowani Kishore* was born in December, 1817, and in November, 1819, *Gour Kishore* executed another deed of permission. On the death of *Bhowani Kishore* an instrument was set up as being his will by *Chundraboli* and *Bhoobunmoyi*, by which power to adopt a son was given to the latter, and until such adoption the income of the estates was given to *Chundraboli* and *Bhoobunmoyi*. The two ladies took possession of the estates and remained in enjoyment of them for nearly four years

In December, 1843, *Bhoobunmoyi* professed to exercise the power alleged to be given to her by the instrument already referred to, and adopted a boy called *Rajendro Kishore*. Thereupon *Chundraboli* alleged that the supposed will of *Bhowani Kishore* was a forgery, and had not been made till after his death, and that *Bhoobunmoyi* had no power of adoption, and in May, 1844, she adopted, or professed to adopt, *Ram Kishore*, the first original Defendant, as the son of *Gour Kishore*, her late husband. The first of the now Respondents is his minor son

The second Defendant and Respondent *Gogun Chunder Chowdhry*, it is now admitted, is the adopted son of *Krishnanath* by an adoption made by his widow *Doyamoyi*, having been given in adoption to her by his father *Gokul Kishore* and his mother *Hurrosoondari Debi*. It will be seen, therefore, that the Plaintiff cannot succeed if either *Ram Kishore* or *Gogun Chunder* has a valid title by adoption. Both the Lower Courts have held that *Ram Kishore* and *Gogun Chunder* were heirs of *Bhowani Kishore* in preference to *Joy Kishore*, and the Plaintiff's suit has been dismissed. Their Lordships will first consider the case of the former. *Bhoobunmoyi*, on behalf of *Rajendro Kishore*, her adopted son, having obtained possession of all the property of *Bhowani*, a suit was brought in 1862 by the next friend of *Ram Kishore* on his behalf against them and other persons, the Plaintiff claiming, as the adopted son of *Gour Kishore*, the whole property ancestral and acquired of *Bhowani* To this suit *Chundraboli* was made a Defendant. It was dismissed by the Sudder Ameen, and there was an appeal from his decision to the Sudder Dewanny Adawlut at *Calcutta* The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of *Rajendro* was invalid, and that the will of *Bhowani* purporting to give the power of adoption was a forgery. They were also unanimous in holding that the deed of permission by *Gour Kishore* was a genuine and valid instrument, and that if the power to adopt continued at the time when *Chundraboli* professed to execute it there had been a valid adoption One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the Plaintiff as to the ancestral property

of *Bhowani Kishore*, but not as to his self-acquired property.

From this decree there was an appeal to Her Majesty in Council, and the question in this appeal as regards *Ram Kishore* is what was then decided. The judgment of this Committee on that occasion is not and cannot be relied upon in this suit as binding the parties to it, the now Plaintiff not being a party to the former suit; but it is treated as a decision upon the law which should be considered as binding.

In that judgment their Lordships say:—

"The next question is as to the validity of the adoption of *Ram Kishore*. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the oonamuttee putter of *Gour* is a genuine instrument, and that supposing the powers given by it to have been in force, when the adoption under it took place the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when *Chundraboli* professed to exercise it the power was incapable of execution."

The judgment then, after stating the words of the instrument, and saying that it was not of a testamentary character, but merely a deed of permission to adopt, proceeds:—

"How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shews a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limit must be assigned. It might well have been that *Bhowani* had left a son natural born or adopted, and that such son had died himself leaving a son, and that such son had attained his majority in the lifetime of *Chundraboli*. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

"But, whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if *Bhowani* had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to *Chundraboli* would have been at an end.

"But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us."

After saying that on the death of *Bhowani* his wife succeeded as heir to him and would have equally succeeded in that character in exclusion of his brothers, if he had any, and that she took a vested estate as his widow in the whole of his property, their Lordships say:—

"The question is, whether the estate of the son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption, who is to defeat that estate, and take as an adopted son what a legitimate son of *Gour Kishore* would not have taken.

"This seems contrary to all reason, and to all the principles of Hindu law, as far as we can collect them."

The substitution of a new heir for the widow was no doubt the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of *Bhowani*, the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it,

they would have been of that opinion. The adoption intended by the deed of permission was for the succession to the zemindary and other property, as well as the performance of religious services; and the vesting of the estate in the widow, if not in *Bhowani* himself, as the son and heir of his father, was a proper limit to the exercise of the power. The words at the end of the instrument are "that *dattaka* (adopted) son shall be entitled to perform your and my *sradh*, &c., and that of our ancestors, and also to succeed to the property." Their Lordships are therefore of opinion that *Ram Kishore* had no title.

They have now to decide upon the title of *Gogun Chunder Chowdhry*.

It may here be stated that *Chundraboli*, after the death of *Bhoobunmoyi* and whilst she was in possession of the property, executed a deed of relinquishment in favour of *Ram Kishore*, dated the 10th of September, 1869, and put him in possession. And by a deed, dated the 30th of December, 1869, reciting this, *Gogun Chunder* agreed that neither he nor any of his heirs or representatives should be able to advance any manner of claim against *Ram Kishore's* right, and against any of the conditions of the aforesaid deed of relinquishment of rights. It is not necessary in this suit to determine what is the effect of this deed. If *Gogun Chunder* is entitled, the Plaintiff cannot succeed.

Gogun Chunder, it has been stated, is the adopted son of *Krishnanath*, the maternal grandfather of *Bhowani*, and is not of the same gotra as *Bhowani*, whose gotra is that of his father *Gourkishore*; and it is objected that, although *Gogun-Chunder* as an adopted son may inherit collaterally, it must be in the same gotra, and consequently he is not heir to *Bhowani*. This was held by the Subordinate Judge, who quoted a gloss upon a text of *Menu* by *Kalluka Bhatta* as his authority. The High Court has held the contrary, and one of the learned Judges (Mr. Justice *Mitter*) said of the gloss in question, which is to be found in *Colebrooke's* Digest, book 5, ch. 4, sect. 1, art. 178:—

"In the original phrase 'gotra-dayada' stands for 'heirs to collaterals.' 'Dayada' is equivalent to heirs, and 'gotra' to family name. It is said that 'gotra-dayada' means heirs of the persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the family who stand in the relation of sapinda, &c., to the adopted son. But granting that the literal construction should be adhered to, does the text in question support the conclusion of the Lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung from the same family. It is not necessarily implied thereby that any one of these six descriptions of sons is not entitled to inherit to the estate of a kinsman sprung from a differnt family."

The limitation of the right of an adopted son to succeed to his collateral relations now contended for is contrary to the whole theory of the Hindu law of adoption. An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, the authorities that govern the decision of questions of adoption arising in the *Bengal* school. And no text has been produced to shew that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family. The author of the Dattaka Chandrika after referring to the contradictory doctrines on the subject of the adopted son being heir to his father's kinsmen, and stating his way of reconciling them, says, sect. 5, para. 24, "Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate even." The doctrine in the Dayabhaga, ch. 10, v. 8, that adopted sons are not heirs of collateral relations (sapindas, &c.), which is in opposition to the text of *Menu*, was considered by this

Committee in *Sumboochunder Chowdry* v. *Naraini Dibeh* (1), and it was held that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations by adoption. And it has been pointed out by the High Court, and has not been disputed before their Lordships, that *Gogun Chunder* and *Bhowani Kishore* are related to one another as sapindas.

For the above reasons their Lordships are of opinion that *Gogun Chunder* is a preferential heir of *Bhowni Kishore* to *Joy Kishore*, and that on this ground the decree of the High Court affirming the decision of the Subordinate Judge who dismissed the suit is right. And their Lordships will therefore advise Her Majesty to affirm that decree, and to dismiss this appeal. The costs will be paid by the Appellants, one set of costs only to be allowed by the Registrar on taxation.

Solicitor for Appellants: *T. L. Wilson.*

Solicitor for Respondent, the Court of Wards: *H. Treasure.*

Solicitors for Respondent *Gogun Chunder*: *Barrow & Rogers.*

1st July 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH UDAYA ADITYA DEB (Plaintiff) ... } *Appellant,*

and

JADAB LAL ADITYA DEB (Defendant). ... } *Respondent.**

Hindu Law—Alienation of Impartible Estate—Family Custom.

Impartibility of an inheritance does not, as a matter of law, render it inalienable.

The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required.

Anund Lal Singh Deo v. *Maharaj Dheraj Guru Narain Deo* (1) followed.

In the case of a titular raj, of which the lately deceased Rajah had made a mokurari pottah, or grant in perpetuity, of part of the zemindari lands thereto belonging, in favor of a younger son, it was found, that the only custom proved was, that the raj estate descended to the eldest son to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant.

Held, that the mokurari grant was not invalidated by reason of the raj estate being by custom impartible.

Appeal from a decree of a Divisional Bench of the High Court (8th April 1879), affirming a decree of the Officiating Judicial Commissioner of *Chutia Nagpur* (6th May 1878), affirming a decree of the Deputy Commissioner of *Manbhum* (30th July 1877)

The zemindari and titular raj of *Patcum*, in Zillah *Manbhum*, in *Chutia Nagpur* [subject to the provisions of Reg. X of 1800 (2)] was an ancient principality, descending as impartible inheritance by primogeniture. The late Rajah having died in 1873, the raj was held by his eldest son, the Appellant, with whom was joined as a party *Paresnath Ghose*, the manager of his raj estate, appointed under "The *Chutia Nagpur* Encumbered Estates Act, 1876."

The Respondent was the younger half-brother of the Appellant, and to him the deceased Rajah, his father, had, in 1868, made a grant of certain villages belonging to the raj estate. This grant gave rise to the question now in dispute.

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(1) 3 Knapp's P. C. Cases, 55. 1. P. C. J. 65.

* 8 Cowell's Ind. Ap p. 248; I. L. R. 8 Cal. 199.

(1) 5 Moore's I. A., 82.

(2) A Regulation for preventing the division of landed estates in the Jungle Mehals of the zillah of *Midnapur* and other districts. Section 2 enacts, that "Reg. XI of 1793 shall not be considered to supersede or affect any established usage which may have obtained in the Jungle Mehals of *Midnapur* and other districts by which the succession to landed estates (the proprietor of which may die intestate) has hitherto been considered to devolve on a single heir to the exclusion of the other heirs of the deceased."

Two instruments, of which the genuineness was not questioned, were executed by the Rajah,—one on the 30th April, and the other on the 30th November 1868. The first was a pon-baha mokurari pottah, or permanent grant for consideration, from generation to generation, in consideration of Rs. 1,200 paid, granting to the Respondent two villages in the perganah of *Patcum*, whereof one was stated to have been previously granted to him for his maintenance. The second was a khorposh mokurari pottah, or permanent grant for maintenance (lit. for food and raiment). Both are set forth in their Lordships' judgment.

The suit out of which this appeal arose was brought by the Appellant to set aside those grants, on the ground that they were contrary to the custom of the family, which was, that younger brothers (called 'hakim' and 'konwar,' and the rest 'lals,' according to the order of their birth) should receive suitable maintenance from their eldest brother, the Rajah for the time being, and not by the gift of the parent Rajah, deceased. It was also alleged that any grant for a longer period than the life of the Rajah could be set aside by his successor.

The defence insisted on the validity of the grant. The first part of the custom above stated was established, and no question arose on this appeal as to the second, or 'khorposh' pottah; three Courts in *India* having concurred in finding that, by the custom of this family, any property of the raj estate so granted by a father for maintenance was resumable by the succeeding Rajah. As to so much of the decree as was based on this finding, no appeal from the decision of the High Court was preferred.

With regard, however, to the 'pon-baha' mokurari pottah of 30th April 1868, the Deputy Commissioner of *Manbhum* found that the granting of it was not contrary to family custom. And, although he was of opinion that the alleged consideration of Rs. 1,200 had not passed, he was at the same time of opinion, that the right to alienate land belonging to the *Patcum* raj had been proved; and he, therefore, held this pottah to be valid.

The Plaintiff, accordingly, obtained a decree for possession of the villages comprised in the 'khorposh' mokurari pottah; and his claim for the two villages granted by the 'pon-baha' mokurari pottah was dismissed.

Both parties appealed to the Judicial Commissioner of *Chutia Nagpur*, who confirmed the decree of the Deputy Commissioner of *Manbhum*.

A Divisional Bench of the High Court (Mr. Justice *Birch* and Mr. Justice *Mitter*) dismissed the appeals preferred by both parties against the decision of the Judicial Commissioner.

The judgment of the High Court is reported in the Indian Law Reports, 5 Calcutta Series, p. 188.

Mr. *T. F. Leith*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellants.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

In this case the only Appellant—the other Plaintiff in the suit being the manager of the estate of the first Plaintiff—is the Rajah of *Patcum*, in *Chutia Nagpur*, and he is the son and successor of Rajah *Shatrooghun*. The raj is admittedly an impartible raj, and one in which the custom of primogeniture exists. There is also a custom that the younger sons of the Rajah are entitled to maintenance, the second being called Hakim, the third, Konwar, and the fourth and subsequent, Lals; but the maintenance given according to this custom ceases with the life of the grantor, and has to be renewed upon a succession to the raj.

The late Rajah *Shatrooghun* during his lifetime executed two instruments, one being called a pon-baha mokurruri pottah or permanent lease at a fixed rental granted in consideration of a bonus or fine, and the other a khorposh mokurruri pottah or permanent maintenance grant. The pon-baha mokurruri pottah was the first, being dated the 30th of April, 1868, and is in these terms:—"This mokurruri pottah, on payment of bonus, is executed,

Within my zemindari of pergunnah *patcum*, appertaining to the sub-district of division *Manbhoom*, the entire mouzah *Kallianpore* (being one mouzah), as per boundaries given below, was previously fixed for your maintenance. Now, excluding it from that maintenance, I make a mokurruri settlement of the above entire *Kallianpore*, one monzah, and *Jhimri*, one mouzah, with all rights appertaining thereto, in all two mouzahs, with you, by means of a mokurruri pottah, and on receipt of a bonus of Rs. 1,200, and at an annual mokurruri rental of Rs. 85-10-2-2-2." Then after some further passages it says:—"Neither I nor my heirs shall have any other right in those two mouzahs beyond the above-fixed mokurruri rent."

The other instrument is dated the 30th of November, 1868, and is in these terms:—"This mokurruri pottah for maintenance is executed. My second son and future Hakim *Keshub Lal Aditya Deb* deceased having died, and you being at present the second of my sons, you will, according to the special rule of our Rajdhani, become the Hakim on my death. A gift was therefore made to you before of one mouzah *Doodri*, one mouzah *Chamda*, one mouzah *Laya*, one mouzah *Kallianapore*,"—and so on, naming other mouzahs, in all eight—"without any title deed, and for your maintenance as Hakim, and you are in possession of those mouzahs. Now considering it proper to execute a deed in respect of seven of the above mouzahs, except *Kallianpore*, I execute a deed for the remaining seven mouzahs aforesaid with the exception of one mouzah, *Kallianpore*. You shall continue to possess and enjoy the rights appertaining to the seven mouzahs aforesaid lying within the following boundaries by right of maintenance during your lifetime." Then after some other passages—"I made a gift of mouzah *Kallianpore* for maintenance. I have excluded that mouzah *Kallianpore*, and granted you a mokurruri settlement of the same along with mouzah *Jhimri* by a seperate deed, and on another date, *i.e.*, the 19th Bysack of the present year."

These two instruments were given to the Respondent, who was the half-brother of the Appellant, and had been the third son of Rajah *Shatrooghun*, but in consequence of the death of his brother had become, when the instruments were executed, the second son and the future Hakim.

It is to be observed here with reference to the intention of these instruments that *Kallianpore* had, as is stated in the latter, been originally given for maintenance, but it is withdrawn from that gift and is included in the other mokurruri with the mouzah *Jhimri*, shewing that *Kallianpore* was no longer intended to be for maintenance, and that the instrument of the 28th of April, 1866, was not intended by the Rajah to be of the nature of a grant, but was intended to be a gift, or, as he thought it would be safer to make it on the face of it, a mokurruri for consideration.

The suit is brought by the eldest son, the present Rajah, to set aside both these instruments, and for possession of the mouzahs included in them. The lower Courts have found that the instrument of the 30th of November, 1868—which is described as being a mokurruri pottah for maintenance—ceased to have effect on the death of the grantor Rajah *Shatrooghun*; and there is now no question with reference to that part of the decision of the lower Courts.

The question in this appeal arises upon the instrument of the 30th of April, 1868, and it is contended that the estate being impartible was inalienable—as their Lordships understand the argument—by reason of such impartibility; and further that, there being the custom to give maintenance, this instrument was in reality for the purpose of maintenance, and consequently, subject to the limitation, which is part of the custom, that it could not remain in force beyond the life of the grantor.

Now it is important to see what has been found by the lower Courts upon this subject. The Deputy Commissioner has said:—"With regard to the mokurruri pottah, I hold the Plaintiff has failed to

prove that the granting of it was contrary to family custom. An attempt has been made to shew that the deed should be thrown out, because it is more than doubtful whether the consideration recited in it ever passed; but I agree with the defence that such shifting of the Plaintiff's claim cannot be allowed. I have not a shadow of a doubt that the late Rajah did grant the deed to the Defendant; Plaintiff himself does not deny it. But whilst I cannot allow the shifting of the claim, I hold that the fact, if fact it be, and I believe it to be a fact, that the consideration of Rs. 1,200 did not pass, is a valuable piece of evidence. If no consideration passed, does it not prove that the late Rajah was not sure of his ground? It seems to me he felt that he was going somewhat near a breaking of a family custom which the Courts might possibly not allow, and therefore he wished to give a business look to the transaction and pretended to take a consideration. If I am right, what was the family custom? I think that referred to by Regulation X. of 1800, that a zemindar, such as Plaintiff unquestionably is, succeeds to all that his father cannot by such custom alienate. So far as the evidence goes, I am of opinion that even if *Shatrooghun* had made on paper, what I believe he made in fact, a present of the mokurruri lease to the Defendant, the Plaintiff could not have set the deed aside." This shews the Deputy Commissioner considered that, although it had not been proved that the consideration passed as stated in the instrument, a gift of the lease was in fact made to the Defendant. Further on he says:—"It appears to me that the right to alienate land in *Patcum* has been proved, and therefore that the mokurruri grant must stand. The granting of a mokurruri is a favour on the part of the grantor, the obtaining of maintenance is a right on the part of the grantee; and the Courts of this district have been in the habit of laying down what maintenance any particular member of a zemindar's family shall be entitled to recover." Here, therefore, we have two distinct findings; one, that this was intended to be a present to the Defendant, the Respondent, and the other that there was a right in this raj to alienate land.

The case then went by way of appeal to the Judicial Commissioner, and he agreed with the Deputy Commissioner in the finding as to the consideration. He says:—"There is no doubt whatever, as the Lower Court holds, that the receipt of the Rs. 1,200 by the grantor is a complete fiction, and that the transaction was not a business one but a simple gift to the Defendant But then the question arises, what was there to prevent the Rajah from making a mokurruri to the Defendant in the same way as he might to a stranger, even if no *pun* (consideration) passed?" Further on he says:—"I think I ought to confirm the decision of the Deputy Commissioner. The general power of alienation on the part of the late Rajah being, I think, established, and the mokurruri pottah being undoubtedly genuine and registered, it lies with the Plaintiff to shew its invalidity; and this he has attempted to do by maintaining that it is contrary to family custom;" and in a later paragraph he says, "That custom has not, I think, been shewn to be opposed to the mokurruri." Therefore the Judicial Commissioner quite concurs with the Deputy Commissioner in the findings of fact.

When the case came before the High Court, the Judges pointed out that it was necessary for the Plaintiff, in order to succeed, to show that there was some custom which would prevent the operation of the general law which would give a power of alienation; and they said that the only custom proved was, that the estate descends to the eldest son to the exclusion of the other sons, and that, instead of there being proof of a custom against alienation, what evidence there was shewed that alienations had been made.

Upon those findings, the question whether the mokurruri pottah is vaild or not seems to be concluded. It could only be impeached either upon the ground that it was really intended to be a main-

tenance grant, and so would cease at the death of the grantor, or that, either by law or by a family custom, there was no power to alienate any part of the raj. It seems that there have been some decisions in *India* in which it was considered that there was not a power of alienation in zemindaries of this kind. But one of those decisions came before this Board in *Anund Lall Singh Deo* v. *Maharjah Gobind Narain Deo* (1) and there their Lordships considered that the inalienability of the zemindary was a matter to be proved; and as it appeared to them that it had not been sufficiently established, they proceeded to consider whether or not the grant that had been made was for maintenance. They certainly did not consider that, as a matter of law, the impartibility of the raj made it inalienable, but their Lordships treated the question of inalienability as one depending upon family custom, which would require to be proved. Here the findings are very distinct that there is no such custom in existence with reference to this raj; and their Lordships, therefore, are of opinion that the judgment of the High Court is a correct one, and they will humbly advise Her Majesty to affirm it and to dismiss the appeal.

Solicitor for appellant: *H. Treasure.*

(1) 5 Moore's Ind. App. Cas. 82. 1 P. C. J. 399.

12th July 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature at Fort William in Bengal.

MUSSUMMAT BIBEE SAHODRA (Defendant.) ... } *Appellant,*

and

ROY JUNG BAHADOOR (Plaintiff). ... ... } *Respondent.*

Nos. 51 and 52 of 1877, consolidated Appeals.

and

LUTCHMAN SAHAI CHOWDHRY and other's (Defendants). ... ... } *Appellants,*

and

ROY JUNG BAHADOOR and others (Plaintiffs). ... } *Respondents.**

No. 61 of 1877.

Limitation Act (IX of 1871), sched. ii, cl. 144—Breach of Condition—Forfeiture.

A Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime. This share she sold as if she had held an absolute interest, and the purchaser's name was entered, instead of hers, in the revenue records; but no change of possession took place till her death.

To a suit brought by the cousin's heirs to recover the property purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, the defence was limitation under Act IX of 1871, sched. ii, cl. 144, commencing from the date of the sale, there having been, it was alleged, "a breach of condition or forfeiture" within the meaning of that clause.

By the terms of the arrangement contained in a solenama, the widow was to have no power to alienate; and after her death her share was to belong to the cousin.

Held, that these terms prohibited only such an alienation by the widow as would prevent the cousin's succeeding after her death, and the alienation made was good for the widow's lifetime.

* 8 Cowell's Ind. Ap. p. 210; I. L. R. 8 Cal. 224.

There was no condition against such an alienation; and if there had been, there was neither any rule of law, nor anything in the words used in the solenama, attaching forfeiture to the breach of such a condition. *Held*, accordingly, that cl. 144 did not apply, and the suit was not barred by limitation.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The question raised by this appeal may be disposed of very briefly. There are two suits, each of which is the subject of an appeal; but the appeals have been consolidated for the purpose of argument here. Taking the earlier suit, No. 253 of 1874, it is brought by the Respondents to recover a 4-anna share of a mouzah called *Athur*, which the Defendant, who is Appellant, claims to be rightfully possessed of under a sale executed to her in the year 1845 by a widow of the name of *Mainan Koer*.

The position of the property was this: The mouzah *Athur* appears to form part of the ancestral property of a family who, in the year 1826, were represented by *Kuldip Ram* and this widow *Mainan Keor*, she being the widow of *Kuldip Ram's* first cousin, *Mehtab Ram*. The two parties were in litigation. *Kuldip Ram* claimed to be entitled to the whole property, subject only to such maintenance as the widow might be entitled to. The widow claimed the whole during her life or widowhood as representing *Mehtab Ram*. Under those circumstances the parties came to a compromise in the year 1826, and that compromise was carried into effect in the suit which was then pending for the purpose of settling this question as to the ancestral property. The compromise provides for several different things, as to payment of debts and so forth, but the only material provision which we need now consider is that which relates to the interests given in the immoveable property to *Kuldip Ram* and *Mainan Koer* respectively. As regards that property, the first clause of the solenama executed by *Kuldip Ram* is that all the villages, whether ancestral or acquired by purchase, which lie in certain districts and which were held by *Roy Mehtab Ram* deceased, "shall, during the lifetime of the aforesaid *Mussummat*"—that is *Mainan Koer*—"remain in equal shares in the joint possession and enjoyment of me the declarant and the aforesaid *Mussummat*, but the aforesaid *Mussummat* shall have no power to alienate the moveable or immoveable properties; and after her death all the moveable and immoveable properties, and the outstanding of the time of *Roy Mehtab Ram*, and the said *Mussummat*, shall be the right of me the declarant." Then there are provisions for a mutation of names in the rent-roll of the Collector's office, so that the name of *Kuldip Ram* should appear with that of *Mainan Koer*; and also provisions for the parties being represented each by their own agents. A corresponding solenama was executed by *Mainan Koer*.

That compromise was carried into effect by the decree, which does not throw any further light upon the question, because it only orders that the two parties, *Kuldip Ram* and *Mainan Koer*, "do hold possession and occupation of all the properties left by *Roy Mehtab Ram* conformably to the conditions laid down in the deeds of compromise, having had their names entered in the office of the Collector as regards the villages in question." Accordingly the two parties appear to have entered into possession, and to have remained in such possession until the sale which is the subject of the present suit.

That sale took place on the 5th of June, 1845, and by the deed of sale *Mainan Koer* purports to convey to the ancestor of the Appellant four annas of the Mouzah *Athur* in question, the family property consisting of eight annas of that mouzah. It then appears that a mutation of names took place, by which the grantee under that sale put his name in the place of *Mainan Koer*; and it is stated by the Appellant, in her written statement in the Court below, that her ancestor, and after him she herself, continued in possession and occupation of a moiety, to wit, four annas, and the Plaintiffs and their ancestors in possession of the other four

annas, of the mouzah in dispute, that is the mouzah *Athur*.

Nothing else appears to have been done to alter the position of the property. *Kuldip Ram* died some time in the year 1852, and *Mainan Koer* died on the 12th of October, 1862. The Respondents, who are the heirs of *Kuldip Ram*, did not bring any suit for the recovery of the property until nearly twelve years after the death of *Mainan Koer*, but they did bring a suit just in time to save the *Statute of Limitations* if the starting point of the statute was the death of *Mainan Koer*.

The suit being brought, a great many issues of fact were raised which appear to have been of considerable difficulty; but those have all been disposed of by the Courts below, the two Courts finding all the issues of fact in the same way in favour of the Respondents, and they are not in question here. The single question now remaining is, whether the suit is barred by the *Statute of Limitations*, and that depends again upon the question whether the statute began to run on the 5th of June, 1845, when *Mainan Koer* sold her interest in mouzah *Athur* to the ancestor of the Appellant, or on the 14th of October, 1862, when she died.

The Appellant contends first that the case falls within head 144 in the second schedule to the *Limitation Act* IX. of 1871. Head 144 is this: "For possession of immoveable property when the Plaintiff has become entitled by reason of any forfeiture or breach of condition: twelve years from the time when the forfeiture was incurred or the condition broken." Then she says that the effect of the compromise of 1826 was to give *Mainan Koer* an interset in the property on condition that she should not alienate; that by her attempt to alienate she broke the condition; that the entirety of the property then vested in *Kuldip Ram*; and that the time of limitation began to run from that moment.

Their Lordships are of opinion that no such condition attached to *Mainan Koer's* life estate, and therefore that there was no forfeiture of it.

The terms of the compromise are, that property shall remain in equal shares in the joint possession and enjoyment of the two parties; but the *Mussummat Mainan Koer* shall have no power to alienate the moveable or immoveable properties, and after her death those properties shall be the right of *Kuldip Ram*. There are no words of forfeiture, and it would be a very strong thing and a very unusual thing to import a forfeiture where the parties have not provided for one, and where there is no rule of law attaching forfeiture to a particular act. But in point of fact the language of the deed of compromise points to quite a different result. There is every indication that *Mainan Koer* was to have just as full an enjoyment of her interest in the property during her lifetime as *Kuldip Ram* was to have in his, and there is no reason whatever on the face of the deed why she should not deal freely with her interest. And where it is said that she shall have no power to alienate the property, that prohibition is coupled closely with the statement that after her death the property shall go to *Kuldip Ram*. The inference to be drawn from that is, that when the parties spoke of alienation they were thinking of alienation in perpetuity, and the thing they desired to prohibit was such an alienation as would prevent *Kuldip Ram* taking the succession immediately upon *Mainan Koer's* death. That being so, the alienation of *Mainan Koer* was perfectly good for her lifetime; there was no adverse possession until she died, and the suit is brought within twelve years from that time.

Mr. *Doyne* argued that the case might fall within head 143 of the same schedule. That head refers to a suit for possession of immoveable property where the Plaintiff while in possession of the property has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under the head of the schedule, he must shew that there has been a dispossession or discontinuance; and the passage which has been read from the Appellant's

written statement distinctly shews that there was no dispossession or discontinuance of *Kuldip Ram*.

Those considerations are sufficient to dispose of the case as to mouzah *Athur*. The second suit, No. 262 of 1874, relates to another mouzah called *Nazipur*, and to eight annas of that mouzah which were the subject of another sale by *Mainan Koer*; but the questions are precisely the same, and therefore there is no need to repeat with reference to *Nazipur* what has been said with regard to *Athur*.

The result is that their Lordships entirely concur with the view taken by both the Courts below, and think the appeals should be dismissed with costs.

The appeal of *Lutchmun Sahai Chowdry* v. *Roy Jung Bahadoor* (No. 61) of 1877, should also be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitor for Appellant: *T. L. Willson*.

Solicitor for Respondents: *Henderson & Co.*

17th, 18th, 21st, 22nd, June and 9th July 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner, Oudh.

SETH JAIDIAL (Plaintiff) ... } *Appellant*,

and

SETH SEETA RAM (Defendant) ... } *Respondent*.*

Oudh Estates Act, 1869, s. 10—Talookdar—Declaration of Trust.

In a suit by an adopted son against his father for a declaration of right with consequential relief in a share of certain estate, the Defendant pleaded that he was absolute owner thereof, and in regard to two of the taloolks named was entered in the taloolkdar's list prepared under Act I. of 1869.

It appeared that under a number of family transactions the property in suit had been given to the Defendant for such interest and with such right of succession to the Plaintiff as by virtue of the law of the Mitakshara attaches to ancestral immoveable estate as between father and son:—

Held, that the Plaintiff was entitled to a declaration to that effect, and that sect. 10 was no bar to his assertion of the interest declared to be vested in him.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

In this case the Appellant *Seth Jaidial*, the Plaintiff below, is the nephew by birth and the son by adoption of the cross-Appellant *Seth Seetaram*, the Defendant below. The suit was instituted for the purpose of ascertaining and enforcing the rights and interests of *Jaidial* as against *Seetaram* in certain moveable and immoveable property which has been the subject of a number of family transactions from the year 1864 onwards. The history of the case prior to the year 1864 may be briefly stated.

Seth Lalljee a landowner of *Oudh* had two sons, the elder of whom was *Moorli Manohur*, and the younger *Seetaram*. *Moorli* again had two sons, of whom the elder was *Rughobardial*, and the younger *Jaidial*. *Seetaram* has never had a natural son. Up to and after the annexation of *Oudh* in the year 1856 the family was undivided, and it possessed ancestral estate which included the talooks of *Moizuddinpur* and *Chandpur*. At the time when the mutiny was suppressed *Lalljee* was dead, and *Moorli* was the head of the family. He then took steps to procure a settlement with himself or his two infant sons, and a sunnud to himself, so as to constitute himself the sole owner of the ancestral estate. These proceedings on *Moorli's* part led to counter proceedings on the part of *Seetaram*, which came before the revenue officers on several occasions. The dispute was also referred to arbitration, and in the month

* 8 Cowell's Ind. Ap. p. 215.

of May 1863 the arbitrator made an award substantially in favour of *Seetaram's* contention that the lands in dispute were joint ancestral property.

A large portion of the evidence and of the discussion in the Courts below and here has been addressed to the question which of the two disputants had the stronger case. For the present purpose that question, which is an intricate and puzzling one, is not very material. It is sufficient to say that the award does not appear to have settled the matter, and that in the month of September 1864 *Moorli* was still asserting his sole ownership and *Seetaram* claiming to share the property. In that state of things an arrangement was come to, the true interpretation of which is the substantial question in this suit.

On the 25th September 1864 *Moorli* was on his death-bed. It would seem that his son *Rughobardial* had attained majority, and that *Jaidial* was about eleven years old. On that day the family met together, when four documents were framed which are now to be construed.

The first (Exhibit C 6) is called *Moorli's* will, and is as follows:—

"I *Seth Moorli Manohur* son of *Lalljee* caste *Khattri*, talookdar of *Moizuddinpur*, *Chandpur*, *Sandak*, *Sarangan*, *Kathgara* &c. in the district of *Sitapur*, declare that whereas I have been suffering from ill health for a long time, I have with a view to prevent a dispute between *Rughoobar Dial* and *Jaidyal* in future come to the following determination: *Raghubar Dial* my eldest son will after death succeed to the whole of my property, consisting of cash goods &c. and my debt and credit account.

"With regard to the talookas mentioned in the margin (1), *Raghubar Dial*, who is elder of the two, will (after the village and talookdari expenses and Government demand have been paid) get $\frac{9}{16}$, and *Jaidial* $\frac{7}{16}$, of the net profits, and the kabuliyatdars as they are at present, and in this proportion the net profits of those talookas will be divided in which their names have not been registered.

"After this determination had been come to, *Seth Sitaram* with my consent adopted my younger son *Jaidial* and executed a deed of adoption under the rules in force. *Sita Ram* will therefore be his protector and guardian like me, but in case of a dispute arising between *Raghubar Dial*, *Jaidial* and *Sita Ram* a partition will be made in the above proportion. When a partition is made the villages of *Katra* will go to the share of *Raghubar Dyal*.

"By this will every deed affecting the proprietary right in land existing up to date is cancelled. The parties above named are required to conform to the provisions of this will without quarrelling. After the partition is made each will pay for his own expenses.

"I have therefore executed this will that it may serve as a document, and prove of use when required.

"Out of the Government promissory notes *Jaidial* will get his share to the value of 18,000, the remainder will go to *Raghubar Dyal*.

"I make over *Jaidyal* with his share above specified to *Sitaram*.

"*Raghubar Dyal* and *Jaidial* have been joint owners of the elephants, horses, bullocks, cows, appurtenances of the kitchen, clothes and other necessaries of life, and they are the owners of these things in the proportion of $\frac{9}{16}$ and $\frac{7}{16}$.

"Signature of *Moorli Manohur Seth*, in Hindi.

"Signature of *Sita Ram Seth*, in Hindi.

"Signature of *Raghubar Dyal*, in Hindi."

The second (Exhibit C 7) called an acquittance roll, is as follows:—

"I *Seth Sitaram* son of *Lalljee* caste *Khattri*, talookdar *Moizuddinpur* in the district of *Sitapur* do herein declare that whereas *Seth Moorli Manohur* my brother has this day executed a will regarding

(1) *Moizuddinpur*, comprising principal villages and those included therein.
Sanda ditto, ditto, ditto.
Sarayan ditto, ditto, ditto.
Chandpur, comprising principal hamlets and those included therein.
Dari Nagra ditto, ditto, ditto.
Jungle Grant.

moveable and immoveable property about which there existed a dispute between me and him, and I having approved of the same have no more claim against him or against his son *Raghubar Dial* with regard to goods cash zemindari or accounts of debt or credit.

"I have therefore executed this deed of acquittance that it may serve as a document and prove of use when required.

"The above written in Persian character is genuine.

"(Signed) *Sita Ram Seth.*"

The third (Exhibit C 8) being a deed of adoption is as follows:—

"I *Seth Sitaram* son of *Lalljee* caste *Khattri*, talookdar of *Moizuddinpur, Alahna, Mahooa, Kola* &c. do herein declare that whereas I have no male issue I have adopted *Jaidial*, son of my brother *Moorli Manohur*, as my son, with a view that he may perform the ceremonies prescribed by the Hindu law; I have conferred on him all the legal and proper powers. I hereby declare that *Jaidial* my adopted son will inherit the whole of my estate both moveable and immoveable and no one else will interfere or have a claim to the same.

"Should I be blessed with a son hereafter, *Jaidial* will get half, and the other half will go to my son.

"I have therefore voluntarily executed this deed of adoption that it may serve as a document and prove of use when required.

"This is a genuine document.

"(Signed) *Sitaram.*"

The fourth (Exhibit C 9) is called *Seetaram's* will, and is as follows:—

"I *Seth Sitaram* talookdar of *Alahna, Mahooa, Kola* tahsil *Misrik* in the *Sitapur* district do herein declare that whereas I have received the aforesaid estate from Government for faithful services rendered by me, it has been determined with a view to prevent future disputes that *Raghubar Dial* should get $\frac{9}{16}$ and *Jaidial* $\frac{7}{16}$ of the estate. Should a dispute arise between *Raghubar Dial* and *Jaidial*, they will divide the estate between themselves in the same proportion, and as long as they are on amicable terms they will divide the profits under the terms of the will executed by *Seth Moorli Manohur*.

"I have therefore executed this will that it may serve as a document and prove of use.

"This is a genuine will.

"(Signed) *Sitaram.*"

Before attempting to construe these documents, it is necessary to state the outcome of the disputes which have ensued upon them.

Moorli died the day after the arrangement was effected, and quarrels broke out again very soon after his death. On the 14th of September 1865 *Seetaram* filed a plaint against his two nephews and others, in which he sought to set up the award of August, 1863, and to cancel Exhibits C 6 and C 7. But he very quickly abandoned his attack, and in November 1865 came to an agreement with *Rughobardial* to divide *Moorli's* estate in the proportions of nine annas to *Rughobardial* and seven to *Seetaram*. This compromise was affirmed by a declaratory decree passed in the suit on the 10th of February 1866. The interests of *Jaidial* were protected by the following directions:—

"That no part of the property the subject of partition shall be alienated to any third party pending decision of a suit to be instituted on behalf of *Jaidial* the minor and adopted son of *Seetaram* Plaintiff to determine whether he is or is not entitled by the will of his natural father or otherwise to the property specified therein as his share, so that the same may be held for him as a proprietor till he shall have come of age, leaving the parties to be fully bound thereby or by this consequent decree as between themselves, so that whatever more than *Jaidial's* rights is now decreed to pass between them shall not be affected by any decree he may secure, and what is included in his rights shall stand as transferred to him instead of as by this decree to his adopting father the Plaintiff *Seetaram*, and that a curator be immediately appointed by the Civil Court to lay suit on behalf of the minor *Jaidial*, unless *Sitaram* Plaintiff file a satisfactory admission

of the rights that may be claimed for the said minor *Jaidial*."

The next step was that in June 1867 *Seetaram* instituted a suit against *Rughobardial* alone, to enforce the declaratory decree of February 1866. *Rughobardial* resisted on the ground that *Seetaram* was only a trustee for *Jaidial*, but a decree was made against him on the 30th of July 1867.

Rughobardial then applied for review of the decree of February 1866, mainly on the ground that in November 1865 when the compromise was arranged he was the infant ward of *Seetaram*. *Seetaram* was the sole Respondent to this application. The point was decided against *Rughobardial*, and his application was dismissed by the Civil Judge of *Lucknow* in the month of August 1868. He then appealed to the Court of the Judicial Commissioner; the case was heard by that officer Sir *George Couper*, sitting with Colonel *Barrow*, the Financial Commissioner, and under their advice a fresh compromise was arrived at.

In persuance of this compromise a decree was passed on the 30th of March 1869, to the following effect:—

"We declare *Jaidial* to be the adopted son of *Seetaram*. We declare that the whole of the property directed in *Moorli Manohur's* will dated the 25th of September 1864 to be divided in the proportion of $\frac{9}{16}$ to *Rughobardial* and $\frac{7}{16}$ to *Seetaram*, shall be so divided, the village *Kootrah* to form part of *Rughobardial's* nine-anna share.

"And in accordance with the express wish of the parties recorded before us this day, we declare that the remainder of the property, whether mentioned in the will or not, after deducting all legitimate costs, including the fees of one pleader on each side, shall be divided into three shares, of which *Rughobardial* shall take two shares, and *Seetaram* shall take one share.

"The jewels which have not been given to the ladies of the family shall be subject to division in the same proportion, viz., two-thirds to *Rughobardial* and one-third to *Seetaram*."

The decree is headed, In the case of *Seth Rughobardial* (Defendant), Appellant, v. *Seth Seetaram* (Plaintiff), Respondent, and is signed by Sir *George Couper* and Colonel *Barrow*. By a subsequent minute, dated the 18th of April 1870, these two officers declared that their intention was to divide the estate of *Mahooa Kola*, which is the subject of Exhibit C 9, in the same way as the property which by Exhibit C 6 is divided between *Rughobardial* and *Seetaram* in the proportions of nine and seven annas.

The partition directed by the decree of the 30th of March 1869 has been carried into effect. On the 1st of June 1870 the Deputy Commissioner ordered that *Rughobardial* should be put into possession of a nine-anna share of *Mahooa Kola*, and that *Seetaram* and *Jaidial* should retain a seven-anna share. And the sum of Rs.48,000 has been awarded to *Seetaram* as his share of *Moorli's* moveable property.

In September 1871 *Jaidial* attained his majority. In the year 1875 disputes arose between him and *Seetaram*, and in 1876 he filed a plaint in the Court of the Deputy Commissioner against *Seetaram*, asking for a declaratory decree to the effect that *Seetaram* was a trustee for him of seven annas of both *Moorli's* land and *Mahooa Kola*, and had no power to alienate or encumber the estate. On the 22nd of May 1876 the Deputy Commissioner dismissed the suit, his principal reason apparently being that, whereas the case made by the plaint was that *Seetaram* was a mere trustee, the case made at the Bar was that he had a life interest in the property.

On the 2nd of October 1876 *Jaidial* filed his plaint in the present suit. In it he lays claim to seven annas of *Moorli's* immoveable and moveable property, and also of *Mahooa Kola*. He mentions the decree of the 30th of March 1869, and without expressly saying that he repudiates the compromise effected by it, remarks that he was not a party to the suit; a remark which is not quite accurate, though it is true that he was not made a party to *Rughubardial's* appli-

cation for review. He prays for a declaration of his proprietary right, for recovery of possession, and for an injunction prohibiting transfer.

By his written statement *Seetaram* claims to be absolute owner of the property in question, and among numerous other pleas, states that he is entered as talookdar of *Moizuddinpur* and *Mahoor Kola* in the talookdar's list prepared in accordance with Act I. of 1869, which under sect. 10 of the Act is a bar to the Plaintiff's claim. He also maintains that Exhibit C 9 is a will, states that it has been revoked, and contends that the addition made on the 18th of April, 1870, to the decree of the 30th of March, 1869, was *ultra vires* and void.

On the 4th of June, 1877, Mr. *Anderson*, the Deputy Commissioner made a decree as follows :—

"The whole property decreed to *Seetaram* by Judicial Commissioner's decree of 30th March, 1869, including $\frac{7}{16}$ share in estate of *Mahoor Kola*, is vested in *Jaidial*. But *Seetaram* will during his lifetime remain trustee and manager for *Jaidial*. *Seetaram* has no power of alienation. *Jaidial* is entitled to maintenance out of the estate. Dismiss the claim of *Jaidial* to cash and personal property. Plaintiff will get his costs out of the estate. Interest at 6 per cent."

Both parties appealed to the Commissioner Mr. *Macandrew* who on the 20th of September 1877 decreed as follows :—

"That the claim of the Plaintiff to possession of the estate and the moveable property be dismissed. The Defendant is to be put into possession of a seven-anna share in the whole estate. He is to have a life interest, but is to be restrained from either alienating or wasting it. The Plaintiff be declared to be the heir and successor of the Defendant, and to have all the rights of a reversionary. He is declared to have a right to a suitable maintenance from the Defendant, and considering the state of feeling between them the Court is of opinion that this maintenance should be fixed and the case be remitted to the lower Court to fix and declare it and the order so declared shall become part of this decree; and as regards costs the Court orders that the costs of both parties be paid from the estate."

By a subsequent order of the Commissioner, dated the 13th of December 1877, the maintenance was fixed at Rs. 4,000 per annum.

Jaidial appealed to the Judicial Commissioner Mr. *Capper*, who considered that *Jaidial* took no interest in the immoveable property beyond that which he acquired by his status as the adopted son of *Seetaram*. With respect to the moveable property he held that *Seetaram* was a trustee for *Jaidial*, and that though *Seetaram* was competent to make a compromise with *Rughobardial*, yet *Jaidial* might challenge it as being prejudicial to his interests. He therefore remanded the suit to the Deputy Commissioner for inquiry whether the compromise of March 1869 was prejudicial to the interests of *Jaidial*, and whether *Seetaram* had reduced into possession any of *Moorli's* property of which he was trustee for *Jaidial*.

On the 6th of June 1878 the Deputy Commissioner found that the compromise of March 1869 was as to personal property prejudicial to the interests of *Jaidial* and void as against him. He further found that *Seetaram* had received the sums of Rs 18,000 and Rs.30,000 on account of *Moorli's* Government promissory notes and his other moveables. He gave *Jaidial* a decree for Rs.30,947. 3. His finding as to the compromise appears to be founded, not on any calculation of the amount which without such compromise might have been got for *Seetaram* and *Jaidial* as against *Rughobardial*, but solely on the ground that *Seetaram* having got the money claimed to hold it as his own.

From this decree both parties appealed to Mr. *Capper* who varied it. The final decree made on the 23rd of July 1878 is to the effect that *Seetaram* shall pay to *Jaidial* by instalments the sum of Rs.44,947. 3, being the exact amount claimed by this plaint, and that the rest of *Jaidial's* claim shall be dismissed. It

directs that the parties shall have their costs in all Courts in proportion to this decree, and interest from date of decree.

Again both parties have appealed, each contending that Mr. *Capper's* decree is wrong in making a distinction between moveable and immoveable property. *Jaidial* contends that the principle applied to the moveable property, and *Seetaram* that the principle applied to the immoveable property, is the true one.

It appears to their Lordships that the four Exhibits C 6, 7, 8, and 9 must be taken together as expressing a family arrangement for the purpose of settling the disputes between the brothers *Moorli* and *Seetaram*. Besides their desire of peace each would by such an arrangement avoid considerable risk of loss. *Moorli* had got a legal advantage with respect to *Moizuddinpur* and *Chandpur* which it was quite possible he might retain and so exclude *Seetaram* from those properties entirely. *Seetaram* had at least a very arguable claim, it seems that in the ultimate opinion of the executive officers he had a sound claim, to one half of those properties. If he succeeded his nephews would only get one-fourth for each of them. *Moorli* was dying, and he wished his eldest son to take the larger share of his estate. *Seetaram* was childless, and his nephew *Jaidial* was a little boy. In these circumstances it was a very reasonable arrangement that the two brothers should bring the disputed properties and other properties into a common fund and divide them, *Seetaram* assenting to the gift of the larger share to *Rughobardial*, and himself taking the smaller share with the obligation to provide for *Jaidial* as his son.

This is exactly what they did. By Exhibit C 6 *Moorli* recites his intentions towards his sons independently of any arrangement with *Seetaram*. Then he says that after those intentions had been formed the adoption of *Jaidial* by *Seetaram* was effected. Accordingly he now treats *Seetaram* as the effective owner of *Jaidial's* share, saying "I make over *Jaidial* with his share above specified to *Seetaram*." *Seetaram* on his part signs an acquittance (Exhibit C 7) of all claims against *Moorli* or *Rughobardial*, on the ground that *Moorli* "has this day executed a will regarding moveable and immoveable property about which there existed a dispute between me and him." In the deed of adoption, Exhibit C 8, he goes on to declare "that *Jaidial* my adopted son will inherit the whole of my estate both moveable and immoveable," subject only to the one contingency of a son being born to *Seetaram*, in which case *Jaidial* is to get half. And by Exhibit C 9 he brings his own talook *Mahooa Kola* into the scheme of division between *Moorli's* sons.

It is impossible not to admit that there are some difficulties in the way of this construction, as there must be in the way of every construction of such hurried and informal documents. But this construction appears to their Lordships to satisfy better than others the wording of the documents, while it brings out of them the most reasonable results. On *Jaidial's* construction which is applied by Mr. *Capper* to the moveable property, we are asked to believe that *Seetaram*, having a substantial claim which he was vigorously prosecuting against *Moorli*, not only gave up the whole of it, but also parted gratuitously with nine annas of his own separate property to *Moorli's* eldest son. On *Seetaram's* construction which is applied by Mr. *Capper* to the immoveable property, we must suppose that *Jaidial* took nothing certain under the arrangement except a son's rights in so much of *Seetaram's* share of *Moorli's* estate as may be held to have an ancestral character. In their Lordships' view the two leading features of the arrangement are these:—First, that the share of *Moorli's* property designed by him for *Jaidial* should pass to *Seetaram* and *Jaidial* as father and son; and secondly that *Jaidial* should be secured in his inheritance of the property coming to *Seetaram* under the arrangement.

It appears to them therefore that Mr. *Capper's* decrees err in drawing a distinction between the moveable and immoveable property, and in treating *Seetaram*

as a mere trustee of the former. On the other hand, in wholly dismissing *Jaidial's* suit as to the immoveable property, the decrees fail to give him the amount of security contemplated by the arrangement of 1864.

There is another objection to these decrees, which is that by giving to *Jaidial* the sums claimed by him, which are the seven-anna shares mentioned in Exhibit C 6, they upset the compromise of 1869 which divides the moveables on a different principle. Their Lordships are clear that, whether they regard the terms of the declaratory decree of February 1866, or ordinary principles of justice, if *Jaidial* could have challenged the terms of the compromise at all, he could only do it in the presence of *Rughobardial*; and though it is competent to him to contend that *Seetaram* is only a trustee for himself, he cannot, in a suit against *Seetaram* alone, obtain anything more than an adjustment of the interests of *Seetaram* and himself in the property actually taken by *Seetaram* under the compromise. For the purpose of this suit therefore *Seetaram's* interest under the compromise of 1869 must be substituted for his interest under the family arrangement of 1864.

Turning to the decrees of Mr. *Anderson* and Mr. *Macandrew*, their Lordships think that those decrees proceed on a right principle in placing both classes of property on the same footing, and in recognising the right of *Jaidial* to security of succession; but that in giving him that security by dividing the property into a life interest and remainder, they give it in a way which is not the simplest nor the most in accordance with the notions of property entertained by those who live under the law of the Mitakshara. Moreover those decrees do not, and by the method adopted could not without elaborate provision, allow for the contingency of *Seetaram* having another son. Their Lordships conceive that in declaring that *Jaidial* should inherit, *Seetaram* intended to place him in the position which under the Mitakshara law a son occupies with reference to his faher's ancestral immoveable estate.

Their Lordships are further of opinion that, though *Seetaram* has no right to alienate the property whether moveable or immoveable so as to defeat *Jaidial's* succession, no case has been made for an injunction to restrain him from such alienation. On this point the plaint alleges no more than that *Seetaram* became extravagant and contracted large debts.

With respect to costs, their Lordships think that the two lower Courts did right in ordering them to be paid out of the estate. The litigation has been lamentable, but each party has raised unjustifiable issues, and so far as the record tells the story it is impossible to blame one more than the other.

The decree should take the following form:—Discharge the decrees and orders of the 4th of June 1877, the 20th of September 1877, the 13th of December 1877, the 21st of March 1878, the 6th of June 1878, and the 23rd of July 1878. Declare that, according to the true construction of Exhibits C 6, 7, 8, and 9, all the share and interest in the moveable and immoveable property of *Moorli Manohur* and in the talook of *Mahoon Kola*, which is thereby stated to be given to *Seetaram* or to *Jaidial*, is given to *Seetaram* for such interest and with such right of succession to *Jaidial* as by virtue of the law of the Mitakshara attaches to ancestral immoveable property as between father and son.

Declare that all property whether moveable or immoveable taken by *Seetaram* under the decree of the 30th of March 1869, as explained by the minute of the 18th of April 1870, is taken by him for such interest and with such right of succession to *Jaidial* as by virtue of the same law attaches to ancestral immoveable property as between father and son.

Declare that the entry of *Seetaram's* name on the talookdar's list is no bar to the assertion by *Jaidial* of the interest hereinbefore declared to be vested in him. Dismiss the plaint so far as it seeks recovery of possession and an injunction. Order the whole costs of the litigation,

including the costs of these appeals, to be paid by *Seetaram* out of the property taken by him under the decree of the 30th of March 1869 explained as aforesaid. Costs to be taxed as between solicitor and client.

Their Lordships will humbly report to Her Majesty accordingly, except as regards the costs of these appeals, which they will themselves order to be paid by *Seetaram* out of the estate.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent: *Watkins & Lattey.*

8th November, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature at Fort William in Bengal.

HURRO DURGA CHOWDHRANI (Judgment-Debtor) ... ... } *Appellant,*

and

SURUT SUNDARI DEBI (Judgment-Creditor). } *Respondent.**

Interest on Mesne Profits—Execution of Decree—Practice—Costs—Grounds of Appeal.

The term 'mesne profits' means the amount which might have been received from the land deducting the charges for collection; and does not include damage resulting from their not having been paid as they became due, or lost of interest year by year.

A decree stated that mesne profits were to be recovered, "with interest from the date of their ascertainment." *Held*, that the Court executing this decree had no authority to allow interest year by year, upon the collections which ought to have been received.

If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs.

Appeal from a decree of the High Court (22nd November 1878), dismissing an appeal from a decree of the Subordinate Judge of *Mymensing* (8th April 1878), and allowing a cross-appeal from the latter.

The question raised on this appeal was as to the allowance of interest on mesne profits, to which the Respondent was entitled under a decree of the High Court of the 27th March 1872, affirming, on appeal and cross-appeal, a decree of the Subordinate Judge of *Mymensing* in favor of the present Respondent's husband, against *Kalichandra Chowdhry*, whose estate was represented in this suit by the present Appellant, as his widow, and as the guardian of his minor son. The decree of 1872 awarded possession of a ten-anna share of seven mehals of zemindari land in *Mymensing*, with mesne profits to be ascertained in execution of decree, and to be calculated from the 1st Assin 1273, corresponding to the 16th September 1866, to the date of delivery of possession, with interest on such profits from the date of ascertainment at the rate of six per cent. per annum. An appeal to Her Majesty against the above decree was dismissed on the 13th November 1875, and in execution took place the proceedings out of which this appeal arose.

On the 10th March 1878, after several intermediate proceedings, an Amin was deputed to inquire and report as to the amount of the mesne profits. After objections to this report had been heard, the Subordinate Judge, on 17th June 1878, made his final order in execution, fixing Rs. 13,359 as the amount of mesne profits, which he allowed with costs.

On an appeal, the judgment of the High Court (*Morris* and *Prinsep*, *JJ.*) disposed of two objections: the *first*, against the assessment of mesne profits as being excessive, and on a contention that the Subordinate Judge should have allowed the Appellant more time to produce

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I. L. R. 8 Cal. p. 332; 9 Cowells' Ind. App. 1.

her papers; and the *Second*, that the mesne profits should have been calculated only down to July 1873 when, as the Appellant insisted, the Respondent obtained possession. But these objections were held untenable. The Respondent had not obtained possession till July 1874—a delay owing to the objections of those whom the Appellant represented.

On the Respondent's cross-appeal the judgment of the High Court will be found reported in I. L. R., 4 Calc., 674.

As the result, by the decree of the High Court, the present Appellant was ordered to pay to this Respondent the aggregate sum for principal and interest of Rs. 19,104 3-2, of which Rs. 13,359-4-7 was for principal, and Rs. 5,744-14-7 for interest. This appeal was thereupon preferred against the whole decree.

Mr. *T. H. Cowie*, Q. C., and Mr *H. Cowell* appeared for the Appellant.

Mr. *R. V. Doyne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The Respondent in this case was the Plaintiff in the Court below. She sued the husband of the present Appellant to recover possession of certain lands, together with the sum of Rs. 3,647-10-9, the estimated amount of mesne profits for two years ten months and twenty days from the 1st Assin 1273 to 20th Srabun 1276. In that suit a decree was made for the Plaintiff to recover possession of the lands, and also the mesne profits, not from a time previous to the date of the suit, as claimed, but from the date of the suit to the date of recovery of possession, to be ascertained by inquiry at the time of the execution of the decree, with interest from the date of the ascertainment at six per cent. per annum. From that decree there was an appeal to the High Court. The High Court, by its decree, amended the decree of the lower Court by giving the mesne profits from the first Assin 1273 to the 20th Srabun 1276, in addition to those which had been awarded by the lower Court. The High Court also stated that the mesne profits were to be recovered, with interest from the date of ascertainment. Therefore, according to both decrees, the mesne profits were to carry interest only from the date of ascertainment. It is clear that the Court, in executing the decree, could not vary or add to it by awarding anything beyond that which was originally decreed. When the decree came to be executed it was referred to an Amin to ascertain the amount of mesne profits, and he ascertained what was the rent which might have been obtained from the estate. That he treated as the mesne profits of the estate, but he added no interest year by year upon the amount. The mesne profits so ascertained amounted to Rs. 13,359 and some odd annas, and the lower Court made an order in execution for that amount. Upon that there was an appeal to the High Court by both parties, first, on the ground that the assessment was excessive; and secondly on the part of the Plaintiff, that, in assessing the mesne profits, the Court below ought to have allowed interest year by year upon the amount which could have been collected and further interest upon the aggregate amount from the date of its order. The High Court, upon that appeal, having heard the argument of counsel, thought that the lower Court was wrong in not having allowed interest upon the rental year by year, upon the ground that the decree-holder was entitled, not merely to the rental less the collection charges, but also to interest thereon year by year as compensation for the loss he had sustained by not having the use of his money during the period he was kept out of possession. The question is, whether the High Court, which by its decree was merely executing the original decree of the High Court, did not, by giving that interest, really add to and alter the decree which was to be executed. Now that depends really upon the question what was the meaning of the term 'mesne profits.'

In their Lordships' opinion, the amount which might have been received from the land, deducting the collection charges, was the profits of the land. The loss of interest year by year upon those profits was merely damages sustained by the

Plaintiff in consequence of her having been prevented from receiving the profits as they became due. But the original decree did not award those damages, and the High Court, by awarding them, added to the decree which was in the course of execution.

Several cases were cited to show that the High Court was right in giving interest year by year, and several of those cases were referred to by the High Court themselves in their judgment. Amongst others the case of *Protap Chunder Borooah* v. *Ranee Surnomoyee* (1) was cited. When that case comes to be examined, it will be found that it was not an appeal from a decree in execution, but from a decree in an original suit; and in that appeal it was contended that the lower Court ought, in the original suit, to have given the Plaintiff a decree, not only for the mesne profits, but for interest upon those mesne profits to be calculated from year to year. The High Court in that case thought that, under certain circumstances, a Plaintiff might be entitled to interest upon mesne profits from year to year; but they said that, inasmuch as that interest had not been claimed in the suit, they could not interfere in the case, and the Plaintiff merely recovered the mesne profis without interest. That is a very different case from the present. There it was contended that the original decree of the Court ought to be altered; here it is contended, not that the original decree of the Court ought to be altered by awarding interest year by year, but that the decree of the High Court in the execution of the case, in awarding such interest, was in accordance with the original decree. The case cited, however, is an authority to show that it was not so; for in that case the mesne profits and the interest thereon were treated as two distinct subjects, and the Court refused to allow the interest as well as the mesne profits, because the loss of the interest had not been claimed as damages.

If the present contention is correct, the term 'mesne profits' in that case included interest thereon year by year, although the Court refused to allow it. It appears to their Lordships that the decision of the lower Court in executing the decree was in accordance with the decree, and that the decision of the High Court by adding the interest from year to year exceeded the original decree.

Under these circumstances their Lordships think that the decree of the High Court ought to be reversed.

It appears that the total amount which the High Court has given by way of interest in excess of the decree is Rs. 5,744. If that had been the only objection, the case would have been under the appealable value; but the Appellant, in order to gain a *locus standi*, appealed also upon the ground that the amount awarded for mesne profits was excessive; and the greater portion of the record, about 240 pages, relates to that part of the case upon which there was no chance of the Plaintiff's succeeding. The decisions of the Amin, of the lower Court, and of the High Court were concurrent with reference to that point. The only possible ground of appeal was, that the Court had allowed interest from year to year.

Their Lordships cannot encourage the joinder of grounds of appeal which are absolutely untenable with grounds which are tenable in order to bring a case within the rule as to value which authorizes an appeal as of right. In the present case the effect of so doing has been a large increase of costs to the Respondent. The Appellant has thereby disentitled herself to the benefit of the rule under which a successful Appellant is ordinarily entitled to the costs of the appeal.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, but they make no order as to costs.

Solicitors for the Appellant: Messrs. *Barrow* and *Rogers*

Solicitor for the Respondent: Mr. *T. L. Wilson.*

(1) 14 W. R., 151.

11th November, 1881.

PRESENT:

Members of the *Judicial Committee* :—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Chief Court of the Punjab.

SIRDAR SUJAN SINGH (Defendant). ... } *Appellant,*

and

GUNGA RAM and another (Plaintiffs). ... } *Respondents.**

Surety—Lex Loci Contractus.

Under a contract, made and to be performed in the territory of an Independent State, between the State and contractors, the latter received an advance of money, for the repayment whereof, in case the contract should fail, a third party became surety to the State. The contract failed and was terminated by the State, to which the surety repaid, on its demand, the money advanced, with some deduction on account of a part performance.

For this amount the surety sued the principals, who were subject to the jurisdiction of the Courts in British India. In deciding whether the contract had or had not failed within the meaning of the suretyship undertaken by the Plaintiffs,—*held*, that not the law of British India, but what was in the contemplation of the parties as to the result of the contract when they entered into it, must be regarded.

Appeal from a decree of the Chief Court of the *Punjab* (7th July 1875), reversing a decree of the Commissioner of the *Multan* Division (15th April 1875), which reversed a decree of the Extra-Assistant Commissioner of the *Multan* District (5th January 1875).

The question raised on this appeal was as to the right, under the circumstances of the case, of a surety to recover from the principal money claimed by the former as paid by him, under the contract to which they were parties. The contract of suretyship was made in 1869 at *Bahawalpur* in the *Punjab*, and the principals contracted to deliver timber to the *Bahawalpur* State, which acted through the Superintendent, Colonel Minchin. The principals *Nand Singh* and *Makhan Singh* received an advance of Rs. 10,000, which *Hurdial Singh*, who was then in the service of the State, agreed to repay, in case the contract should fail. In 1870, the State held, that the contract had failed, put an end to it, and giving credit for certain timber delivered, claimed from *Hurdial Singh* the balance of the advance, Rs 8,860-7. This he paid; and afterwards, *Nand Singh* having died, and his representative *Sujan Singh*, together with *Makhan Singh*, being resident in British territory, *Hurdial* sued them for the amount in the Court of the Extra-Assistant Commissioner of *Multan*. For the defence it was denied that the contract to supply timber had failed, and it was disputed that the State had rightly exacted payment from the surety.

The facts are fully stated in their Lordships' judgment. The Court of first instance decided that, at the stage at which the contract was rescinded, the State was not justified in putting an end to it, and dismissed the claim. This decision was reversed by the Commissioner of the *Multan* Division, who remanded the suit for trial on the merits with reference to the question whether the State terminated the contract on good grounds.

On an appeal to the Chief Court by *Sujan Singh*, and on cross-objections preferred by the surety *Hurdial Singh*, the Commissioner's decree was reversed and the surety's claim was decreed with costs. A review, under s. 378 of the Code of Civil Procedure, having been dismissed with costs, *Sujan Singh* brought the present appeal, pending which *Hurdial Singh* died. The latter was represented by his heirs, the Respondents.

Mr. *J. D. Mayne* appeared for the Appellant.

The Respondents did not appear.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR RCHARD COUCH— :

The suit in this appeal was brought by

* I. L. R. 8 Cal. 337; 9 Cowell's Ind. App. 58.

Hurdial Singh, who has since died and is now represented by the Respondents, against *Makhan Singh* and the Appellant *Sujan Singh*, to recover a sum of money which the Plaintiff said he had paid as surety, and was entitled to recover from them.

Makhan Singh is since dead, and his repesentative has not joined in the appeal. *Sujan Singh* is the son and representative of *Nand Singh*, who died before the suit.

The circumstances under which the Plaintiff became surety are, that, on the 12th of November 1869, *Nand Singh* and *Makhan Singh*, through their agent *Gormukh Singh*, entered into a contract with the Political Agent of the State of *Bahawalpur* to supply timber, the contract being that the timber should be supplied clear and without knots; that, on its arrival at *Multan*, it was to be examined there by a mistree appointed by the Political Agent, and after inspection was to be forwarded to *Bahawalpur*; that, though the timber should be forwarded, yet, notwitnstanding the approval of the mistree, the contractors would take back any timber which was disapproved of by the State at *Bahawalpur*. Another clause, as to the place of depositing it, is not material; and the fifth was, that the Political Agent would purchase the timber brought by the contractors to *Bahawalpur*, and rates of payment for it were specified. Nothing was said as to the quantity of timber which was to be supplied, nor as to the time during which the contract was to remain in force. It was only a contract to supply timber, and allowed the Political Agent, who represented the State of *Bahawalpur*, to take it or not according to his approval of it. It would appear that, shortly after the making of the contract, the contractors were desirous of obtaining an advance of money, and they applied to the Political Agent for it. The Plaintiff has given his account of the transaction; but as the Political Agent, Colonel Minchin, has also stated what took place, it will probably be better to refer to what he said. He was examined as a witness, and said, in answer to the question "On whose security did *Nand Singh* and *Makhan Singh* obtain an advance of Rs. 10,000 from the *Bahawalpur* State?"—"On the security of the Plaintiff, who was at that time confidential agent attached to my Court; the Defendants were introduced to me by the Plaintiff, who stated that they were the agents for the sale of timber belonging to the *Maharajah of Cashmere* and *Cashmere* subjects;"—"I at once accepted him as security, on the understanding that if the Defendants failed to carry out their contract, the Plaintiff should make good the balance of advance." In answer to a question in cross-examination he said,—"The Plaintiff was in no way responsible for the fulfilment of the contract, but only for the repayment of the advance in case the contract should fail." The Plaintiff's statement was, that he had a letter from the Defendants, asking him to obtain an advance on account of the contract; that the agent *Gormukh Singh* asked for Rs. 25,000, and he suggested that Rs. 10,000 might be advanced; and that he went to Colonel Minchin on the day he received the letter. Colonel Minchin refused to advance the money unless on security, and the Plaintiff said he would be surety, and requested him to advance Rs. 10,000 for the present to enable the contractors to open their work. The money was advanced. The period for the supply of timber appears to have been during the cold season, when only it could be floated down the river, as it had to be for a considerable distance. The contractors supplied some timber. Part of it was received and part rejected; and complaints were made no doubt as to the quality of it. In September 1870, Colonel Minchin called upon the Plaintiff to pay the balance which then remained of the advance of Rs. 10,000, after giving credit for the timber which had been received by the State, and which balance amounted, as Colonel Minchin says, to Rs. 8,860-7. He gave directions that this amount should be recovered from the Plaintiff; and it was recovered from him, in the first instance, by his giving up jewels and

different securities, which were valued at the sum to be recovered, which was ultimately realized from them. The Plaintiff was, in fact, obliged to pay the amount, as being the balance remaining of the advance; and this is what he now seeks to recover from the Defendants. The question is, whether he is entitled to do so. The lower Courts have decided that he is entitled. When the case first came before the Chief Court, one of the learned Judges was of opinion that, applying, according to his view, the law of British India to the case, there had been a breach of contract which justified the payment of the money by the Plaintiff; and therefore he, as surety, was entitled to recover it. The other learned Judge was of opinion that the act of Colonel Minchin, as an act of State, could not be inquired into; and that, on this ground, the Plaintiff having been thus obliged to pay the money, he was so entitled. Consequently a decree was made in the Plaintiff's favour. There was then an application for a review, upon which the learned Judge, who had in the first instance thought the contract had been broken, after a discussion of the evidence, came to the contrary conclusion, and thought that the contract had not been broken, and therefore that the Plaintiff was not entitled to recover. The other learned Judge adhered to his opinion that the act of Colonel Minchin could not be disputed, and on its being referred to a third Judge, he took the same view. The application for a review was, therefore, dismissed, and the decree was confirmed.

Their Lordships have now to consider whether this decree in favour of the plaintiff ought to stand.

The contract under which the Plaintiff became the surety, and which is the contract that must really be considered in this case, was made in *Bahawalpur*, and the parties must be considered to have made it according to the liabilities that would be incurred there. Their Lordships do not concur in the view that, when the surety comes to enforce his rights against the principals, the law of British India is to be looked at. They must see what was in the contemplation of the parties when they entered into the contract at *Bahawalpur*, and the evidence of Colonel Minchin puts it as high as it can be put in the Defendants' favour. He says, that the Plaintiff was to be responsible for the repayment of the advance in case the contract should fail. The question is, whether the contract to supply timber has not failed within the meaning of the contract of suretyship. It is clear that when Colonel Minchin, in September 1870, directed that the balance should be recovered from the Plaintiff, the contract had failed. It was put an end to by a power which neither the Defendants nor the Plaintiff, the surety, could dispute. Colonel Minchin had power to put an end to the contract; and if we look not merely to the power which he might have as Political Agent, but to the terms of the contract for the supply of timber, it would appear that he was entitled to do so. The contract was one which, being indefinite in point of time, it would seem might be put an end to by either party. It was really only a contract to pay for timber supplied and accepted according to certain rates. Therefore, in this respect, if it were necessary to go into that question, he had power to put an end to the contract. Moreover, if their Lordships had thought it necessary to go into the question whether Colonel Minchin was justified in what he did, there is evidence that the contract had failed through the acts of the contractors; that they had, according to Colonel Minchin's evidence, after offering a quantity of timber which had been rejected, as there was power to do, abandoned the contract, and they do not seem to have taken any steps insisting on the timber being received or to have sent other timber in its place. The evidence is, and there is no reason to doubt that it is true, that they had in fact done in the way of abandoning the contract what would have justified the Political Agent in treating it as at an end, and saying that the balance ought to be repaid to the Government. The Agent had, under those circumstances, declared the contract at an end. In any view of the case, therefore, the balance of the advances

ought to be repaid by the surety. And the surety, having been compelled to pay the money, is entitled to recover it from the Defendants.

Their Lordships think that the decree which was made in the first instance by the Chief Court, and confirmed upon the application for a review, was right; and they will humbly advise Her Majesty to dismiss the appeal.

Solicitor for the Appellant: Mr. *T. L. Wilson.*

18th, 19th, and 22nd November, 1881.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Chief Court of the Punjab.

NAWAB MAHAMMAD AZMAT ALI KHAN (Defendant.) ... ... } *Appellant,*

and

LALLI BEGUM and others (Plaintiffs,) } *Respondents.**

Mahomedan Law—Acknowledgment of Children as Sons—Pensons Act (XXIII of 1871), ss. 4 and 6—Jurisdiction of Civil Court—Omission to obtain previously to suit Certificate enabling Court to entertain suit—Effect of Certificate granted after the hearing.

The acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent.

The question whether such acknowledgment should be presumed or not, depends on the circumstances of each particular case. *Ashrufood Dowlali Ahmed Hossein Khan* v. *Hyder Hossein Khan* (1) referred to and followed.

Part of the property in suit consisted of land, which was assumed in the Courts below to be held on terms bringing it within the Pensions Act, 1871. After the judgment, which disposed of the principal questions in the case, had been given, final judgment was suspended upon an objection that no certificate had been obtained under that Act. The certificate having been then obtained and delivered to the Court,—*held*, that the original defect did not prevent the suit proceeding.

Appeal from a decree of the Chief Court of the *Punjab* (5th December 1876), in part reversing, and in part affirming, a decree of the Commissioner of *Lahore* (19th January 1874).

Mr. *T. H. Cowie*, Q. C., Mr. *R. V. Doyne*, and Mr. *J. T. Woodroffe* for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr *J. D. Mayne*, for the Respondents.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This appeal arises in an action brought by *Mussamut Lalli Begum*, claiming in her own right, as widow of the late *Nawab* of *Kurnal*, *Ahmed Ali Khan*, and as guardian on behalf of her minior sons, *Rustam Ali Khan* and *Umar Daraz Ali Khan*, to recover her own share as widow, and the shares of her minior sons, who are alleged to be sons of the late *Nawab*, in large landed estate and other property left by him. The Defendant in action is *Nawab Azmat Ali Khan*, who is the undoubted son of the late *Nawab* and much older than the two minior Plaintiffs.

The late *Nawab* had four wives. A son, *Rahmat Ali Khan*, died in his lifetime He left, surviving him, *Azmat Ali Khan*, the Defendant, the *Mussamut Lalli*, who asserts that she was his wife and is now his widow, and the two minior Plaintiffs.

In the Courts below several judgments, original and on remand, have been given,

*I. L. R. 8 Cal. 422; 9 Cowell's Ind. App. 8.

(1) 11 Moore's I. A., 94; 2 P. C. J. 223.

and the result of the litigation appears to be as follows: The Commissioner of *Lahore* found that neither *Mussamut Lalli*, nor her sons, were entitled to inherit, being of opinion that she was never married to the *Nawab*; that her sons were not originally legitimate; and further, that the status of sons had not been conferred upon them by the late *Nawab* by any recognition of them as his sons. On remand the Commissioner found that, by family custom, widows did not inherit. The Chief Court of the *Punjab* agreed with the finding of the Commissioner as to this custom, and dismissed the *Mussamut's* appeal on the ground that she was disentitled by the custom. The Commissioner also, as already observed, dismissed the suit of the sons. The Chief Court of the *Punjab* reversed his decree so far as it dismissed the suit of the sons, and decreed in their favour, being of opinion that the minor Plaintiffs were entitled to inherit. No question now arises as to the widow both Courts having found that she is excluded by the custom of the family; and she does not appeal from those decisions.

The issues raised as to the right of the minor Plaintiffs to inherit originally involved the following questions:—First, the alleged marriage of their mother, *Mussamut Lalli*, with the late *Nawab*; secondly, the alleged acknowledgment and recognition of them by the late *Nawab* as his sons, and the legal consequence of such recognition, if made; and thirdly, the existence of certain family custom.

It will be convenient, in the first place, to refer to the issues as to the customs of the Mandals, to which this family belonged, to see if any custom has been established varying the general rule of the Mahomedan law relating to inheritance, or the effect of the acknowledgment of a son. An attempt was made to show that, by the customs of the Mandals, the sons of ignoble wives did not inherit. It appears that, in 1849, an inquiry was instituted by the Government respecting the customs of the Mandals, and various duster-ul-amals were drawn up by members of Mandal families respecting them. But, on consideration of these documents, it appears first, that they do not agree on important points; and, further, they do not profess to record existing customs, except possibly with regard to the exclusion of women from inheritance, but contain endeavours to come to an agreement with respect to the rules which should bind the family in the future. This was the view taken by the Government at the time, and also by both the Courts in *India* in this suit, of these documents, so far as they related to the inheritance of sons. On a remand by the Chief Courts oral evidence of the custom was taken by the Commissioner. The evidence satisfied the Commissioner, and the Chief Court agreed with him, that the custom to exclude widows from a share of the inheritance was proved. The claim of the widow was therefore rejected. With respect to the sons, the Commissioner's judgment is to this effect: he finds distinctly, upon the question which was referred to him by the judgment remanding the case, that legitimate ignoble sons would take a share with noble sons; that there is no distinction as to the right to inherit between the sons of noble and ignoble wives. But in the course of his judgment he finds an issue to be proved, which does not appear to have been referred to him. He says this: "They agree"—that is, the dustur-ul-amals and the oral evidence agree"—that illegitimate sons of ignoble mothers, though recognized as sons, get no share." Their Lordships have been referred to the evidence on which this last finding rests; but the learned Counsel for the Appellant did not prosecute the consideration of it after a few witnesses had been referred to, because it soon appeared that the evidence afforded no foundation upon which the learned Commissioner could properly base his finding, and the Judges of the Chief Court have distinctly come to a different conclusion upon it. His finding that legitimate ignoble sons get a share with noble sons was, however, affirmed by the two Judges of the Chief Court,

who both came, after a very careful review of the evidence, to the conclusion that no custom prevails in this family which varies the ordinary rules of the Mahomedan law with regard to the rights of sons to inherit.

An attempt has been made to show that the family were originally Hindus and converts to the Mahomedan faith, and upon this foundation a suggestion has been raised that Hindu customs were preserved in the family; but the foundation for this suggestion entirely fails. Not only was the fact of the family having been at one time Hindus not proved, but it was negatived by some of the witnesses. Even if the fact had been proved, it would only have lent probability to the suggestion that some Hindu laws had been preserved in the family as customs. It must still have been proved that they were in fact so preserved and acted upon; and, as already stated, the proof of the existence of any custom, so far as the present suit is concerned, entirely failed, except as to the widow's right to share. It is to be observed also, that there is evidence that the late *Nawab* was himself a strict Mahomedan. The rights of the minor Plaintiffs have therefore to be determined by the rules of Mahomedan law as applicable to the facts of the case.

The undisputed facts of the case are, that *Mussamut Lalli* was originally a slave girl in the late *Nawab's* house, and at one time acted as a servant in it. She lived in the house up to the time of the *Nawab's* death, and beyond question the *Nawab* cohabited with her, and the two minor Plaintiffs were born in his house, and remained in it up to the time of his death. Those facts are undisputed.

The questions which arise are,—first, whether there was a marriage between the late *Nawab* and *Mussamut Lalli* before the births of the Plaintiffs, in which case, of course, both would be his legitimate sons; and, secondly, whether, if that be not established, there is proof of an acknowledgment and recognition by the *Nawab* of the two Plaintiffs as his sons, which would give them the status of sons and a title to inherit.

The direct evidence of the marriage is not very satisfactory, and is in some respects contradictory. Still there is positive evidence that a ceremony of marriage did take place before the births of the children. That direct evidence is met by the negative evidence of winesses, who say that if such a ceremony had taken place they must have known of it. From this state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established; but the evidence exists, and a question certainly arises, whether the treatment of the minor Plaintiffs by the *Nawab* as his sons, to be hereafter adverted to, and the acknowledgments he made respecting them, do not afford such a strong presumption of marriage as to entitle the testimony of the witnesses who speak to the marriage to credit which otherwise it would not have possessed. Their Lordships, however, do not think it necessary to decide the case upon the ground that an actual marriage is proved. The Commissioner of *Lahore* has found against the marriage. The two Judges of the High Court certainly do not find against it. The inclination of Mr. Justice *Boulnois's* opinion was that it was not proved, whilst the inclination of Mr. Justice *Lindsay's* opinion was the other way; they therefore did not find against the marriage, though they have not affirmed it. Their Lordships also do not find it necessary to pronounce a distinct opinion upon the question whether the marriage, in fact, took place, as they think the Plaintiffs are entitled to succeed upon the ground that acknowledgments of them as his sons by the *Nawab* have been proved.

The evidence of the acknowledgment of the elder son, *Rustam*, is extremely strong. It rests not only on oral testimony, but on documents, one of which is almost conclusive of the question. It seems that *Rustam* was born six or seven years before his father's death. His brother *Umar* was born shortly before his death,—the precise time is not ascertained,—probably about a year, or a little

more: but it is not possible to arrive at the time with any exactness.

With regard to *Rustam*, it is shown that he was treated by the *Nawab* as a legitimate son would be. He was often taken by his father on visits to the houses of Mr. *Warburton*, a native of *India*, but educated by an Englishman and a Government official, and of Major *Parsons*, another British officer, both living in the neighbourhood. The *Nawab* appears to have introduced *Rustam* as his son, and the evidence is that he treated him with greater affection than his eldest son *Azmat*. Not only in the *Nawab's* house was *Rustom* put forward as his son, but he was taken on the above-mentioned and other visits as if he were a legitimate son. He was always dressed as a legitimate son would be. Mr. *Warburton* proved that he "used frequently to see *Rustam* going about well dressed, mounted on an elephant, and attended by servants." He also says he was extremely like the *Nawab*. A great deal of other evidence was given to this effect. Besides evidence of this kind, when *Rustam's* education was about to be commenced, the *Bismilla* ceremony was performed. There is distinct evidence of the performance of that ceremony, not only by the native gentlemen who attended, but by Mr. *Warburton* and Major *Parsons*, who were also invited and attended. Mr. *Warburton* appears to have been an intimate friend of the late *Nawab*; he is a witness whose credit is entirely unshaken, and appears to be in every respect an unimpeachable witness. At this *Bismilla* ceremony *Rustam* was introduced and treated as the son of the *Nawab*. It is scarcely conceivable this ceremony would have been performed if he had been an illegitimate son. With regard to the evidence of the Defendant's witnesses as to the manner in which these children were treated, their Lordships think that it is entirely unworthy of credit. In opposition to the strong and credible evidence given by the witnesses for the Plaintiffs, it is attempted to be shown that these children were, in fact, the children of a slave girl allowed to have promiscuous intercourse with men outside the *Nawab's* house, and whose fathers, some of the witnesses say, it was impossible to know. This evidence, and that which seeks to prove that the boys were treated as such children would probably be treated, seems utterly unworthy of credit.

In addition to the oral evidence which has been mentioned, a declaration, important in itself, and as affording confirmation of the oral testimony of the Plaintiffs, is found in the report which the *Nawab* made to the Government respecting the arms belonging to his family. In a letter to the Deputy Commissioner of *Kurnal*, dated the 7th March 1866, the year before he died, is a schedule in which the arms held by himself and the members of his family are described. The letter is:—"After expressing a desire for an interview which has abundant advantages, and is the best of the objects, be it known to your splendid and kind mind, on the arrival of your kind note a list of my personal arms is annexed to this friendly letter, as required in Commissioner's circular dated 8th January 1866." In that list there are columns with the names of the possessors and the descriptions of the arms. First there is 'Personal,' that is himself; and he returns 11 native swords, 1 shield, muskets, pistols, and other arms. Then follows:—"The *Nawab's* son, *Azmat Ali Khan*" (the Appellant), 4 native swords, 1 shield, 2 double muskets, and so on. Then follows:—"The *Nawab's* son, *Rustam Ali Khan*" (the Respondent), 4 native swords, 1 shield, 2 double muskets, and so on. In this document the *Nawab* describes *Rustam* as "the *Nawab's* son, *Rustam Ali Khan*," and returns exactly the same number of arms as belonging to him as belonged to his eldest son. He therefore not only calls him his son, but treats him as he treated *Azmat*, his undoubted legitimate son. Their Lordships think that this acknowledgment in a formal report to the Government is almost conclusive as regards *Rustam*.

Undoubtedly the evidence of acknowledgment and recognition of *Umar*, the youngest son, is, as may naturally be expected, much less than that in the case

of the elder brother. Considering the short period that elapsed between his birth and the death of the *Nawab*, it is not surprising that a paucity of evidence appears; but their Lordships think that enough is shown in the case of *Umar* also to satisfy them, as it satisfied the Judges of the Chief Court of the *Punjab*, that he was acknowledged and treated as a son.

(His Lordship then went through the direct evidence on this point, continuing thus) :—

It is also important to observe that *Umar* received the titular name of *Khan*, as his brother *Rustam* had, a name which it is not likely the father would have bestowed upon any but his acknowledged and legitimate sons. Those who advised the Appellant were apparently aware of the importance attached to this name, for they endeavoured to show that it had not been given to the boys until after the death of the *Nawab*; that is distinctly disproved by the evidence in the case, and it appears that they always bore that name.

The evidence of Major *Parsons* is not so distinct as that of Mr. *Warburton*. He says, to the best of his recollection, the *Nawab* spoke himself to him about the second boy. Besides this testimony, there is general evidence that both boys were treated by the *Nawab* as his sons.

Undoubtedly an acknowledgment of each son must be proved. In the actual circumstances of this case, it is highly probable that when the *Nawab* had recognized the elder son of *Mussamut Lalli*, he would also acknowledge the younger, and this probability gives support to the evidence in the case of the latter. There seems to be no reason for his making a distinction between them.

Their Lordships have already adverted to the unsatisfactory character of the evidence given on the part of the Defendant. The only piece of evidence entitled to weight is the genealogical tree which has been produce by him. That tree professes to be a pedigree of the *Nawab's* family, which was returned to the Government. The genealogy begins, at no distant period, with the father and uncles of the late *Nawab*. He was asked for a genealogy of his family. Undoubtedly, in the paper which has been produced, there is, under his own name, an entry of two sons only, *Rahmat Ali Khan*, 'deceased,' and *Azmat Ali Khan*; there is no mention of *Rustam*, though *Rustam* must have been born at the time that this pedigree was drawn up. It is, however, to be observed that the document produced is a copy only, and that the original has not been produced or satisfactorily accounted for. There may be considerable question whether the copy was admissible in evidence; but whether admissible or not, it is a copy only, and there is an entry after the name of *Rahmat Ali* of his death—"*Rahmat Ali Khan*, 'deceased.' Now at the time that this pedigree was prepared *Rahmat Ali Khan* was not dead; and therefore the document must have been altered, at least to that extent after it had been originally prepared. It is possible that when the *Nawab* was called upon for his genealogy he might have thought it sufficient to give the genealogy only down to himself. But the document itself, the original not being produced, containing an entry which could not have been in a genuine original, cannot be safely relied upon. Even if an original pedigree had been produced without the name of *Rustam*, though it would no doubt be a piece of evidence favourable to the view of the Appellant, and perhaps strongly favourable to that view, it would not be sufficient to outweigh the positive evidence of the acknowledgment of *Rustam* by the *Nawab*.

Their Lordships, therefore, have come to the conclusion that an acknowledgment by the *Nawab* of both the minor Plaintiffs as his sons has been proved.

The only question which remains on this part of the case in as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Mahome-

dan law has not been disputed at the bar,—*viz.*, that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons, capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Mahomedan law has not been questioned at the bar. In this case we have not only the treatment of the Plaintiffs by the *Nawab* as his sons, from which, under certain circumstances, an acknowledgment may be presumed, but we have actual acknowledgments of them. It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend on the circumstances of each particular case in which it arises. The only authority, after the course which the argument has taken, to which their Lordships think it necessary to refer, is the case of *Ashrufood Dowlali Ahmed Hossein Khan* v. *Hyder Hossein Khan* (1). In that case their Lordships say:—"The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child: but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged he acquires the status of legitimacy." The rule of the Mahomedan law as to acknowledgment is so affirmed in this judgment. "When therefore a child really illegitimate by birth becomes legitimated, it is, by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact." This last passage appears to refer to cases where an express acknowledgment is not proved, and has to be presumed from other facts. "They are built on the foundations of the law, and do not when the grounds of legitimacy by confounding concubinage and marriage." These observations must be taken with reference to the facts of that case; and in that case it appeared that there was a 'mootta' marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as a son and at others not; and indeed, by a deed executed by the father for that purpose, he was distinctly repudiated by him as his son. In that case it was decided that, in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child, or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judges below can only be understood by referring to the questions to which they were addressed. However, there really is no dispute about the law; and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts.

The remaining point relates to a part of the property which is sought to be recovered. It appears that some part of the property in suit consisted of land which was assumed in the Courts below to be held under a grant from the Crown on terms which brought it within the Pensions Act (XXIII of 1871). Their Lordships have not been referred very specially to the facts, nor was that necessary in the view taken by them of the construction of this Act; they are therefore not to be understood to affirm the assumption upon which the Courts below acted, that the grant in question is a grant within the Pensions Act. They give no opinion upon that point; but, assuming that the Court was right in considering the grant as one within the Pensions Act, their Lordships think it came to a correct decision in holding that, when the certificate mentioned in the Act was obtained, the suit might proceed. It seems that, after the judgment which dis-

(1) 11 Moore's I. A., 94, see p. 113; 2 P. C. J. 223.

posed of the principal questions in the case had been delivered, final judgment was suspended upon an objection that no certificate had been obtained. Before the case was finally disposed of and the final decree, passed, the certificate was obtained and delivered to the Court. The Pensions Act, by s. 4, provides that: "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government." Then the sixth section is, "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector." It is contended that the suit ought to have been dismissed altogether as regards the property held under the grant, because no certificate was obtained before the commencement of the suit; but their Lordships think that the Court, although up to a certain time they had proceeded, apparently without objection, with the suit without a certificate, was justified in going on with the suit when it was received. The Statute says that: "A Civil Court otherwise competent to try it,"—this Court was competent to try it—"shall take cognizance of any such claim upon receiving a certificate from such Collector." When the Court received the certificate it was bound to take cognizance of the claim; and it seems to their Lordships that, finding an existing suit when it received the certificate, it might take cognizance of the claim in that suit. The decision on that point, therefore, seems to their Lordships to be correct.

The result is, that the decree of the Chief Court of the *Punjab* should be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The Appellant will pay the costs of the appeal.

Solicitors for the Appellant: Messrs. *Watkins* and *Lattey*.

Solicitor for the Respondents: Mr. *T. L. Wilson*.

23rd, 25th, 26th, and 29th November, 1881, and 21st January, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

THAKURAIN RAMANAND KUAR (Plaintiff) ... } *Appellant,*

and

THAKURAIN RAGHUNATH KUAR and another (Defendants). ... } *Respondents.*

On Appeal from the Court of Commissioner of the Faizabad Division.

ANANT BAHADUR SINGH (Plaintiff). ... } *Appellant,*

and

THAKURAIN RAGHUNATH KUAR and others (Defendants). ... } *Respondents.**

Oudh Estates Act (I of 1869), ss. 8, 9, and 10—Recognition of Trust—Specific Relief Act (I of 1877), s. 42.

Notwithstanding the confiscation of land in Oudh, followed by its restoration under the Government Order of 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by "The Oudh Estates Act, 1869," the legal owner may, either by express agreement, or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad.

A talookdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny; a sanad granted to her as talookdar, with full power of alienation, and her name was afterwards entered in the lists prepared under s. 8 of "The Oudh Estates Act, 1869." But certain of her acts were

* I. L. R. 8 Cal., p. 769; 9 Cowell's Ind. Ap. 41.

not explicable except on the understanding that she was abiding by the will.

Held, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life.

Held also, in a suit by the remainderman for a declaration of the invalidity of the transfer by the widow as against him, that although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder, and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought, because his suit has been wrongly decided against him on the merits.

Appeal from a decree of the Additional Judicial Commissioner of *Oudh* (17th July 1878), affirming a decree of the Commissioner of the *Faizabad* Division (17th November 1877), which reversed a decree of the Deputy Commissioner of the *Faizabad* District (2nd July 1877).

Mr. *J. F. Leith*, Q. C., and Mr. *J. W. H Arathoon* appeared for the Appellants.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* for the Respondents

January 21st, 1882.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORREIT COLLIER:—

First Appeal:—This suit is brought by *Ramanand Kuar*, one of the widows of *Nihal Singh*, talookdar of *Sihipore*, against *Raghunath Kuar*, another of his widows, and *Bisheshur Baksh Singh* to whom the latter widow had made a gift of the talook.

The suit is described as a suit for a declaratory decree under the 6th chapter of The Specific Relief Act, and the plaint prays for a declration "that the Plaintiff is reversioner, and is entitled to succeed to the estate of *Sihipore* after the death of the first Defendant, who holds only a life-interest and is a trustee, anything contained in Act I of 1869 notwithstanding."

Then follows a short statement of facts, *viz.*, that *Nihal Singh* was talookdar and owner of *Sihipore*; that he died in the year 1832, leaving him surviving five widows, of whom the first Defendant is the third, and the Plaintiff the fourth: that the first widow succeeded her husband in the possession of the talook, and that, upon her death, the second widow having predeceased her, the first Defendant succeeded in pursuance of a will of *Nihal Singh*, and that the first Defendant has acknowledged that she holds a life-estate only under the will: and that the said Defendant made a gift of the eatate to the second Defendant on the 27th February 1877. The plaint concludes thus:—

"The Plaintiff submits that, as the first Defendant is only a holder of a life-interest and is a trustee, the gift is invalid. The Plaintiff, therefore, prays that she is entitled as a reversioner aforesaid."

It was not contested that, by virtue of Act I of 1877, s. 42, such a suit is maintainable. The case of the Defendants was, in substance, that *Raghunath Kuar* had, by virtue of a summary settlement made with her on the 2nd December 1858, and of a sanad on the 15th of March 1861, followed by the entry of her name on the first and third lists, prepared by the Chief Commissioner of *Oudh* under s. 8 of Act, I of 1869, as published in the *Gazette of India* under s. 9 of that Ac', an absolute estate, which she had power to alienate to whom she chose.

The case of the Plaintiff was, that, granting the legal title thus conferred upon the first Defendant, she has so conducted herself that she must be deemed in equity to be bound to hold the estate in trust, for the purpose of carrying into effect the provisions of her husband's will.

Whether or not she has so conducted herself is the question in the cause.

The Deputy Commissioner gave judgment for the Plaintiff, the Commissioner and the Additional Judicial Commissioner for the Defendants. Against the judgment of the latter this appeal is preferred.

The will of *Nihal Singh* is in these terms:—

"I, *Nihal Singh*, talookdar of *Sihipore*, do hereby declare in writing that I have married five wives, and therefore I exe-

cute this deed, and deliver it into the custody of *Baldi Ram Pandit*. After my death, my first wife should become the proprietor of the talook and all the goods and chattels that may be in my house, and she shall support the other four wives by supplying them with food and raiment, and they shall not claim a share in the estate. After the death of my first wife, my second wife shall become the proprietor of the estate; on the death of the second wife, my third wife shall become the proprietor; on her death, my fourth wife; and on her death, the fifth wife shall become proprietor. After the death of all the five wives, *Sheoamber Singh* (may he live long) shall become proprietor of my estate, goods, and chattels.

"I have reduced the above into writing in order to maintain the integrity of the *Sihipore* estate, and to perpetuate its name and memory. Every one in my house is interdicted by oath of my person to do any act contrary to the terms hereof. I pray God that any one contravening it may be visited with calamity, similar to what befel the people of *Chittour*. The Hindus are bound by oath of the *Ganges*, and the Mahomedans by the Koran, to act in consonance with the terms hereof. I have no issue, and therefore I have executed this deed. But if I get a child, it shall succeed to my estate, and manage all the affairs.

"Dated this 5th day of Asarh Badi, 1238 Fasli (30th June 1831).

"(Sd.) SHEO DYAL MAHAJAN,
"*Resident of Sahibganj*.

"Witnessed by—
"Gurdial Kaeth of *Hirdepore*, and
"Ram Ghulam Lal of *Katra*."

With respect to the devolution of the estate after the death of the testator, their Lordships adopt the view expressed by the Commissioner in his judgment of 17th November 1877, "Whoever may have been considered 'malik,' of real owner, of the estate, it seems certain that none of the widows engaged for it as revenue-payers with Government subsequent to the death of *Nihal Singh*. Till after the death of *Harpal Singh*, shortly before Annexation, the present holder being the senior surviving widow, perhaps took an engagement, and was found in possession at Annexation."

Had the talookdar left no will, each of the widows would, by the ordinary Hindu law, have been entitled to an equal share of the estate; and, after the death of *Harpal* (who would seem to have taken unauthorized possession of it), the three surviving widows,—*viz*, the Defendant, the Plaintiff, and *Sheonath* the fifth widow (who has not joined in this suit), would have been entitled to share it. What was the effect of the sanad granted to the Defendant by the Native Government, if a sanad was granted to her, we do not know; but it may not be unfairly presumed to have been in accordance with her husband's will.

The first material piece of evidence in the case is a letter (marked C) from *Raghunath* to *Ramanand*, dated 9th April 1856, about two months after the annexation of *Oudh*, in these terms:—

"Accept my good wishes and prayers for you. May God bless us both. Now the partition deed has been written, but considering your expenses to be heavy, I will pay you Rs. 500 per annum, separate from *Sheonath Kuar*. But mind, you have to maintain our position; and, after my death, all the burden, will fall upon you."

In the absence of any information relating to the 'partition' referred to, it is difficult fully to understand the meaning of this letter. It has been argued, with some force, that the payment for expenses, together with the intimation that the burden of the inheritance will fall on *Ramanand* after the death of the writer, is a recognition that she holds under the terms of her husband's will.

The next document relied on by the Appellants is a deed of compromise (as it is termed) dated 14th November 1858, by which it would appear that certain disputes between the widows were for a time settled. This transaction took place some eight months after the confiscation of *Oudh* (15th March 1858), and before anything had been done to reinstate the

landowners. The instrument is in two parts, one executed by *Raghunath*, the other by the other widows.

The Latter document (marked D) is as follows :—

"Both of us, *Ramanand Kuar* and *Sheonath Kuar*, co-widows of *Thakur Nihal Singh*, talookdar of *Sihipore*, &c., do hereby agree with our free will and consent and bind ourselves in writing to *Thakurain Raghunath Kuar*, that so long as she lives she may manage the affairs of the *ilaka*, &c., and out of the allowance of Rs. 400 per annum fixed by her to enable us to pay for the expenses of our winter clothing, raiment, and charity, and other necessaries of life, we will defray our expenses and will not indulge in extravagance. We will all three take our food, nice or coarse, whatever is cooked, together, and live in harmony with each other. We will not interfere with the management of the estate. We will try to maintain and guard what was earned by *Thakur Nihal Singh*, and will not waste it by extravagance. If perchance any expenses are required for the protection of life, property, or zemindari, they shall not be incurred without the sanction of *Raghunth Kuar*.

"As long as the said *Raghunath Kuar* lives and pays both of us according to the agreement herein recorded, we will not complain to the brotherhood or to the authorities; and if we do so, we shall render ourselves liable to blame before God, the brotherhood, and the authorities. If God preserves the *ilaka* in its present condition, we will continue to receive the allowance mentioned above; but if perchance the estate is increased or decreased, we will of course receive the allowance at an increased or decreased rate, as the case may be. Our parents, brothers, and relations will be allowed to visit us according to the universal custom of the country."

Though no express mention is therein made of the will, their Lordships regard this document, which recognizes the right of *Rughunath* to a life-estate in the entire property to which she was only entitled under the will, and her duty to pay an allowance to the other widows, which was only prescribed by the will, as an affirmance by both parties of its binding effect upon them. Shortly after this,—*viz.*, on the 2nd December 1858, a summary settlement of a number of villages was made with the Defendant for three years.

The principal difficulty in this case arises from the conduct of the Plaintiff.

Subsequent disputes arose, in the course of which the Plaintiff repudiated this agreement or compromise, and indeed denied its existence; while, on the other hand, the Defendant in the most explicit terms set up the will, and claimed her rights under it.

On the 30th March 1859, the Plaintiff presented a petition to the Revenue authorities, praying that she might be recorded as owner of one-third of the estate—a claim in direct opposition to the will. On the question being referred to the tehsildar, the Defendant again set up the will, defended her exclusive possession under it, succeeded in her defence, and retained possession of the whole estate

The litigation seems to have been ended by the following *sulehnama*, or deed of compromise, on the 9th December 1859 :—

"We, *Musst. Kawal Jhari Kuar*, Plaintiff, and *Raghunath Kuar*, Defendant, widows of *Nihal Singh*, deceased, talookdar of *Sihipore*, Pargana *Sultanpore*, declare herein that :—

"Whereas there has been going on a dispute between both of us about the share of inheritance, and the case was pending in the Court, the Deputy Commissioner of *Faizabad* personally came to *Khapradih* and disposed of the dispute with our mutual consent in the following manner;—that residing in *Gaura* or in *Sihipore Khas*, *Kawal Jhari*, Plaintiff, shall get from *Raghunath Kuar*, Defendant, Rs. 450 in cash per annum for her expenses. Consequently we, the Plaintiff and the Defendant, having compromised, have recorded these few words as a deed of compromise (*sulehnama*), that it may serve as a document for the future. And if ever we bring a claim in this matter we shall render ourselves amenable to Government.

"Dated this 9th day of December 1859, corresponding with the 14th of Aghan Sudi."

In January 1861, a letter, probably a circular letter, was sent to the Defendant, no copy of which is, unfortunately, to be found in the record, and whose purport can only be collected from her answer, which is in these terms (it is called document E):—

"Sir,—I have the honour to acknowledge the receipt of your parwana (letter), dated 7th December 1860, inquiring as to whom I wish to bequeath my estate after my death and what relationship he bears to me.

"Sir, so long as I live I shall continue to be the proprietor and mistress of my estate. After my death my rival widows, *Musst. Sheonath Kuar* and *Ramanand Kuar*, shall succeed to my heritage and the estate. But I must note that none of my two rival widows shall have power to alienate the estate by gift, transfer, or grant to any of their relatives, or to any stranger after my death, except *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*. After my death, and after the death of the two rival widows, *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*, shall inherit the estate and all our legacy. The said talookdars are my great grandsons as described below.

"My husband, *Thakur Nihal Singh*, had an elder brother *Ganga Parshad Singh*. My husband was killed and left no issue. *Ganga Parshad Singh* had three sons, *Sheo Sewak Singh*, *Hubdar Singh*, and *Harpal Singh*. *Harpal Singh* also was killed and left no issue. *Hubdar Singh* had a son, by name *Bhairon Singh*, who died during the lifetime of his father; soon after *Hubdar Singh* was also killed. *Sheo Sewak Singh* had a son, by name *Sheoambar Singh*. The latter has left two sons, *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*, who shall succeed us and inherit all property.

"Petition of *Raghunath Kuar*, talookdar of *Sihipore*, &c., Pargana *Sultanpore*.

"Dated this 6th day of January 1861."

It should be mentioned that another translation of this letter represents the inquiry to have been "whom she wished to appoint as her successor."

On the 15th of March following the Defendant received a sanad, whereby an estate of inheritance according to the law of primogeniture, together with full power of alienation, was granted to her.

The letter of the 6th January is treated by the two Appellate Courts as simply a will, revocable by the testatrix and revoked by her when she made the gift to her nephew, the second Defendant, who, it may be stated, is not a member of her husband's family. If it had stood alone it might have been so treated, according to the view of this Committee in the case of *Hurpurshad* v *Sheo Dyal* (1) with reference to a somewhat similar document, but which, having been acted upon, was there treated as amounting to a conveyance *inter vivos*. But, looking at the document in connexion with the will of *Nihal Singh*, the other documents, and the conduct of the Defendant in the suit before the Revenue authorities, their Lordships regard it rather as a declaration that on her death the estate would devolve according to the directions of the will.

The doctrine that, notwithstanding the confiscation of the land in *Oudh* by the proclamation of Lord *Canning*, its restoration by his Circular letter of 10th October 1859, affirming the absolute title of the grantees of summary settlements, and the granting a sanad with full power of alienation confirmed by the *Oudh* Estates Act of 1869, the legal owner may, either by express agreement or by his conduct, constitute himself in equity a trustee for others as to the whole or part of the beneficial interest, has been affirmed by many decisions of this Board.

This doctrine was first laid down in these terms in the judgment delivered by Lord Justice *James* in the case of *Thukrain Sookraj Koonwar* v. *The Government* (2):—

(1) L. R., 3 I. A., 259; 3 P. C. J. 611.

(2) 14 Moore's I. A., 112; 2 P. C. J. 705.

"It (the Government letter of 10th October 1859) gave the registered talookdar the absolutely legal title as against the State and against adverse claimants of the talookdari, but it did not relieve the talookdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the Appellant was the acknowledged *cestuique trust* of the registered talookdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered."

In the case of *The Widow of Shunker Sahai* v. *Rajah Kashi Persad* (1) it was held that, with respect to a one-third share of seven villages in the talook, the Rajah had, though no formal deed or writing was produced, by his admissions at the time of the summary settlement, constituted himself a trustee for the Plaintiff so as to be bound to account to her for a one-third share of the rents and profits.

The doctrine was further illustrated by the case of *Thakoor Hurdeo Bux* v. *Thakoor Jawahir Singh* (2). The evidence being unsatisfactory, the case was remitted for retrial on the following issue,—*viz*, "Whether the Respondent has, in any or what manner, agreed, or become bound, to hold the villages comprised in the summary settlement and sanad, or any or what part thereof, in trust for the Appellant."

On the case again coming before this Board, their Lordships observe,—"The actual relation of the Appellant, Respondent, and *Parbut Singh* (who was no party to the appeal) remained that of a joint and undivided Hindu family from the date of Lord *Canning's* proclamation up to the quarrel and removal of the Respondent to *Kaswara* in 1865. The Commissioner also found, and correctly in their Lordships' opinion, that the evidence proved that, during that period, there had been a joint interest in and common management of the property. Such an interest could not have existed unless the Defendant had consented that the villeges should be held as the joint property of the family. Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement, to the effect that *Hardeo Bux* was his partner, and with his deposition on the 8th July 1859, in which he stated that the custom prevailing in his family was that, if his cousins, meaning the Plaintiff and *Parbut Singh*, who were his partners, should claim, they would get them divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sanad should be held by him in trust for the joint family and as a joint family estate, subject to the law of the Mitakshara."

The principles of equity laid down in these cases (to which others might be added) appear to their Lordships to apply to the facts of the present case.

The Defendant *Raghunath* all along, certainly from April 1856 to the time when she obtained the sanad, held herself out as claiming the estate under the terms of her husband's will.

At the time of the summary settlement with her, on the 2nd December 1858, the agreement or compromise of the 14th of November previous, which their Lordships interpret as a recognition by all the three widows of that will, seems to have been in force. Although the junior widows soon after repudiated that compromise, and the Plaintiff claimed in a suit one-third of the property, the Defendant succeeded in defeating her by setting up the will, and the suit ended in a second compromise of the 9th December 1859, which, though not clearly expressed, their Lordships regard as in effect recognizing the position of the Defendant which she claimed. This compromise, as far as appears, remained in effect un-

(1) L. R., 4 I. A, 198; S. C., L. R., I. A. Sup. Vol, 220; 3 P. C. J. 289.
(2) L. R., 6 I. A., 161; 3 P. C. J. 704.

til January 1861, when the Defendant executed document E, which has been before referred to, and which, coupled with the surrounding and preceding circumstances, their Lordships regard as a declaration by *Raghunath* that she held the estate in trust—a trust which would bind his heirs—to carry into effect the provisions of her husband's will. It is said that nothing was done by *Ramanand* in consequence of *Raghunath's* affirmance of the will, and that she was in no way damnified thereby. But their Lordships think it very difficult to maintain that position. It is true that *Ramanand's* former claims are quite inconsistent with her present claim. But then she has been defeated, and *Raghunath* has succeeded. Without the will the two would have been ordinary Hindu widows, and *Raghunath* would not have been in a position to claim the sole benefit of the two settlements and of the sanad which were granted to her. Document D is dated eighteen days before the summary settlement. Document E is dated about ten weeks before the sanad. At two critical points of time we find *Raghunath* the author of formal and important documents, which, though they do not expressly mention the will, are not explicable except on the supposition that she was abiding by the will, which, on other occasions, she expressly set up and successfully used as a defence to her possession. They are, therefore, of opinion that the Plaintiff is entitled to the relief she prays for, *viz*, that it may be declared that she is entitled to succeed to the estate after the death of the first Defendant. It follows that the deed of gift to the second Defendant could confer no more than the life-interest of the first Defendant. There is no prayer to set that deed aside, and if there had been, it could not have been effectual, inasmuch as the deed is not wholly void but operative to convey a life-estate.

Their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, that a declaration to the effect abovementioned be made, and the costs of both parties be paid out of the estate.

Second Appeal.—This suit was brought by *Ram Sarup Singh*, who was a son of *Sheoambar Singh*, to whom the estate was given in remainder after the life-estates of the widows, by the will of *Nihal Singh*, which has been before set out. *Ram Sarup* having died, leaving the Plaintiff, his son, and *Ram Sarup's* brother, *Balbhadar*, having also died without issue, the present Plaintiff succeeds to all the rights of *Sheoambar*.

He brings his suit against the Defendants in the former suit, with whom he has joined the two junior widows, for a declaratory decree under the Specific Relief Act, and prays to have it declared "that the deed of gift, dated the 27th day of February 1877, is invalid against the Plaintiff, who is a reversioner, because the donor, the first Defendant, held only a life-interest, and is a trustee, anything contained in Act I of 1869 notwithstanding."

In their Lordships' opinion, the Plaintiff, having, in terms of the English law, a vested remainder immediately after the life-estates, is entitled, under the Specific Relief Act, to maintain this suit.

The question is, whether the first Defendant is to be declared, *quoad* the Plaintiff, to hold the estate in trust for carrying into effect the provisions of her husband's will.

The evidence in this case differs in some respect from that in the former case. The exhibits C and D (of the dates 9th April 1856 and 14th November 1858 respectively) are not in evidence.

The proceedings in the suit which has been referred to, of *Ramanath* against *Raghunath*, are in evidence.

Exhibit E (the letter of 6th January 1861) is in evidence.

In addition to these, two documents of some importance were tendered, one being a letter of Defendant to the present Plaintiff, of the 18th January 1870, marked 'Be;' another letter of the same date, marked 'Alif,' written (as alleged) by her agent, and referred to in the first letter. With respect to those documents, the Deputy Commissioner thus express himself:—

"The letters Alif and Be remain for consideration as to the alleged admissions of trust. Alif was put in, it was said, only because it was referred to in Be, so it will suffice to consider the value and effect of the latter. The Defendant, *Raghunath Kuar*, if she wrote this, informed the Plaintiff that she would do 'nothing contrary to the writing of the *Thakoor*;' that he had been falsely informed that she meant to write a deed in favour of *Bisheshur Buksh* (Defendant 4). A witness, *Kunj Behari Lal*, deposes that he wrote Be for the Defendant, being at the time her service; other witnesses depose that the signature to this letter is Defendant's. The letter is denied. It is pointed out that Alif and Be were not filed with the plaint, nor alluded to in any way. This fact, a very important one, certainly renders the genuineness of these papers doubtful; whether genuine or not, Be contains only a promise, and does not creat any fiduciary relations, if none previously existed between the Plaintiff and Defendant. There is nothing in the promise which gives it any legal force."

He dismissed the suit.

The Commissioner, who affirmed this judgment, makes no distinct allusion to these letters.

The judgment of the Deputy Commissioner and the Commissioner being concurrent, no appeal lay to the Judicial Commissioner. The present appeal is brought from the judgment of the Commissioner.

Although the Deputy Commissioner throws some doubt on the genuineness of the two letters—chiefly, it would appear, on the ground that they were not filed with the plaint (they seem to have been filed before the settlement of the issues),—he does not reject them, but considers their effect. As several witnesses testify to the signature of the Defendant to 'Be,' and there is no contradiction of their testimony, and as *Janki Lal*, the writer of 'Alif,' testifies to his own handwriting, their Lordships do not deem themselves justified, in the absence of a finding by the Court below that the witnesses were not to be believed, in rejecting the letters. 'Be,' is in these terms:—

"May God assist us. You will know the particulars from this letter and from that of *Janki Ram*.

"From *Thakurain Raghunath Kuar* to *Ram Sarup Singh*:

"My dear *Ram Sarup Singh*. After my good wishes to you, I pray God to keep us in good health.

"I have received your letter, have become acquainted with its contents, and have been satisfied. *Bhagwant Singh*, *Lalla Gurparshad*, *Pandit Gurdyal Ram*, and *Chandka Singh* paid a visit to me in person, and related all the particulars to me verbally. The report that you have received from the second wife to the effect that I wish to make a bequest in favour of *Bisheshur* is altogether false; she wishes to incite a quarrel between you and me. I do not wish to contravene the instructions given by my husband, either by thought, word, or deed. I am surprised that, although I have twice represented to the Government authorities my intention to comply with the instruction imparted by my husband in favour of your father, you are not satisfied, and are easily led away by others. I beg to assure you that nothing will be done contrary to the will of my husband.

"You will learn the other particulars from *Janki Lal's* letter. The rest is all right.

"Dated *Asarh-Badi* 5th, 1277 E. 18th June 1870."

'Alif' is in these terms:—

"From *Janki Lal* to *Thakoor Ram Sarup Singh*:

"Sir,—After compliments, I beg to state that may it please God to keep you in good health, which is advantageous to me. Having taken leave of you, I arrived at *Sihipore* yesterday, and related all the particulars to *Thakurain Sahab*. *Lalla Gurparshad*, *Chandka Singh*, *Bhagwant Singh*, and *Gurdyal Ram* came to-day to the *Thakurain* with your letter to her, who is going to send you a reply. *Lalla Gurparshad* and *Gurdyal Ram* will give you all the particulars verbally. *Thakurain Sahab* takes thousands of oaths to the effect that nothing

will ever be done contrary to the written wishes of *Thakur Nihal Singh*, and that the second wife to *Thakur Nihal Singh* is trying to instigate a false quarrel between you and her, *Thakurain Sahab*. You may, therefore, rest assured that no other plan is set on foot. The *Thakurain* wishes to make over one or two villages to *Bisheshur* from the estate lying on the west, with your sanction, which, she says, will be obtained, so that there may be no dispute or litigation hereafter. The rest is all right.

"Dated *Asarh-Badi* 5th, 1277 Fasli."

The proceedings in the suit of *Ramanath v Raghunath* referred to the *Tehsildar*, wherein *Raghunath* insisted, and successfully, that she held under her husband's will, could not have been unknown to the rest of the family. The present Plaintiff, the remainderman, may well have relied on the expressed intention of *Raghunath* to observe that will, and may have therefore thought it unnecessary to dispute her claims to a sanad. Their Lordships have already intimated their view of her letter of the 6th January 1861, *viz.*, that it was a declaration of trust on behalf of those interested under *Nihal Singh's* will, including the remainderman. But it must be here noticed that the present Plaintiff, on the 9th of March 1862, presented a petition, wherein he ignored the will of *Nihal Singh*, and impugned as invalid this very declaration of trust, contending that he had a present right to the estate, or at the least was next in reversion to *Raghunath*.

If his case had rested here, their Lordships would not have been disposed to make in his favour a declaration of a trust which he had expressly repudiated. But the letters 'Alif' and 'Be' give a different aspect to the case. The order made after his petition is, that he be directed to apply to *Raghunath*. What correspondence upon this took place between them can only be conjectured from these two letters. It would seem from them that the Plaintiff no longer disputed the life-interest of *Raghunath* or the will of *Nihal Singh*, but had received some information that she intended to make an absolute gift of the estate, whereupon *Raghunath* refers to her representation to the Government of the 6th January 1861, and to some subsequent representation to the same effect, for the purpose of reassuring him of her intention to comply with her husband's will, and quieting his suspicions that she intended to avail herself of the full powers contained by her sanad. According, then, to the evidence in this suit, *Raghunath* has herself given a significance to her declaration of the 6th of January 1861, which still more clearly fastens upon her the obligation to abide by it. She treats it as a wrong done to her that she should be suspected of any intention of departing from her husband's directions. And this places it beyond doubt that the declaration in question, which, as before observed, does not expressly mention *Nihal's* will, is really founded upon it, and treats it as a direction obligatory in conscience if not in law.

Their Lordships, however, think that two concurrent declaratory suits were unnecessary at the present time, and that it would not have been unreasonable if the first Court had, as a matter of discretion, declined, under the circumstances, to grant declaratory relief to the more remote remainderman. That, however, was not done. *Ram Sarup's* suit has been decided on the merits, and decided against him, as their Lordships think, wrongly. They will, therefore, humbly advise Her Majesty that the Appellant is entitled to the decree he asks, but without costs, nor do they give any costs of this appeal.

Solicitors for the Appellants in both appeals: Messrs. *Watkins* and *Lattey*.

Solicitor for the Respondents in both appeals: Mr. *T. L. Wilson*.

30th November, 1881 and 21st January, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BILASMONI DASI and others (Defendants). } *Appellants,*

and

RAJAH SHEOPERSAD SINGH (Plaintiff).... } *Respondent.**

Construction of Pattah—Mokurari Ijara—Absence of Words of Inheritance.

The word 'mokurari' does not necessarily import perpetuity, although it may do so. Used in connection with the grant of an ijara in a pattah, this ward is not inconsistent with such interest being only for life.

By a pattah was granted a mokurari ijara at a fixed rent in a mouzah, consisting mainly of waste lands, part of the grantor's zemindari, without words of inheritance. On the death of the grantee, who brought the land under cultivation and died in possession many years after, the question arose whether the pattah was for life, or for a heritable and transferable estate.

Held, that there being in the pattah no words importing perpetuity, notwithstanding the use of the word 'mokurari,' the question was whether the intention of the parties that the grant should be perpetual, was shown with sufficient certainty in any other way; *e.g.*, by the other terms of the instrument, its objects, the circumstances under which it was made, or the conduct of the parties to it. *Held* also, that such intention was not shown.

Appeal from a decree of the High Court of *Bengal* (30th August 1879), reversing a decree of the Subordinate Judge of *Bhagalpore* (23rd June 1877).

The suit out of which this appeal arose was brought by the Respondent, the son and heir of the late Moharajah *Jaimangul Singh*, zemindar of Pargana *Gedhour*, Zilla *Monghyr*, against the successors in estate of *Roghunath Singh*, who died in 1875. The latter had been tenant to the Moharajah, having obtained from him, in the year 1798, a pattah granting to him a mokurari ijara of Mouzah *Balwani*, uncultivated land belonging to the Moharajah's recently-settled zemindari of *Gedhour*. In this suit the Respondent claimed possession of Mouzah *Balwani*, on the ground that, according to the pattah, the mokurari ijara was only for the life of *Roghunath Singh*, and that consequently, on his death in 1875, the right of possession attached to the Moharajah's estate had devolved on his successor. The defence was, that the mokurari ijara was hereditary and transferable, and that, therefore, *Roghunath Singh's* heirs and assigns were entitled to the possession, whilst they continued to pay the fixed rent. The pattah is set forth in their Lordships' judgment, where all the facts material to this report are stated.

The suit was dismissed by the Subordinate Judge of *Bhagalpore*, who was of opinion that, by the pattah, there was a grant in perpetuity.

On appeal to the High Court that decision was reversed, and the Plaintiff was declared entitled to recover possession of the property in suit, with the mesne profits claimed.

The judgment of the Divisional Bench of the High Court (*Garth, C. J.*, and *Prinsep, J.*) is reported in the Indian Law Reports, 5 Calcutta Series, 550.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne* appeared for the Appellants.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This is an appeal from a decree of the High Court at *Calcutta*, whereby the decree of the Subordinate Judge of *Bhagalpore* was reversed, and the Respondent, the Plaintiff in the suit, was awarded possession of Mouzah *Balwani* with mesne profits thereof from the 22nd of August 1876, together with interest and costs.

Mouzah *Balwani* is situate within, and forms part of, Pargana *Gedhour*, the Res-

* I. L. R. 8 Cal. 664; Cowell's Ind. App. 33.

pondent's ancestral zemindari. On the 21st of February 1798, a pattah was granted by the Government to Rajah *Gopal Singh* and Rajah *Bharat Singh*, therein described as zemindars of Pargana *Gedhour*, in which it is stated that the annual consolidated jama of the said Pargana, inclusive of the ganjats, markets, bazars, all sayers and motahariffas, and also of rent-free lands held under sanads and without sanads, had, together with the fee of kanungoes, been fixed and assessed premanently at sicca Rs. 15,001 from 1205 Fasli. In the register of Pargana *Gedhour* for the year 1205 Fasli the gross proceeds of Mouzah *Balwani* are entered as Rs. 6-3-10, and the sudder jama as Rs. 4-1-5, and it is not disputed that at that time it was almost wholly in jungle and unprofitable. It appears from the thakbust map, which was prepared in 1846, that the entire area of the Mouzah is 7,500 bighas, of which 3,000 were then under cultivation.

On the 28th Kartick 1206 Fusli, corresponding with the 21st of November 1798. Rajah *Gopal Singh* granted to *Roghunath Singh*, the father of the Appellant *Ram Lall Singh*, a pattah in the terms following:—

"I have acquainted myself with the contents of this.

"The stipulation of pattah granted, on receipt of kubulyat, to *Roghunath Singh*, mokurari ijardar of Mouzah *Balwani*, appertaining to Pargana *Gedhour*, in the Sircar and province of *Behar*, on behalf of Rajah *Gopal Singh*, is to the effect and purport following:—

"Whereas the Mokurari ijara pattah of the said Mouzah is granted from 1206 F. S., at a consolidated jama specified below, inclusive of malikana, subject to no objection or excuses on the score of calamities of weather, together with fisheries and fruit trees; with the exception of abkari and toddy gunjes, bazars, hats, all sayer, mothurfa (taxes levied on professions), lakheraj lands, covered by sanadas and not covered by sanadas, rosum of rosumdars, daily allowances of *rozanadars* and *chandar* of chaudadars; the above-named person should, with ease of mind, make cultivation and improvement, pay the above amount year after year, crop season after crop season, instalment after instalment, as per kistbandi, in full, into the treasury of this Sircar (raj), raise no objection whatever on the score of drought, inundation, hailstorms, deaths and desertions, but himself bear the losses arising therefrom. In addition to the above jama, whatever profits may be derived from salutary improvement in cultivation by him shall belong to the mokuraridar, the Sircar having nothing to do with the same. In case of nonpayment of instalments agreeably to the kistbandi, month after month, the mutsuddis of the Sircar shall have authority to realize the arrears by sale of the goods and chattels of the above-named, to send a sazawal or attaching officer to the said village, and make and receive the collections. The expenses of entertaining sazawal, tehsildar, and other shall be borne by the above-named. He should keep the tenants of the said village satisfied and contented by his good treatment, and make collections from the tenants according to order of Government, agreeably to pattahs of nakdi and *bhaoli* lands to be granted to them, and never demand any sum in excess. He should not in any way commit oppression upon tenants, so that they may be able to stand to their engagements, and he should not oust them until the determination of their leases. He should grant receipts to the tenants upon payment of rent, instalment after instalment. He should not give a single span of land in the said village without asking permission, and without consent of the huzoor, nor resume any previously granted without the orders of the huzoor. Should the said lakheraj lands be hereafter resumed under orders of the huzoor, and the huzoor be pleased to make a settlement of the rent thereof with the ticca mokuraridars, then the above-named shall pay the rent thereof according to the settlement to be made by the huzoor. He should not suffer a single span of the land on the limits and bounderies to

pass and to be included in the boundary of others. Should it so happen, he should of his own accord inform the Sircar of it, have the matter settled with the aid of the Sircar, and maintain and preserve the boundaries and limits of the said Mouzah. He should not allow theives and padders to settle within the estate leased to him. God forbid! should anybody's property be robbed and plundered, he should trace out the thieves and robbers with the property, and produce them before the thanadar or the district authority. Should the thanadar apprehend the robbers and apply to him for aid, he shall fothwith afford assistance to him. He should bring without fail to the notice of the huzoor whatever property may be found belonging to dead persons, or that is deserted or lying buried under ground, without heirs to claim it. He should act in strict conformity with the orders already passed or to be hereafter passed by the huzoor for regulating settlement of rent with tenants and malgulzars of all classes, and should never raise any excuse or objection whatsoever. He should not demor or put forward any excuse in this, and should act up to the above.

"Rent for four years to be paid without any objection or excuse, Rs. 24.

				Rs.
For 1206	Fusli	...	...	6
„ 1207	„	...	...	6
„ 1208	„	...	...	6
„ 1208	„	...	...	6

"Uniform rent from 1210 Fusli to be paid year after year, crop season after crop season, without any objection or excuse, sicca Rs. 25 current in the province.

"One-half of which is Rs. 12 8.

"Dated 28th Kartick 1206 Fusli."

Roghunath Singh executed a corresponding kabuliat bearing the same date.

The other Appellants are the representatives of the Defendants in the suit, who derived their title from *Roghunath Singh* and denied the Plaintiff's title; and no question is raised in this appeal as to their derivative title, nor as to Rajah *Bharat Singh* not having joined in the pattah.

On the death of Rajah *Gopal Singh*, in or about October 1812, his son Rajah *Jeswant Singh* declined to receive the rent of Mouzah *Balwani*, alleging that his father had taken possession thereof at the end of the year 1219 Fusli under Reg. VII of 1799, and that a fresh pattah had been granted to *Roghunath Singh* for eleven years from 1220 Fusli, at the yearly rent of Rs. 51. Thereupon summary proceedings were taken by *Roghunath Singh* to compel the Rajah to receive his rent at the old rate, the result of which was that *Jeswant Singh* was referred to a regular suit if he desired to substantiate his allegation.

On the 13th of February 1821, Rajah *Nawab Singh*, the younger brother and successor of *Jeswant Singh*, who had died in the previous year, brought a suit in the Court of the Registrar of *Monghyr* against *Roghunath Singh* and his surety, to recover the rents then due for Mouzah *Balwani* under the alleged lease for eleven years. In his answer, *Roghunath Singh* asserted that he held under the pattah of 1798, and denied the eleven years' lease. And the District Judge, by a decree, made on the 9th of January 1826, on appeal from the decision of the Registrar, directed that *Roghunath Singh* should remain in possession in accordance with the pattah of 1798, and pay the rent therein reserved.

In 1869, the Respondent succeeded to the zemindari, and on the 24th of July 1875, *Roghunath Singh* died. This suit was brought on the 22nd of August 1876, and the only question in the appeal before their Lordships is whether the pattah is a lease for life or in perpetuity.

Their Lordships were referred by the learned counsel for the Respondent to several cases in the late Sudder Court, in which it was ruled that a lease at a fixed rent without more did not import perpetuity, and that to create a perpetual lease the addition of the words "from generation to generation," or other words importing perpetuity, were necessary.

On the other hand it was held by the High Court at *Calcutta*, in a case of ghatwali tenure, where the words "mokurari istemrari" were used, that the holding was perpetual—*Munorunjun Singh* v. *Leelanund Singh* (1) and Rajah *Leelanund Singh* v. *Thakoor Munorunjun Singh* (2). But this Committee, on an appeal from that decision, held, that these words might mean either permanent during the life of the person to whom the grant was made, or permanent as regards hereditary descents (3).

In the present case the word 'istemrari' is not used. The instrument is called "the mokurari ijara pattah," and their Lordships, in the case of the *Bengal Government* v. *Nawab Jafir Hossein Khan* (4) stated their opinion to be, that though 'mokurari' might import perpetuity, that was not the necessary meaning of the word.

The question then is, whether the intention of the parties is shown by the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, with sufficient certainty, to enable the Courts, in the absence of words importing perpetuity, to pronounce that the grant was perpetual? The Subordinate Judge held, that the pattah was intended to be hereditary, because it appeared that the Mouzah was covered with jungle when the mokurari was granted, and that it had since been brought under cultivation through the exertions and labour of the original mokurariдar and his representatives, and therefore it might, "consistently with the principles of equity, be presumed that the lessor and lessee must have thought at the time that the lease in question should be granted in perpetuity, because it is void of reason to suppose that the lessee should have taken the lease for his life, and brought it under cultivation at heavy expense and through great exertion." As to the subsequent conduct of the parties he said, that "if the representatives of *Gopal Singh* had considered the lease as one for life, they would have never adopted such steps as were incompatible with their position and dignity to cancel such life-interest as was thought by themselves to last only for a few days, and *Roghunath Singh* himself would not have described the mokurari as a permanent one." Their Lordships are unable to see the force of this observation; but it appears from it that the Subordinate Judge did not fail to consider every thing that he thought might show the intention of the parties. It is, therefore, to be remarked that he did not refer to any of the provisions in the pattah or of the words used to express them. Apparently he thought they did not show any intention that the pattah was to be perpetual.

The High Court agreed with the Subordinate Judge that the lease was granted with a view to the improvement of the Mouzah, but thought that this did not show it was intended to be hereditary, and referred to some of the provisions which they said seemed necessarily to imply that a substantial interest in the property remained in the Rajah, and were quite inconsistent with his having permanently parted with that interest. Their Lordships do not concur in all the views taken by the High Court of these provisions, but on the other hand they do not find in them sufficient to show an intention that the lease should be permanent. They are consistent with either intention.

A case in the High Court at *Calcutta*, printed in the Record, was referred to by the learned counsel for the Appellants, in which Mr. Justice *Mitter* said,—"We do not find it usual that tenants taking upon themselves the trouble and outlay for clearing and reclaiming jungle lands are contented with anything short of hereditary interest in them." But the judgments of the learned Judge and the lower Court are expressly stated to be founded upon the fair construction of the terms of the grants, and the surrounding circumstances attendant on the execution of

(1) 3 W. R., 84. (2) 5 W. R., 101.
(3) 13 B. L. R., 124.
(4) 5 Moore's I. A., 467, at p. 498; 1 P.C. J. 472.

them, as well as the conduct of the Plaintiff in connection with that and similar other tenures in his zemindari. The learned Judge only refers to what is usual as a circumstance which supports his veiw.

Their Lordships would repeat what was said by this Committee in *Dhunput Singh* v. *Gooman Singh* (1), where it was proved that the hereditary character of the pattah had been recognized by the successive zemindars. "If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of the lands."

As the Appellant is unable to point to any words in the pattah importing perpetuity, it appears to their Lordships, upon a consideration of the object of the pattah and its language and provisions, as well as the surrounding circumstances, that the intention to grant a perpetual lease does not sufficiently appear; and they are, therefore, unable to say that the decision of the High Court is not the right one. They will, therefore, humbly advise Her Majesty to dismiss the appeal, and the costs thereof will be paid by the Appellants.

Solicitor for the Appellants: Mr. *T. L. Wilson*.

Solicitors for the Respondent: Messrs. *Barrow* and *Rogers*.

(1) 11 Moore's I. A., 465; 2 P. C. J. 309.

12th January 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CHOORAMUN SINGH (Plaintiff,) ... } *Appellant,*

and

SHAIK MAHOMED ALI, BEBEE JEEAN (his Wife) and AHMED KABIR (his Son) (Defendants.) ... } *Respondents.**

And cross appeal by Ahmed Kabir.

Redemption—Priority—Mortgage—Execution of decrees on mortgages of same property.

Two successive mortgages of the same property were executed by A, the first in favour of B, the second in favour of C, her husband, the money lent in each case being advanced by C. two suits were instituted upon the mortgages and on the same day a decree was made in each suit. The decree upon the second mortgage was executed first and at the sale in execution the present Plaintiff became the purchaser. At the subsequent sale in execution of the other decree D the son of C became the nominal purchaser, the purchase money being advanced by his father.

In a suit by the Plaintiff against B, C and D, A not being a party, to set aside the sale to D, and to have it declared that he (the plaintiff) was entitled to redeem.

Held, that the Plaintiff was entitled to redeem: that the sale to D must be set aside, in as much as C was in fact the real purchaser after having caused the first sale to take place.

Held, further, that it was unnecessary in the decree to state whether the Plaintiff was entitled to redeem as second mortgagee or as purchaser.

Consolidated appeal and cross appeal from an order of the High Court (March 28, 1879), reversing an order and decree

* Cowell's Ind. App. p. 21; 11 Cal. Law. Rep. 1.

of the Subordinate Judge of *Bhagulpore* (June 1, 1877.)

Leith, Q. C., and *C. W. Arathoon*, for *Chooramun Singh*.

Doyne, for *Ahmed Kabir*.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD BLACKBURN:—

In this case there are two appeals, an appeal and a cross appeal. The circumstances under which the point upon which their Lordships have to express an opinion arises are these: A family, consisting of the father, the wife, and the son, are the three Defendants. They have been called Defendants one, two, and three; but the expressions, "father," "wife," and "son," which have been used as most convenient, may be used here. There have been two bonds made creating a charge upon the estate. The first in point of date was in the name of the wife. She, on the face of the bond, was the lender of the money. The next in point of date was a bond in the name of the husband, the first Defendant. There was a third, also to him; but that is not very material to consider. That being the state of things, these bonds were brought to judgment and execution. The first suit, instituted against the original grantor of the bonds, was that which was brought in the name of the wife upon the 7th of July, 1875. The second suit instituted was that which was brought in the name of the husband; and that was instituted on the 24th of July, 1875, very shortly afterwards. The two came to judgment upon the same day, the 6th of September, 1875; and two judgments were given. As far as there was any question of priority the prior suit was the suit on the prior bond. The execution of the bond that was in the name of the wife had priority over the other; but the execution which was first carried out to a sale, upon the 1st of May, 1876, was upon the bond which was second in point of date, which bond had been given in the name of the husband. It was upon that execution that a sale took place, and at that sale the Plaintiff became the purchaser. On the 23rd of October, 1876, some months afterwards, they proceeded to the sale under the execution which was first in point of date on the bond that had been in the name of the wife; and on that sale the son became the purchaser. The question here is between the Plaintiff, the purchaser under the first execution, though under the second bond, and the purchaser under the second sale. The Plaintiff in substance brought his action to set aside the sale to the son, and to have himself declared the purchaser; he expressly stating in his plaint that he claimed it as purchaser, and to be entitled to redeem. He did not say that the bond debt to the father and husband on the second bond was prior in date; all that he claimed was that, under the circumstances of the case, he should be entitled to redeem. The original grantor of the bonds was no party to the suit, and was not in any way brought before the Court. That being the state of things, and there being a great many phrases about fraud and other matters of that sort, the Plaintiff's contention was that in fact, though there were the three names used, and though it was said that the money was lent by the wife on the first bond, and that the son was the purchaser under the sale, yet in reality the father was the party all through; that it was the father who had lent the money in the name of his wife; and that it was the father who had purchased in the name of the son. That was really and truly the contention; and on that contention of fact both the Judge of the Inferior Court, and the Judges of the High Court upon appeal, have found in favour of the Plaintiff. They found that the husband or father was merely using the names of the others, because the three, the husband, the wife, and the son, were living joint in family together; and though some evidence was called to shew that the wife had a separate estate, and that she might have been the lender of the money, there was no evidence whatever attempted to be given to shew that the son had any separate estate, or that he purchased, or that the son, in fact, was anything else but what

the Plaintiff alleged him to be. Their Lordships think that, both the Inferior Court and the Supreme Court having decided that question of fact without any apparent difficulty or doubt, they should not further enter into the question as to whether it were so or not, especially as it rather appears as if, upon further entering into the question, there would be very strong grounds for their Lordships coming to the same conclusion as that at which the Courts below arrived. When once it is established, as their Lordships now take it to be, as a fact to start with, that the purchase under the second sale was by the Defendant, the husband or father, himself, who had himself caused the first sale to take place and then purchased under the second sale, it is quite clear that that could not stand against the purchaser under the first sale and it is clear that it must be set aside. The High Court in altering the Judgment of the Court below, say that being so, it must be set aside, and the Plaintiff is entitled to redeem. But then, unfortunately, the Court, strongly impressed with the fact that the original mortgagor might have been ill-used or might have some claim, went on to declare something favourable to the original mortgagor, who was not before the Court at all, and which might very possibly embarrass the Plaintiff in his title. Accordingly, he complains that when they made their decree they put in unnecessary matters. The decree as actually drawn up would be all right until it comes to "be and the same is hereby set aside." Then, as it stands at present, it goes on, "And it is declared that the Plaintiff, as the second mortgagee in respect of the said property, is entitled to redeem the first mortgage of the said Defendant, *Mahomed Ali*." It seems to their Lordships that it was quite unnecessary and irrelevant to say whether it was as a second mortgagee or whether it was as a purchaser. It may be that the original grantor of the bond might be induced to make out some case or other that there was *res judicata* in his favour on these words, and consequently their Lordships think that those words, "as the second mortgagee in respect of the said property," should be struck out. It then goes on to the end of the sentence, as to which there is no objection; and then it says, "And it is further declared that the said Plaintiff has not acquired the equity of redemption regarding the said property belonging to the said *Lala Rughoobuns Sahai*, alias *Domi Lal*." Now that is a question which, if raisable at all, as to which their Lordships express no opinion, can be raised only by *Lala Rughoobuns Sahai*, and has nothing to do with this suit. That declaration, therefore, ought also to be struck out. That is really the only alteration. In every other respect the decree of the High Court seems to be perfectly right. In those respects it should be altered.

The cross appeal is upon the question of fact which has already been mentioned. It is brought by the son, who also opposes the first appeal. The son's case upon the cross appeal is that he was not merely benamee for his father; but he produces no evidence, nor does he shew that any evidence ever was produced, to shew that he was not a mere name. Both the Courts below have thought that he was so; and consequently he fails on that. The result is that the decree stands, with the alteration mentioned, and the cross appeal is dismissed.

There remains only one other question, what is the effect on the costs of the litigation? The general rule is, that where an Appellant succeeds he gets the costs of the appeal, and that where a Respondent succeeds he gets the costs. The question now is, whether there is any ground for altering that general rule. The cross appeal, which is brought on the question of fact, and which the Appellant was fully entitled to oppose, has been decided against the cross Appellant and in favour of the original Plaintiff: and no reason whatever can be suggested why it should not be with costs. As to the first appeal the matter is not quite so clear. The alteration made is leaving out a portion of the decree of the Court below, which it seems was quite unnecessary, and

which their Lordships think the Plaintiff had a right to complain of and to get rid of as embarrassing to his title. The question is, whether or no there may be some plausible grounds for saying that that should not be done at the expense of the Respondent. The Respondent appeared and resisted it. Their Lordships are of opinion that there are no grounds for excepting this case from the operation of the general rule and that the general rule should prevail.

The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be altered in the manner already mentioned, and that the cross appeal should be dismissed, and that both should be with costs to the Plaintiff.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent *Ahmed Kabir: Hendersons & Co.*

13th January, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DOORGA PERSAD (Defendant), ... } *Appellant,*

and

KESHO PERSAD SINGH and Another (Plaintiffs). ... } *Respondents.**

Act XL. of 1858—Guardian and Ward—Minors—Relation of Manager of Joint Estate to Co-sharers under Age—Effect of Separation in Estate.

A co-sharer in ancestral family estate, under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the estate, is not, in consequence, the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate: nor is the eldest male member of the family, being of full age, guardian of such minors for the purpose of defending suits brought against them for money advanced in respect of the estate, unless he has obtained a certificate of administration under Act XL. of 1858, s. 3. That Act shows that he is not guardian of the minors; the care of whose persons and property (unless taken under the protection of the Court of Wards, by s. 2) are subject to the jurisdiction of the Civil Courts.

A family having become separate in estate with apportionment of a debt, once joint, among its several members, the sons of one of the latter, on their father's decease, are not liable for the whole debt for which he, at one time, was responsible jointly with the rest of the family, but only for his portion of the debt.

Appeal from a decree of the High Court of *Bengal* (7th August 1879), modifying the order of the Subordinate Judge of *Bhagulpore* (8th February 1877).

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* for the Appellant.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a judgment of the High Court in a suit brought by the Respondents, who are infants, in the name of their guardian, against the Appellant, in the Court of *Bhagulpore*. The object of the suit was to prevent the Appellant from executing a decree which he had obtained against the Respondents. The case arose in this way: The Plaintiffs and *Sheo Nundun* and *Hur Nundun*, were members of a joint Hindu family, and joint proprietors of an ancestral family estate situate in the district of *Bhagulpore* and subject to the Mitakshara law. The suit in which the decree was obtained was brought on a bond, dated the 21st of April, 1870, for Rs.16,348, executed by *Hur Nundun* on behalf of himself and as uncle and guardian of the present Plaintiffs. *Hur Nundun* was not at the time when he executed the bond the guardian of the present Plaintiffs, or at any time the manager of the estate; the elder

* Cowell's Ind. App. p. 27; I. L. R. 8 Cal., 656.

brother, *Sheo Nundun*, after the death of *Lalji*, the father of the present Plaintiffs, was the manager. The suit in which the decree about to be executed was obtained was brought against *Sheo Nundun* and the present Plaintiffs. The present Plaintiffs being minors, the suit was stated to be brought against *Sheo Nundun* as heir of *Hur Nundun*, and against the present Plaintiffs under the guardianship of *Sheo Nundun*, and *Mussamat Ghuneshyam Konwari*, mother and guardian of the minors. It turned out that the mother was not the guardian; that although a certificate of guardianship had been granted to the mother, that certificate had been set aside, and that the mother really was not the guardian. An *ex parte* decree was obtained against the Defendants; but the mother came in and asked to have the decree set aside upon the ground that no notice had been served upon her. The Court ordered that the case should go down for another trial, but upon the second trial the Judge who tried the case struck out the name of the mother and did not allow her to appear as the guardian of the infants. The suit was decreed against *Sheo Nundun Persad* and the Plaintiffs for the total amount of the bond, with interest. The Plaintiffs contend that that decree was not binding upon them, inasmuch as they were infants at the time, and were not represented by a guardian. On the other hand, it is contended that *Sheo Nundun Persad*, who was named as guardian in the suit, was their guardian, he being the co-proprietor and manager of the estate. It is clear that the manager of an estate although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond, as *Hur Nundun* did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL. of 1858, passed for making better provision for the care of the persons and properties of minors in *Bengal*, enacted, sect. 2, that, "except in the case of proprietors of estates paying revenue to Government, who have been or shall be taken under the protection of the Court of Wards,"—which does not apply to this case,—"the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court." That shews that *Sheo Nundun Persad*, although he was a co-proprietor and manager of the estate, was not the guardian of the infants, who, according to the Act, were subject to the jurisdiction of the Civil Court. Then sect. 3 enacts that "Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." No certificate was obtained by *Sheo Nundun Persad*; and although it is stated that he was the guardian of the infants, he clearly was not the legal guardian, and had no right to defend that suit in their name. The decree in the suit, therefore, was not binding upon the infants. The Plaintiff in that suit attempted to execute his decree against the property of the infants. The Judge of the First Court says:—"*Sheo Nundun Persad's* entire ancestral property, and what he had inherited after the death of *Hur Nundun* as his legal heir, were sold for satisfaction of several decrees." He had, therefore, no property upon which the decree could be executed; and therefore the Plaintiff in that suit attempted to execute the judgment which he had obtained against the minors by seizing their property in execution of the decree. The object of the suit under appeal was to declare that the Plaintiff in the former suit was not entitled to execute the decree against the infants' property and to restrain them from executing it against that property.

Then it was attempted to shew that, although the decree had been obtained against the infants without their having been represented by a guardian, still the suit was brought for a debt for which

they were liable. Whether that could justify the execution of the decree it is not necessary now to inquire, because the Courts below went into the question whether the bond was given for a debt for which the infants were liable, and held that it was not. After stating all the facts of the case, the Judge says, "It would appear that the debt was contracted by a person who was not manager of Plaintiffs' estate; that it was not for any unavoidable or pressing necessity, or for any benefit of the estate of the Plaintiffs; that the Defendant did not inquire into these matters; and that he obtained a decree in a case wherein the Plaintiffs were not properly represented. The decree cannot, therfore, be enforced against the person or property of the Plaintiffs."

The case was appealed to the High Court, and that Court came to the same conclusion with reference to the greater portion of the debt included in the bond, viz., that the money had not been borrowed on account of any necessity; that it had not been borrowed for any benefit to the estate; and that no inquiry had been made by the Plaintiff in the suit, at the time when he advanced the money, as to whether those advances were necessary for the protection of the estate or for the benefit of it; and the High Court therefore upheld the decision of the First Court to a certain extent. But then they found that a portion of the debt for which the bond was given was a debt which was due from *Lalji*, the father of the present Plaintiffs; and they held that although the present Plaintiffs might not be liable upon the decree, they were bound to pay the debt due from their father. The debt which was due from their father was a sum of about Rs.10,623. The High Court, however, did not award the whole of that sum against the Plaintiffs. After stating that the father was liable for the original debt to the extent of that amount, they say, "But the original debt due from the Plaintiffs' family has been apportioned amongst the several members, who have now separated. The Plaintiffs, whose share in the family property is one-sixth, are therefore liable to that extent for the amount which was due from their father and the other members of the family at the time of his death." It is objected that the decision of the High Court was wrong in that respect, and that if the Plaintiffs were liable for the debt of their father they were liable for the whole amount of the debt. But it appears to their Lordships that the Plaintiffs were not liable for the whole debt for which their father and the other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family, who had separated, and several bonds given for the several portions of the debt. It appears, therefore, to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt.

Under these circumstances their Lordships are of opinion that the High Court came to a correct decision; and they will humbly advise Her Majesty that the decree of the High Court be affirmed.

The Appellant must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents: *Watkins & Latty.*

2nd, 7th, 8th February, and 10th March, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH NILMONI SINGH (Defendant) ... } *Appellant*,

and

BAKRANATH SINGH (Plaintiff,) and THE SECRETARY OF STATE FOR INDIA (Defendant.) ... } *Respondents.**

Jaghir—Inclusion of Jaghir Lands in Area of Settled Zemindari—Ghatwali Tenure—Reg. XXIX. of 1814.

In the area of a zemindari were included at the Permanent Settlement the mauzahs which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zemindari assets on which the jama of the latter was fixed.

Held, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX. of 1814 (1), (the zemindari being *Pachete*, adjoining, and at one time included in, *Birbhum*,) the jaghir was analogous to such tenure as described in the preamble to the Regulation.

Held also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained as before, public services, and continued to be due to the Government. That the zemindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahommedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of the jaghir mehal upon the death of the holder, and alienation during his life.

It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar so approved, as assets by descent in the possession of the latter.

Rajah Lelanund Singh v. *The Government of Bengal* (1) followed.

Appeal from a decree of the High Court (9th June 1879), made under the 15th clause of the Letters Patent of the High Court, 1862, which reversed a decree (21st April 1877) of a Divisional Bench, and restored a decree (25th November 1875) of the Judge of the District of *West Burdwan*.

Mr. *R. V. Doyne* appeared for the Appellant.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* for the Respondents.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a decree of the High Court at *Calcutta*. The Appellant is Rajah *Nilmoni Singh*, the rajah and zemindar of *Pachete*. He was the Defendant in the suit out of which the appeal arises, and which was brought against him by the Respondent, *Bakranath Singh*, for confirmation of possession of a jaghir mehal, consisting of mouzah *Dhekia* and other mouzahs specified in the schedule to the plaint, by establishing his title to the same and reversing a summary order of the 10th of August, 1874.

It appears that the Appellant, having obtained a decree against *Bir Singh*, the father of the Respondent, for the sum of Rs. 72 odd, awarded to him for costs, had caused the mouzahs in question to be attached in execution of the decree, and that on the 11th of June, 1874, a proclamation was issued for the sale of the right, title, and interest of the judgment-debtor therein on the 10th of August in that year. In the proclamation the plaintiff was described erroneously as the

* Cowell's Ind. App. p. 104; I. L. R. 9 Cal. 187

(1) Relating to "the lands held by the class of persons denominated ghatwals in the district of *Birbhum*."

(1) 6 Moore's I. A., 101; 1 P. C. J. 505.

judgment-debtor, whereas he was only the heir at-law against whom the decree had been revived after the death of his father, *Bir Singh*.

On the day appointed for the sale, the Respondent presented a petition stating that he was not in possession of any property of the deceased judgment-debtor, and that the Government jaghir mehal could not be sold on account of the debts of the deceased; that since the death of his father, the late *Bir Singh*, he had been appointed jaghirdar, and was in possession of the mouzahs attached as *Ghatwal* appointed on the part of Government; that the decreeholder, without describing the mouzahs to be jaghir, and without stating the nature of his father's interest therein, had secretly done the acts relating to the execution of his decree; and that the Petitioner, having received information that the jaghir mehals would be sold on the 10th of August, had presented the petition stating his objections. Upon that petition the summary order referred to in the plaint was passed by the Moonsiff:—"This petition of claim has been filed to-day just before the sale; the claim can not be allowed at such a time. It is ordered that the petition of claim be rejected." The sale accordingly took place, and the present Appellant became the purchaser.

The suit out of which this appeal arises was originally instituted in the Court of the Moonsiff of *Chowki Gungajalghati*, in the district of *West Burdwan*, and the Secretary of State for *India* was made a *pro formâ* Defendant. The suit was subsequently removed into the Court of the Judge of *West Burdwan*.

The Government put in a written statement, in which they alleged that the lands were police-service lands, and that they had been held by jaghirdars in lieu of wages for the performance of police duties from before the permanent settlement, as had been formerly determined in the presence of the Rajah Defendant by the Deputy Commissioner of *Manbhoom*, in Case No. 105 of 1863, and the several Courts of Appeal; that the lands not being transferable, and the Rajah Defendant having caused them to be sold without any specification that they were service lands, and having himself purchased them at the sale, could acquire no title by the purchase.

The Rajah Defendant, in his written statement, contended, amongst other things, that the mouzahs were not a jaghir constituting Government property, but part of his permanently settled *mal* estates, and that they had been granted by his father to the Plaintiff's father as a service tenure.

Further, he made the following statement:—

"Third. 'Tarruf *Dhekia*,' in which these mouzahs are comprised, was divided into two (equal) parts, one of which is Plaintiff's ancestral property, and the other was enjoyed by *Dhurmo Das Chuckerbutty* as a service tenure in the manner described above. Subsequently, the half share of turruf *Dhekia*, held by the said *Dhurmo Das*, having been sold by auction for arrears of rent, his grandson, *Udoy Chuckerbutty*, brought a civil suit to set aside the sale, alleging the share to be Government jaghir property; but, in the judgment of the High Court, the suit was dismissed, on declaration that the disputed estates appertained to the *mal* land, and in rejection of the allegation as to the Government jaghir lien, as will appear from the decision. Therefore the Plaintiff's suit is evidently false."

The Plaintiff himself was examined, and stated that his profession was that of a ghatwali jaghirdari, that he was jaghirdar of ghat *Dhekia*, that he was appointed in 1273 by the Magistrate of *Bancoora*, and served the Government and carried out the orders issued by the thannah; that the jaghir lands did not remain in his possession unless he performed the service; that the person who is appointed in the place of a dismissed ghatwal holds possession of the land; that after his appointment the sub-inspector put him into possession: and that he never did any service for the Rajah, and did not receive any permission from the Rajah on his appointment.

Amongst other issues, the following were raised:—

2nd. Whether the status or condition

of the lands as Government service, *i.e.* ghatwali or jaghir, had been decided in a former suit by a Court of competent jurisdiction.

3rd. Whether the land in suit was held by the Plaintiff as service land, *i.e.* ghatwali or jaghir under Government, or as service land under the Defendant, Rajah *Nilmoni Singh*.

4th. Whether the land was land on account of which rent was paid to the Rajah by the Rajah's appointee, and whether this rendered the tenure a saleable one.

5th. Whether the Plaintiff's interest in the land was such an interest as admitted of being brought to sale in satisfaction of a decree due from the Plaintiff's predecessor to the Rajah.

The case was tried by the Officiating Judge of *West Burdwan*. On the trial the Government accepted the full burthen of the suit, and supported the Plaintiff. It still holds the same position, having been made a Respondent, and having appeared by Counsel before their Lordships and opposed the appeal.

The only substantial question to be decided is, whether the mouzahs in question, which had been held by the Plaintiff's father during his lifetime, and which at his death descended to the Plaintiff, as his heir, and to which the Plaintiff was appointed by Government, were liable to be seized in execution of a decree against the father as assets by descent in the hands of the Plaintiff, his son.

Neither the origin of the jaghir nor the precise time at which it was created is known, but it appears that as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by jaghirdars who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the jaghir was held. The villages included in the jaghir were permanently settled as part of the zemindari of *Pachete*, of which the Defendant Appellant is the zemindar. In fixing the Government revenue at the time of the decennial settlement, the lands included in the jaghir were assessed at the two-thirds then payable by the jaghirdar to the Government, and the one-third retained by the jaghirdar in lieu of services formed no part of the assets of the zemindary in respect of which the Government revenue was fixed.

Jaghirdars were successively appointed or approved by Government up to the time of *Gooroo Churn Mookerjee*, who was appointed in 1816 in the place of *Roop Sing*, who was dismissed for misconduct.

In February, 1817, *Gooroo Churn* petitioned the magistrate for leave to associate *Dhurmo Doss Chuckerbutty* with himself as headman; this was sanctioned, and they divided the jaghir and the duties. On the death of *Gooroo Churn*, his son applied to be installed as his successor, but *Roop Sing* having applied to be reinstated, his application was granted. In 1834 *Roop Sing* attempted to oust *Dhurmo Doss Chuckerbutty*, but this was not allowed, and the jaghir has ever since remained divided.

It was contended, on behalf of the Appellant, that, as the lands were included in his permanently settled zemindary, the services as well as the rent belonged to him; that the services were private services, and that he had a right to cause the lands to be sold in execution of his decree.

In support of his case, the decision of the High Court referred to in the Rajah's written statement was cited. It is set out in the appendix to the record, and was in a suit brought against the Rajah by *Udoy Chuckerbutty*, who had been appointed successor of *Dhurmo Doss Chuckerbutty*, to obtain possession of the mouzahs which constituted that portion of the jaghir which upon the division of it had been allotted to *Dhurmo Doss*, whose right and interest had been sold by the Rajah in execution of a decree for rent obtained by the Rajah against him. The Government was a party to that suit, and supported the claim of the Plaintiff therein. The first Court held that the Plaintiff had a right to recover possession of the jaghir lands, but that decision was

reversed on appeal by the High Court. In speaking of that case, the officiating Judge in the present case remarked :— "It is not relevant as evidence in this case, but is useful as a precedent or in argument. The Court found in that case that the services exacted by Government were encroachments on the Rajah's rights, and that the duties, *i.e.*, service, attached to the holding of the land, and not the holding of the land to the appointment to perform the duties. With respect to the lands in dispute, I have to remark that the Rajah's evidence in this case, as well as that of the Government, shews that the opposite is true in this case." Then, after referring to the evidence, he says :—"I therefore conclude that the performance of the services is the chief title to the jaghir lands, and that no man has any right to hold these lands except on a title arising out of a valid appointment to discharge the services ; to adapt the words of the High Court's judgment," or rather the converse of it, "to the facts of the case, 'the holding of the lands attaches to the duties, and not the performance of the duties to the holding of the land.'" On the third issue he found that the land in suit was land held by the Plaintiff, *Bakranath Singh*, as service under Government, *i. e.*, not ghatwali but jaghir land, and was not held as service under the Rajah. On the 4th issue he found that the land in suit was not land on account of which rent was paid to the Rajah by the Rajah's appointees ; and on the 5th that the Plaintiff's interest in the lands was not such as admitted of its being brought absolutely and without special conditions to sale in satisfaction of a decree due from the Plaintiff, or his predecessor, to the Rajah, but that the interest was saleable for the purpose aforesaid, provided it be sold subject to the performance of the jaghir services by the purchaser, after he has obtained appointment to the duties at the hands of the magistrate or his representative police authorities, and installation by the same authorities. He accordingly annulled the sale of the lands under the execution ; set aside the summary order of the Moonsiff, and declared that the Plaintiff had a right to continue in possession as the service tenant of the Government, and as the rent-paying tenant to the Plaintiff. The case was appealed to the High Court. The appeal was heard by a Division Bench, consisting of Mr. Justice *Markby* and Mr. Justice *Romesh Chunder Mitter*, who differed in opinion. The decree of the officiating Judge was reversed, and the suit dismissed, in accordance with the opinion of the senior Judge, Mr. Justice *Markby*, Mr. Justice *Romesh Chunder Mitter* dissenting, and holding that the decree ought to be affirmed.

Mr. Justice *Markby* agreed with the officiating Judge that the Rajah had not shewn that the Plaintiff held as his appointee ; he relied upon the fact that the lands were part of the revenue-paying lands of the Rajah, and also upon an admission of the Advocate-General, on behalf of the Government, that the tenure was an hereditary one, unless there was some special objection to the person entitled to succeed. He also relied very strongly upon the decision in *Udoy Chund Chuckerbutty's* case, already referred to, and added, "An appeal against this decision was lodged in the Privy Council by the Government, but it has not been prosecuted ; and it is admitted that there is no intention to prosecute it." He stated that he thought it was his plain duty to follow the former decision, unless he had the clearest possible reasons for differing from it ; and that so far from differing from the decision, having considered the evidence and heard the arguments, he entirely concurred in it. He then proceeded to discuss the question whether the fact that the holders of the lands were liable to perform some services of an exceedingly indefinite character, but something of a police kind, to Government took away from this tenure the character of alienability, which it would otherwise possess, and expressed his opinion that it did not.

An appeal was preferred under sec. 15 of the Letters Patent of the High Court from the decree of the Division Bench to

the High Court, and was heard by Mr. *Louis S. Jackson*, then officiating Chief Justice, Mr. Justice *Ainslie*, and Mr. Justice *Sewell White*, when the decree of the Divison Bench was reversed, and the decree of the first Court affirmed by a majority, consisting of the acting Chief Justice and Mr. Justice *Sewell White*, against the opinion of Mr. Justice *Ainslie*. Their Lordships concur generally in the view taken by Mr. Justice *Romesh Chunder Mitter* and the acting Chief Justice, and are of opinion that the decree now under appeal ought to be affirmed. The Judgment of Mr Justice *White* was founded merely upon the form of the Proclamation; he concurred with the first Court in holding that as the Proclamation did not describe the lands as held under a service tenure, the sale to the Rajah, under the execution, passed no title to the property, and he abstained from expressing an opinion upon the question as to which Mr. Justice *Markby* and Mr. Justice *Romesh Chunder Mitter* differed, *viz.*, whether the interest of the Plaintiff's deceased father in the lands was such that when they came into the possession of the Plaintiff they were assets of the father, and as such liable to be attached and sold for his debts.

According to the report of *Lalla Kunji*, tehsildar of *Pachete*, made on the 18th of July 1799, it appears that there were in *Chakla Pachete*, in addition to the digwars, three other classes of guards, whom he describes as jaghirdars, ghatwals, and chaukidars. He says of the first, they hold their mouzahs in jaghir, and whenever the digwars require assistance in arresting thieves or rioters, the jaghirdars assist them with their men. Of the second, that is the ghatwals, he says the second were posted at the ghats, 36 in number. In 23 of these the ghatwals were subordinate to the digwars, and were paid by them out of their jaghirs; 13 are occupied by the Rajah's own immediate servants paid by him.

It is clear that the jaghirdar in question was not one of the ghatwals referred to in the report as being subordinate to and paid by the digwars out of their jaghirs, for they were paid by the one third of the malgoozari, which they were allowed to retain as a compensation for their services.

Mr. Justice *Romesh Chuder Mitter* held that the tenure in question was analogous to a ghatwali tenure, Mr. Justice *Ainslie* treated it as one of the ghatwalis to the south of *Birbhoom*. Their Lordships entertain no doubt that whether it was a ghatwali or not the tenure was analogous to a ghatwali tenure of the nature described in the preamble to Reg. XXIX. of 1814; and the Acting Chief Justice appears to have entertained the same view, by referring to Mr. *Harrington's* Analysis of the Regulations, vol. iii., 509, where, after mentioning Reg. XXIX. of 1814, he goes on to say, tenures of this description were mentioned generally in a note to the 2nd volume of this Analysis, as held at a low rent by ghatwals or guards of passess.

The preamble of Reg. XXIX. of 1814 is as follows:—"Whereas the lands held by the class of persons denominated ghatwals, in the district of *Birbhoom*, from a peculiar tenure to which the provisions of the existing regulations are not expressly applicable, and wheras every ground exists to believe that according to the former usages and constitution of the country this class of persons is entitled to hold their lands generation after generation in perpetuity, subject nevertheless to a fixed and established rent to the zeminder of *Birbhoom*, and to the performance of certain duties for the maintenance of the public peace and support of the police." *Pachete* was formerly one of the pergunnahs and mehals of zillah *Birbhoom*, but by Reg. XVIII. of 1805 was separated from the jurisdiction of the magistrate of that zillah, and placed under the jurisdiction of a distinct officer to be denominated Magistrate of the Jungle Mehals (see sects. 2 and 3 of that Regulation). Their Lordships consider that the jaghir in question, although not falling within the Regulation, was a tenure of the nature of those described in the preamble. In the case of *Rajah Nilmoney Singh* v. *The Government and Others* (1), it having

(1) 6 Suth. W. R, 121.

been found by the Lower Courts that the lands were held upon a ghatwali tenure, the High Court upon special appeal held that they were not resumable by the zemindar, upon the gronnd that the tenure had been forfeited on account of the tenant's refusal to perform them. The Chief Justice remarked, "If the Government received only two thirds of the annual value of the lands as rent or revenue, and allowed the tenant to retain one third on account of services, the services must have been public and not private. The Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the zemindar."

That case was affirmed by Her Majesty in Council on appeal (1).

The permanent settlement of the lands did not alter the nature of the jaghir or of the tenure upon which the lands were held, nor could it convert the services which were public into private services under the zemindar. The zemindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was assessed, and not to the services in respect of which the one third of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government.

In the very luminous judgment pronounced by Lord *Kingsdown* in the case of *Rajah Lelanund Singh* v. *The Government of Bengal* (2), the origin and nature of the ghatwali tenures of *Birbhoom*, and the effect of the Permanent Settlement thereon, were fully explained, and it was there held that lands held under that tenure were not resumable by Government under Bengal Regulation I of 1793, s. 8, cl. 4, as lands included in the allowances to zemindars for thana or police establishments. In that case it was no doubt held, that it was the province of the Rajah of *Khurruckpore* to appoint and dismiss the ghatwals (p. 127), but it was also stated that ghatwals held their lands in virtue of sanads granted by the zemindar, except some who had received theirs from the former authorities (p. 123), it was also found that in that case the lands had been granted by the ancestors of the Rajah (p. 112), and it was said that the Regulation did not apply to lands which the zemindars had permitted other persons to hold free from rent, or at a reduced rent, or (referring to the cases in which the sanads had not been granted by the zemindar) to lands which such persons had a right to hold free from rent or at a reduced rent.

The above cases show that the jaghir of which the lands in question formed one, and which were expressly found, in the case above referred to between the Appellant and *Bir Singh* the father of the Plaintiff, and also in the present case, to be analogous to the ghatwali holdings of *Birbhoom*, are not resumable by the zemindar or by the Government.

In the case of *Hurlal Singh* v. *Jorawan Singh* (3), cited with approbation by Lord *Kingsdown* in 6 Moore, 125, it was held that the ghatwali tenures were not divisible on the death of a ghatwal, but descended to the eldest son.

In delivering the judgment in that case *Mr. F. C. Smith* said, "Regulation XXIX. of 1814 says nothing on the subject, the point must, therefore be decided with reference to the usual practice, and the meaning and intent of the term ghatwal. Now the ghatwali lands are granted for particular purposes, especially of police, and to divide them into small portions amongst the heirs of the ghatwals would be to defeat the very ends for which the grants were made. I have submitted the question to the Judges of the Court, and all, with one exception, are of opinion that a mehal of this nature cannot be divided, but should, on the death of an incumbent, devolve entirely on the eldest son, or the next ghatwal.

It was stated by Mr. *D. C. Smith*, one of the Judges consulted that the chakeran lands of *Bengal* always go to the eldest

(1) 18 Suth. W. R., P. C., 321.
(2) 6 Moore's Ind. Ap., 101. 1 P. C. J. 505.
(3) 6 Sel. Rep. 170. New Ed. 204.

son or to the nearest member of the family most capable of performing the duties. See also *Sutherland's* Weekly Rep., special Vol., p. 39.

These jaghirs, although hereditary, are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.

The same principle which precludes a division of a tenure upon death must also apply to a division by alienation. Their Lordships are of opinion that the tenure is not transferable or saleable in execution of a decree, and that it is not one of the tenures referred to by the *Bengal* Reg XXXVII of 1793, s. 15.

In the case of *Rajah Lelanund Singh* v. *Doorgobutty and Others* (1) it was held that the ghatwalis of *Kurrcukpore* were not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees except with the consent of the zemindar and his approval of the purchaser as a substitute for the outgoing ghatwal. In the case, however, as in the case already cited from 6 Moore, Ind. Appeals, the ghatwal had been appointed by the Rajah, and the Rajah, and not the Government as in the present case, had a right to appoint and dismiss the ghatwal.

In the case of *Binode Ram Sein* v. *The Deputy Commissioner of the Santhal Pergunnahs* (2) it was held, and in their Lordships opinion rightly, that the surplus proceeds of a *Birbhoom* ghatwal tenure, which had passed by descent from ancestor to heir, were not liable, in the hands of the heir, for the debts of the ancestor; and reference was made to a decision of Mr. *Hawkins* in the Sudder Court (3), in which it was held that the lands were not alienable.

In a case also between the Appellant and the Respodent *Bakranath Singh*, it was held that the holder of the tenure in question in this suit is not responsible for the debts of a former jaghirdar. The Deputy Commissioner in his judgment said, "As jaghirdar, the Defendant has what his father had, a life interest, in the jaghirer. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain, as he may at any moment be dismissed from Government employ," rather he should have said may never be sanctioned as jaghirdar. He proceeds, "The jaghir is strictly a life tenure as far as the jaghirdar is personally concerned, he holds the land in lieu of pay, and a new jaghirdar receiving the jaghir would not be bound by any arrangement made by his predecessor. A newly elected jaghirdar would not be held responsible for debts incurred by the late jaghirdar as such, as were he to be so he would lose the benefit of his pay. Thus, a jaghirdar cannot be held responsible for arrears of rent due by a former jaghirdar." That decision was upheld on appeal to the High Court, 10 Suth. W. R. 255. The case is expressly in point, for if a successor is not liable for rent of the jaghir due from his predecessor it follows *a fortiori* that he cannot be liable for an ordinary debt. It is unnecessary to decide whether the decision is *res judicata* or not.

The above decisions are more than sufficient to outweigh the decision in the case of *Udoy Churn Chuckerbutty* to which Mr. Justice *Markby* attached so much weight, even if that case had not been decided upon a different finding of facts. Their Lordships, however, are of opinion that the learned Judges took an erroneous view in that case of the effect of the permanent settlement.

With reference to the argument upon which Mr. Justice *Ainslie* so strongly relied as to the difficulty under which the zemindar would lie for the recovery of his rent if the lands could not be sold in execution of a decree for rent against his tenant, it is sufficient to say that the zemindar at the time of the permanent settlement must have been aware of the nature of the tenure upon which the lands were held, and that this case does not involve the necessity of deciding what remedy the zemindar has for recovering his

(1) Suth. W. R. (1864) p 249.
(2) 7 Suth. W. R 178.
(3) 2 Sevestre's Reports, 423.

rent, whether by sequestration of the estate or by application to the Government to remove the tenant, or by what other mode. Their Lordships therefore abstain from expressing any opinion which would be a mere *obiter dictum* upon the point.

It is quite clear that if the jaghir were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character, as remarked by the Court in Suth W. R. (1864), p. 250.

For the above reasons, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, from which the appeal has been preferred, and to dismiss the appeal.

The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Lambert, Petch, & Shakespear.*

9th February, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On appeal from the High Court of Judicature for the North-Western Provinces at Allahabad.

HIRA LALL (Plaintiff,) *Appellant,*

and

GANESH PERSHAD and others (Defendants.) } *Respondents.**

Proof of Document—Secondary evidence.

The proprietary right in a talooka was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserved part. Afterwards assignments on both sides took place, and the Plaintiff, claiming through the vendor, sued the Defendants, who derived title from the vendee, to enforce this liability. The Plaintiff alleged, but did not produce, an *ikrar-nama* admitting this agreement between the original parties to the sale. The only proof adduced was a judgment in a suit in which this agreement had been held established. The Plaintiff's case failed, as it has not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession.

In the suit in which that judgment was given, the *ikrar-nama* not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal, inspection of the document having been offered to, and declined by the Appellate Court, secondary evidence was admitted.

On this appeal, the error was pointed out of allowing the Plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document.

Appeal from a decree of the High Court of the North-Western Provinces (10th July, 1879), affirming a decree of the Subordinate Judge of *Allahabad* (26th February, 1879), dismissing the appellant's suit with costs.

Mr. *J. Graham*, Q. C., and Mr. *W. A Raikes*, appeared for the Appellant.

Mr. *J. F. Leith* Q. C., and Mr. *H. Cowell*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRET COLLIER:—

This appeal comes before their Lordships under somewhat peculiar circumstances. The case of the Plaintiff, who is the Appellant, is in substance this: that in October, 1830, three persons, named *Sheo Ghulam Singh*, *Beni Singh*, and *Mardan Singh*, sold a talooka to a person of the name of *Ghulm Mahommad*, reserving to themselves a certain portion of that talooka, which is differently described as 1845 bigahs, and 1,400 bigahs,—in fact, various figures are given describing it,—subject to this condition, that they were to pay no rent for this portion reserved, nor the Government revenue, but that the Government revenue was to be paid by

* I. L. R. 4 all. a 406; 9 Cowell's Ind. App. 64.

the vendee. They say that by the conditions of the deed of sale, subsequently confirmed by an ikrarnamah of April, 1831, this was expressly agreed and stipulated on the part of the vendee. The Plaintiff is a purchaser of a part of the reserved portion, deriving title from the original vendors. The Defendant is a person to whom one *Dulham Begum* (who was the widow of a person named *Ghulam Ahmad*, for whom it is alleged that the original vendee purchased benamee), sold it—it does not appear when.

The Plaintiff seeks to establish that the agreement between the original vendor and vendee is binding upon the present Defendants, and that they are bound to indemnify him, the Plaintiff, for the payment of the Government revenue in respect of the reserved property, or such portion of the reserved property as he possesses.

The Plaintiff does not put in the original deed,—that is said to have been in the possession of the original Defendants,—and he does not give, nor did he ever give, any satisfactory evidence of its contents. He does not put in the ikrarnamah, on which he principally relies as setting forth the agreement which has been referred to, and he gives no reason whatever for not producing it. He does not state whether or not it is in his possession; whether he has made any search for it; whether it is lost; nor does he attempt to give any secondary evidence of it, but he relies entirely upon a judgment which was obtained in the year 1853 by the original vendors together with another person against *Dulham Begum*, who has been before spoken of; and he contends that this judgment, without any other evidence whatever, proves his case.

This judgment turns chiefly upon the construction of the ikrarnamah. Their Lordships cannot help observing, in passing, on the extraordinary course which appears to have been pursued by the Court of the Sudder Dewani Adawlat in that suit. In the Court of first instance, the Plaintiff, although he admitted that he had the ikrarnamah in his possession, did not produce it, alleging that it had been in the possession of the Defendants, and that they might have tempered with it, or had tempered with it But as he did not produce it, the Judge (it appears to their Lordships quite properly) held that secondary evidence of it could not be admitted, and dismissed the suit. When the case came on appeal to the Sudder Court at *Agra*, it seems that the Plaintiff did then produce this document, and offer it for the inspection of the Court. The Court refused to look at it, but admitted secondary evidence of its contents. It appears to their Lordships that the Sudder Court was wrong in that course of proceeding. If the Plaintiff had the original and did not produce it in the Court below, his case was not proved, because it rested almost entirely on the ikrarnamah, there being no evidence of the contents of the deed of sale; but to accept secondary evidence of the document which was in the Plaintiff's custody, without looking at the original, seems to their Lordships to be an extraordinary course. But, be this as it may, the Plaintiff is right in contending that this was a suit between the same parties in estate, relating in a great degree to the same subject matter, and in relying upon it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was "for a declaration of right and proprietary possession, exempt from the payment of the rateable rent (by prohibiting the Defendant from demanding the rateable revenue)." And the point decided in the Sudder Court is thus stated:—"The Court, for the above reasons, reverse the decision of the Principal Sudder Ameen, and decree in favour of the Appellants for possession of the land, exempt from the payment of revenue and wasilat to the amount claimed by them."

It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps

be assumed to have had in contemplation when they entered into the agreement, or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Further, it does not appear whether the effect of the judgment is simply to render the Defendant, *Mussumat Dulham Begum*, liable to indemnify the Plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land and to bind all persons who may be hereafter in possession of it under any title whatever. *Mussumat Dulham Begum*, it may be observed, as far as their Lordships are able to understand the evidence on this part of the case, which is as obscure as the rest of it, would seem to be, as has been said, the widow of *Ghulam Ahmad*, the real purchaser, and thus to have been a representative of the purchaser bound by his undertakings, but it would by no means follow that the land is to be bound in whosoever hands it may hereafter come by purchase or otherwise. The judgment, thus ambiguous, is applied almost wholly to the construction of the ikrarnamah, which the Court did not look at. If this ikrarnamah had been produced in the present suit, their Lordships might, by applying the judgment to the terms of it, have been able to determine the effect of that judgment; but, in the absence of the ikrarnamah, which the Plaintiff has not produced, and the non-production of which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the Plaintiff seeks to have it construed. The more obvious interpretation of it seems to be the more limited one.

Under these circumstances, their Lordships are of opinion that the Plaintiff has failed to prove his case; and they will therefore humbly advise Her Majesty that the judgment appealed against be affirmed, and that the appeal be dismissed with costs.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitors for Respondents: *W. & A. Ranken Ford.*

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18th February, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

JAIMUNGUL KOERI and others. ... ... } *Appellants,*

and

MOKHUN KOERI and another ... ... } *Respondents.**

Privy Council—Appeal—Concurrent findings on facts.

Where the lower Courts have proceeded upon the evidence and have come to the same conclusion, it is an established rule of practice that the Judicial Committee of the Privy Council will not on appeal enter into the question whether the decision of the Courts below are or are not correct on matters of fact.

Appeal from a decree of a Divisional Bench of the High Court at Calcutta.

The judgment of the Judicial Committee was as follows:—

In this case their Lordships are of opinion that there is no question of law involved. The question is one of pure fact, whether the Plaintiff was upon the evidence shown to be the person she asserted herself to be. There has prevailed, for a great many years, a rule of practice that their Lordships do not enter into the question of whether the decisions of the Courts below are, or are not, correct on matters of fact, provided the two Courts below have proceeded upon the evidence and have come to the same conclusion. Here, the allegation of the Plaintiff being a question of fact, and there being no question of law involved, that would be a sufficient ground for dismissing the appeal and advising Her Majesty to affirm the decision of the Court below, unless it can be shown that

* 10 Cal. Law Rep. p. 611.

the two Courts below did not in substance really and truly proceed upon the same ground. Probably if the Appellant could do that, the case might be said not to come within the rule. Both the Courts below agree that the Plaintiff is not made out to be the right person. The Judge of the first Court proceeds further to say, having shaped the issue in that way, that another claimant was the right one. Of course, if he had said, "Finding that claimant A was the right one, I find that claimant B cannot be the right one," that would be a most irresistible conclusion, if he had gone on that ground. But their Lordships think, upon looking at the judgment that the Judge below has gone into the evidence and shown ample and strong reason for saying that the Plaintiff is not the right claimant, and when he afterwards says that the other one is the right one, he may have drawn an improper conclusion from the reasoning on which he arrived at the conclusion that the Plaintiff was not the right person. The Superior Court proceed on the very same ground of fact, as their Lordships understand it, and say they agree with the Judge below in thinking the present Plaintiff is not the right person, but do not draw the conclusion that the other claimant was the right one. So that the two Courts below have not only come to the same decision, but have come to the same decision substantially on the same grounds. Therefore the case seems to fall within the rule of practice which has been alluded to; and their Lordships think, without further going into the merits, that they ought humbly to advise Her Majesty to dismiss this appeal with costs

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15th March, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Madras.

RAJAH VENKATA KANAKAMMA ROW and others (Plaintiffs) } *Appellants,*

and

RAJAH RAJAGOPALA APPA ROW BAHADUR, THE COURT OF WARDS, and others (Defendants) } *Respondents.*

Mesne profits—Account from date of exclusion of co-sharers.

A question of the partibility of a zemindary disputed in a family of six brothers having been decided in favor of three who sued for their shares;—*Held* that the decree should be that the Plaintiffs were entitled to recover one-half of the zemindary, together with the mesne profits thereon, from the time of their dispossession; provided that they should recover such mesne profits for a period of no more than three years next before the commencement of the suit, subject to an allowance to the Defendants for all, or any portion of, such mesne profits which the latter might prove to have been duly applied for the benefit of the joint family.

Appeal from a decree of the High Court of *Madras* (31st January 1879) modifying a decree of the District Judge of *Kistna* (26th March 1877).

Mr. *Cowie*, Q. C., and Mr. *Grady* appeared for the Appellants.

Mr. *Mayne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

It is not now disputed that the zemindary of *Nuzvid* is not impartible, nor is it disputed that the Plaintiffs Appellants are entitled to recover one-half of that zemindary. The only question which is

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* 9 Cowell's Ind. App. p. 125; I. L. R. 5 M. 236.

now raised is whether they are entitled to recover mesne profits of that moiety.

Their Lordships are of opinion that they ought to make the same decree now which the first Court ought to have given when the first Defendant, Rajah *Narayya Appa Row*, was living. The minors, the sons of Rajah *Narayya*, appealed to the High Court. If the first Court had given the proper decree, it would have been that the Plaintiffs should recover from the first Defendant, Rajah *Narayya* one-half of the zemindary of *Nuzvid*, together with the mesne profits of that one-half of the estate.

Their Lordships therefore think that the decree of the High Court must be altered; and they will humbly advise Her Majesty that the decree of the High Court be reversed so far as it dismisses the claim of the Plaintiffs Appellants to the one-half share of the zemindary of *Nuzvid*, and that, in lieu thereof, it be declared that they are entitled to recover from the representatives of the first Defendant out of his assets one-half of the said zemindary, with mesne profits thereof from the time of the Appellants' dispossession, provided that they shall not recover such mesne profits for a period exceeding three years next before the commencement of the suit, subject to an allowance to the Respondents for all or any portion of such mesne profits which Respondents may prove to have been duly applied for the benefit of the joint family; and that the case be remitted to the High Court to give effect to these directions. The Respondents must pay the costs of the appeal out of the estate of the first Defendant.

Solicitors for Appellants: *Frank Richardson & Sadler.*

Solicitor for the *India Office*: *H. Treasure.*

17th and 21st March 1882.

PRESENT.

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North-Western Provinces.

THE MUSSOORIE BANK, LIMITED. (Defendant), } *Appellant,*

and

ALBERT CHARLES RAYNOR (Plaintiff), ... } *Respondent.**

Construction of will—Precatory words—Misstatement in petition for special leave to appeal—costs.

In order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain.

A testator made a gift in these words: "I give to my dearly beloved wife the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her" *Held*, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created.

An order in Council granting leave to appeal is liable at any time to be rescinded with costs, on its appearing that the petition upon which the order has been granted contains any misstatement, or any concealment of facts which ought to have been disclosed. Even if there has been no intention to mislead, a material misstatement having been made, the order is still liable to be rescinded; and, to maintain it, to clear the case of bad faith is not sufficient. *Mahun Lall Sookul* v. *Beebee Doss* (1) referred to and followed.

Of three grounds on which special leave to appeal had been obtained, two had been correctly stated, but with the third was connected error in the petition, to which objection was taken at the hearing On its appearing that there had been no intention to mislead, the appeal was heard and allowed; but in regard to the above, without costs. *Ram Sabuk Bose* v. *Monmohini Dossee* (2) referred to.

Appeal from a decree of the High Court, (22nd August, 1878,) reversing

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* 9 Cowell's Ind. App. p. 70; I. L. R. 4 All. p. 500.

(1) 8 Moo. I. A., 195. 1 P C. J. 792.

(2) 2 I. R, 2 Ind. Ap. 82. 3 P. C. J. 442.

a decree of the Subordinate Judge of *Dehra Doon*, (10th May, 1878).

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellant.

Mr. *R. V. Doyne*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE :—

In this case their Lordships have felt almost more difficulty in deciding whether or not to hear the appeal than they have in disposing of it when heard, and in order to shew the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

In the month of December, 1860, Captain *William Raynor* died, having left a will which he expressed in the following terms :—" I give to my dearly beloved wife, *Mary Anne Raynor*, the whole of my property, both real and personal, including my Government promissory notes, *Delhi Bank* shares, my house at *Ferozepore*, No. 50, together with all my plate and plated ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." And he appointed his son *William Joseph Raynor*, and his wife *Mary Anne Raynor*, to be his executors. Mrs. *Raynor* alone proved the will.

During her lifetime no question arose as to the true nature of Captain *Raynor's* will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th of September, 1868, Mrs. *Raynor* made her will by which she gave to her son, *Albert Charles Raynor*, who is the Respondent in this appeal, " 24 of my shares in the *Delhi and London Bank*," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter *Adelaide Louisa Swetenham*, partly to her son *William Joseph Raynor*, and partly to her stepdaughter *Elizabeth Goolding*. To the latter was given the house No. 50 at *Ferozepore*, which the testatrix describes as " my house and estate." Mrs. *Raynor* died some time in 1875, and her will was proved, it does not appear by whom.

In the year 1876 the *Mussoorie Bank*, who are the Appellants, instituted two suits against Mrs. *Raynor's* executors for the purpose of recovering the sum of Rs. 25,000 advanced by the bank to Mrs. *Raynor* upon the security of thirty *Delhi Bank* shares and of certain houses. One of these suits, No 41 of 1876, was instituted in the Small Cause Court at *Dehra Doon*, and on the 5th of December, 1876, the bank obtained a decree under which the thirty shares were attached. The other suit, No. 115 of 1876, instituted before the Subordinate Judge of *Dehra Doon*, was to enforce the bank's mortgage upon the houses. On the 12th of December, 1876, the bank obtained a money decree for the sum of Rs.32,121. 2*a*. 4*p*., but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. *Raynor's* interest in the mortgaged properties was uncertain.

Against this decision the bank appealed to the High Court, who gave judgment on the 2nd of January, 1878. They held that Mrs. *Raynor* certainly had some interest in the properties she mortgaged to the bank ; that she might have had an absolute interest in them, especially as she had acquired them after Captain *Raynor's* death ; and that the bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the interest which Mrs. *Raynor* had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain *Raynor's* estate was properly represented.

While the appeal in the mortgage suit was pending, *Albert Raynor* brought the present suit for the purpose of setting

aside the order of the 5th of December, 1876, so far as regards the twenty-four bank shares bequeathed to him by his mother, and of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain *Raynor* may be assumed for the present purpose; and the case made by the Respondent is that Mrs. *Raynor* took only a life-interest in her husband's property. On the 10th of May, 1878, the Subordinate Judge dismissed the suit, holding that Mrs. *Raynor* took an absolute interest under her husband's will. *Albert Raynor* appealed, and on the 22nd of August, 1878, the High Court gave him a decree on the ground that Mrs. *Raynor* held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The bank then applied to the High Court for leave to appeal against this decree. On the 13th of January, 1879, the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs. 6,000, and that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

The bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an Order in Council dated the 14th of August, 1879. And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the petitioners, the Respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the petitioners' mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the bank shares were attached; that *Albert Raynor* objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the bank shares were attached under the decree in the mortgage suit, or that *Albert Raynor's* objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs. 6,000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The order was made more than two years ago, and the Respondents were fully aware of it; yet no objection was made until all the costs of the appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the Respondent to move as early as possible to rescind the order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the Law Reports, Indian Appeals, p. 82. It is there said, "In their Lordships' opinion an objection of this kind ought to be taken by the Respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred: and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from *India*, and when all the costs attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. The Appellant's solicitor has filed an affidavit shewing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of

the 5th of December under which the shares were attached; and it appears that he did not leave the judgment of the 12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there had been a material misstatement, it is not sufficient to clear the case of bad faith. To use the words of Lord *Kingsdown* (1), "Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if this Court has been induced to make an order which, if the facts were fully before it, it would not, or might not have been induced to make." There Lordships therefore proceed to ask whether the order in question was one which they might not have been induced to make if the facts had been fully and truly stated.

The grounds which the petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs. 6,000, are three in number: first, that the decision virtually affects the right of the bank to have a mortgage security for the whole sum of Rs. 32,000 odd; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. *Raynor*; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit, or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked; and they are not at all affected by the error in the petition. It is clear that if Mrs. *Raynor* took only a life interest in her husband's property, the bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not, unless they successfully contest against the *Raynor* family, as to each such portion, the question whether or no it belonged to Captain *Raynor* or was purchased with his assets. The third ground is affected by the misstatements in the petition; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired; secondly, because the decree obtained by *Albert Raynor* appears to be more directly mixed up with the mortgage suit, when it is stated that the shares were attached under that very decree, than when they are shewn to be attached under a decree, in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the bank to frame a new suit, properly constituted for the purpose of contesting all questions with the *Raynor* family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shewn in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was *prima facie* strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the appeal.

(1) Mohun Lal Sookul v. Beebee Doss and others, 8 Moore, Ind. Ap. Cal. 195.

Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shews that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice *James* in the case of *Lambe* v. *Eames*, (1), and by Sir *George Jessel* in the case of *In re Hutchinson and Tenant* (2). They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to shew that he could not possibly have intended his words of confidence, hope, or whatever they may be, his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the appeal to the High Court with costs; but with respect to the costs of the present appeal they think it right to follow the

(1) Law Rep. 10 Eq. 267; 6 Ch. 597.
(2) 8 Ch. D. 540.

case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Sabuk Bose* v. *Monomohini Dossee*; and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the Appellants, they will give no costs of the appeal. The money which has been deposited will be returned to the Appellants.

Solicitors for Appellants: *W. Carpenter & Sons.*

Solicitors for Respondent: *Watkins & Lattey.*

17th March 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CHUNDI CHURN SASHMUL (Defendant), ... } *Appellant,*

and

DOORGA PERSAD MIRDHA (Plaintiff). ... } *Respondent.**

Appeal—Evidence.

An application having been made by the Defendant before the hearing in a suit to recover possession of certain land for the record in a former suit to be sent for, on the alleged ground that it related to an exchange of the same land, an order was made that the matter should be decided when the case was tried and the record sent for if necessary.

At the hearing no further application was made for the record in the other suit, and the case was decided upon oral evidence in favour of the Plaintiff.

Held, affirming the decree of the High Court, that under the circumstances the Defendant was not entitled to appeal on the ground that the record in the earlier suit had not been produced.

Appeal from a decree of a division Bench of the High Court at *Calcutta*, dated the 2nd July, 1878.

Doyne, for the Appellant.

C. W. Arrathoon, for the Respondent.

The facts of the case are set forth in the judgment of their Lordships of the Judicial Committee, which was as follows:—

This suit is brought for two parcels of land containing 290 bighas, which are part of a parcel of 632 bighas. The case of the Plaintiff is that *Mohont Hoigrib Doss* had obtained a money decree against *Adjoodhianath Manna* and *Sumbhoonath Manna*, who held the 632 bighas, on the 14th January, 1863, and had purchased the lands at the sale in execution thereof and sold them to the Plaintiff. The Defendant claims under a lease from the Government, which was made in December, 1871, for three years, and was renewed in April 1874. The facts with regard to the 632 bighas, of which the 290 in suit form a part, are these.

The Government before 1816, was in possession of a large tract of land along the sea shore in the district of *Midnapur* which was used for the purpose of making salt. In 1816 it granted a perpetual lease of 632 bighas of that land to *Komolakant Manna*, the predecessor in title of the above mentioned *Mannas*. The Government after that made an embankment by which the land thus leased was left outside next to the sea, and subsequently, in 1858, there was an arrangement between the Government and the *Mannas* by which, as the lands which were often outside the embankment became less valuable for the purpose of cultivation but were valuable for the purpose of making salt, the *Mannas* were to have an equal portion of land inside the embankment, and the Government was to take the lands which were outside. Before this, a local rajah who (and whose successor) was called in the suit "the rajah," had brought a suit against the Government to recover the lands which lay outside the embankment and had obtained a decree for all the lands which were outside. In consequence of this, the Government directed the *Mannas* to pay to the rajah the rent which had been reserved on the lease, and thus after the arrangement the *Mannas* were in

* 12 Cal. Law Rep. 81.

possession of 632 bighas lying inside the embankment, but paying rent to the rajah as for the land which was outside. The *Mannas* having allowed their rent to fall in arrear, the rajah brought a suit on the 19th July, 1862, to recover arrears of rent from 1855 to 1862. The suit was brought for recovery of the rent, as in consequence of death, it would seem that the rajah's estate had become divided. A decree was obtained by him on the 27th March 1863, and an order for attachment and sale was made on the 18th August, 1863. It was contended by the Defendant that on the 27th February 1865, at the sale under that attachment, the whole of the 632 bighas outside the embankment was sold and the Government was ousted from it, and that in consequence thereof the Government ejected the *Mannas* from the land which had been taken in exchange and which was inside, the suit having been brought about and the loss of the outside land by the failure of the *Mannas* to pay the rent. Therefore, the material question in the case was whether the outside land originally leased had been sold at the auction on the 27th February 1865, and an issue was framed raising that question It was the third issue, "Whether or not, in consequence of *Sumbhoonath* and another's" (that is the name used for the *Mannas*) "non-payment of the rent of their mal lands, the zemindar obtained a decree and effect the sale of those lands: and the Government, again taking the disputed lands from *Sumbhoonath* and another"—being the lands inside the embankment,—"were in possession from 1865 and settled the lands with the Defendant referring to the lease in 1871. An application appears to have been made shortly before the suit came on for hearing on the part of the Defendant in which he asked to have the documents relating to the exchange of the land in dispute, which had been filed in another suit numbered 141 referred to in this suit, and the order made on that occasion was that the matter would be decided when the case was tried, and the record would be sent for if necessary. The other suit was one which had been brought by the Defendant against a brother of the Plaintiff, and related to another portion of the 632 bighas. It was said that the exhibits in that suit would furnish evidence of what was sold on the 27th February, 1865. The case came on to be heard before the Subordinate Judge, and it would appear that no further application was made to him to send for the record of the other suit, and no attempt was made to use the documents which had been filed in that suit, but the case was decided upon the oral evidence, and the Judge held that it had not been satisfactorily proved that the lands outside the embankment had been sold. He said:—"It is true that some of the Plaintiff's witnesses have said in their depositions that the lands on the outside were sold, but it has not been satisfactorily proved and upon the said oral evidence it cannot be said that the lands on the outside were sold on account of debts due to the zemindar, nor supposing they were sold, does it appear for what reason they were sold. The Defendant should have given evidence to prove this matter by means of papers of the Court." If there had been, as there might, an oversight on the part of the pleaders for the Defendant in not calling the attention of the Judge to the order which had been made on the 3rd November, 1876 or in not tendering in evidence which might have been done the sale proceedings of the 27th February, 1865, he might have applied to the Judge for a review; and if he had refused it, the case might have been carried to the Court of appeal and an application made that the evidence should be received. There was an appeal but in the grounds of appeal instead of this matter being brought to the attention of the Court, the ground taken was that, "It has been proved by the evidence of the witnesses of both the parties that the lands given in exchange by *Adjoodhianath* were sold by auction, and that the sale certificate has been filed." The sale certificate which was filed did not prove it. The Plaintiff does not object

on the ground that the said lands were not sold. "The issue had been raised on that very point." Consequently the Lower Court should have held that the lands given in exchange had been sold by auction. "The Court in a judgment on the appeal stated that it had been urged before it "that the Subordinate Judge ought to have sent for the record of the suit No. 141 above mentioned which contains copies of all papers relating to the auction sale of February, 1865, in order that it might be seen that the lands formerly held by *Adjoodhianath*" that is the *Mannas* outside the embankment were really sold, and therefore, although the objection was not taken in the grounds of the appeal, it seems to have been allowed to be taken at the hearing. The judgment was :—"This Court is of opinion that it ought not to interfere with the judgment appealed against. It was the duty of the Defendant Appellant who raised a special plea to adduce proof in support of it, but he failed to do so and he neither pressed for the production of the manuscript of suit No. 141 in the Lower Court, nor urged any objection on this subject in his petition of appeal. To allow the objection now would be to take the Plaintiff Respondent by surprise. Oral evidence is of course inadmissable to prove the particulars of the auction sale of February 1865." No objection in point of law could be taken to that judgment considering what had been done. It was a perfectly correct judgment. There was a special appeal from it, and the High Court, as might have been anticipated, held that there was no ground for the special appeal. The Defendant the Appellant now comes on appeal to Her Majesty in Council and says :—"This Appellant now humbly submits there is error in the judgments of the Lower Appellate Court and of the High Court, and that they should be reversed or raised for (among others) the following reasons : because the fact on the supposed non-proof of which the Judge put his judgment was not in issue or disputed ; and if supposed to be disputed, this Appellant should have been allowed to prove it by the production from the other record of the papers therein relating to the said sale in execution." Their Lordships have already mentioned that it was put in issue and was disputed and the present Appellant had no right to assume that he need not prove it. He had sufficient warning that it was necessary for him to do so, and as to his saying that he should have been allowed to prove it by the production from the other record of the papers, the answer is that it had produced those papers, or if he had taken the other steps to have them in the first Court and had tendered them in evidence he might, if they had been rejected, have made it a ground of appeal. But he did not do what was proper and necessary and their Lordships are of opinion that he was shown no ground for reversing the decisions of the Lower Courts. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the Appellant will pay the costs.

Appeal dismissed.

Solicitors for Appellant, Messrs. *Miller, Smith* and *Bell.*

Solicitors for Respondent. Mr. *T. L. Wilson.*

22nd and 23rd March, and 10th May, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Madras.

MUTTAYAN CHETTI, (Plaintiff) ... } *Appellant,*

and

SANGILI VIRA PANDIA CHINNATAMBIAR, (Defendant) ... } *Respondent.**

Mitakshara law—Assets by descent—Charge on inheritance in the possession of the son for the father's debt—Estate inherited from maternal grandfather.

The estate which a son takes by heritage from his father constitutes assets by descent for the payment of his father's debt, not incurred for any immoral or vicious purpose. This estate may be attached and sold in execution of a decree upon such a debt; and that it is an impartible zemindary does not alter the case.

The principle that the ancestral property, in which the son acquires an interest by birth, is liable for the father's debt, unless within the above exception, holds good by the Mitakshara law as administered in *Madras* as well as in *Bombay* and *Bengal*. *Girdharee Lall* v. *Kantoo Lall*, 14 B. L R, 187; s. c., L. R. 1 I. A., 321, referred to and followed.

Part of an impartible zemindary inherited from a maternal grandfather was hypothecated by the zemindar as security for a debt, not within the above exception. *Held*, that all the right, title, and interest which had come to his son by heritage from the indebted zemindar, as well in the hypothecated part as in the rest of the zemindary, were liable, so far as they had not been administered in payment of the father's debt, to be attached and sold in execution of a decree against the father, based on his admission of the debt.

A zemindary inherited from a maternal grandfather is not "self acquired" property.

Quære: Whether the zemindar, having inherited from his maternal grandfather, was under the same restriction, in reference to alienation as against the son, as he would have been if the property had come through the male line.

* 9 Cowell's Ind. Ap. p. 128; I. L. R. 6 Mad. 1.

Appeal from a decree of the High Court of *Madras* (3rd March 1880) which varied a decree of the District Court of *Tinnevelly* (29th November 1876).

Mr. *J. F. Leith*, *Q. C.*, and Mr. *J. D. Mayne* appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The Appellant in this appeal was the Plaintiff, and the Respondent the Defendant, in a suit, No. 13 of 1875, brought in the District Court of *Tinnevelly*. It appears that in an original suit, No. 8 of 1867, brought in the District Court of *Tinnevelly*, the late zemindar of *Sivagiri*, the father of the Defendant, put in a *razinama*, dated the 20th of January, 1868, whereby he acknowledged the sum of Rs. 55,872. 12*a*. to be due, and agreed that the amount should be paid on the 31st of December, 1872, together with interest at one per cent. per mensem, by the instalments mentioned therein, and he thereby hypothecated certain lands therein specified, being part of the zemindary, as a security for the payment of the principal and interest.

On the 4th September, 1868, a decree was passed in accordance with the *razinama*. The money not having been paid according to the stipulations the property hypothecated was attached, in the lifetime of the late zemindar, for instalments Nos. 1 to 9 mentioned in the *razinama*. The Plaintiff Appellant, in his plaint in the suit now under appeal, alleged that the whole zemindary was on several occasions attached by other creditors, and that subsequently to the death of the late zemindar, the Plaintiff again attached the hypothecated property on the 23rd of February, 1874, for the tenth instalment of the *razinama* decree; that the District Court advertised that all the property in the zemindary would be sold in a lot on account of all the creditors; that the Plaintiff presented a petition to the said District Court praying for a separate sale of the hypothecated property mentioned in the decree, or for the sale of the whole

zemindary subject to his hypothecation lien; that the Court dismissed the said petition, on the 23rd of February, 1874, without any inquiry; that subsequently, on the 25th of February, 1874, the right, title, and interest of the late zemindar in the whole of the zemindary was sold by auction and purchased by *Subramania Mudahar* of *Tinnevelly*; that the Defendant presented a petition praying for the release of the attachment made by the Plaintiff for the last instalment, and that on the said petition an order was passed by the Court, on the 18th of April, 1874, to the effect that the attachment ceased with the sale of the zemindary. The Plaintiff further alleged that by reason of the objections and measures taken by the Defendant the judgment debt remained, unpaid, and that the Plaintiff had thereby sustained heavy loss.

The Plaintiff in his plaint also alleged that the zemindary was the self-acquired property of the late zemindar, and, moreover, that the debt acknowledged by the *razinama* was a just one, having been contracted by the late zemindar for the upkeep of the zemindary for the liquidation of debts contracted on the liability of the whole zemindary before the birth of the Defendant, and for the benefit of the zemindar's family, and he prayed that a decree might be passed cancelling the orders passed on the 23rd of February, and the 18th of April, 1874, and upholding the attachment made by Plaintiff in Suit No. 8 aforesaid, confirming his right to recover the judgment debt of the said Suit No. 8, on the liability of the said *Sivagiri* zemindary, and adjudging the sum of Rs. 88,062. 12*a*., as per particulars given to be recovered by the Plaintiff, with subsequent interest and costs from the Defendant and on the liability of the property hypothecated to the Plaintiff under the decree in the Suit No. 8, and specified in the schedule thereto, and of all other property that had devolved on him from the late zemindar, and granting such other relief as the Court might deem proper and necessary in the case.

In the particulars given, the sum of Rs.88,062. 12*a*. was made up of Rs.79,574 13*a*. for principal, and Rs.8,487. 9*a*. for interest due under the decree according to the terms of the *razinama*.

The property mentioned in the schedule to the plaint was the same as that hypothecated by the *razinama*.

No written statement was put in by the Defendant.

The case was tried by the District Judge of *Tinnevelly*, who, on the first hearing, was of opinion that, as the only basis of the plaint was the *razinama* decree in original Suit 8 of 1867, on which the Plaintiff had already taken out execution and received partial satisfaction, the plaint must be thrown out.

On appeal, however, the High Court reversed that judgment, stating that "the questions raised in this suit are the liability of the property in the hands of the present zemindar to satisfy the decree obtained by the Plaintiff against the late zemindar . . . . The question of liability and of its extent being one of very considerable difficulty . . . . a suit regularly conducted was the most appropriate method of determining it." The case was, therefore, remitted for trial on its merits, and was heard again.

On the hearing, after the remand, the contention of the Defendant was, first, that the suit was not legally maintainable; secondly, that the nature of the debt was not proved to be one legally or morally binding upon the present zemindar; and, thirdly, that the late zemindar had no power for this debt to encumber any portion of his estate beyond his own tenure of the property.

The counsel for the Plaintiff sought to shew—

1st. That the debt which is the basis of the suit was one incurred before the birth of the present zemindar;

2ndly. That it was a *bonâ fide* debt for absolute necessity and not for mere extravagance;

3rdly. That the entire zemindary was the self-acquired property of the late zemindar, and could be alienated at will by him, and therfore that the hypothecation created by him was enforceable.

It was stated by the District Judge in his judgment that though no issues were settled, the above points were virtually the issues to which both parties at the final hearing addressed themselves.

The following is the history of the zemindary as found by the District Judge, and concurred in by the High Court :—

"The zemindary of *Sivagiri* was an ancient polliem of the district of *Tinnevelly*, and was converted into a zemindary with a permanent peishcush by the Government in the year 1803, and the then poligar was granted a sannad-i-milkeut istimrar, and was created first zemindar of *Sivagiri*. He died on the 21st of February, 1819, and, having left no male heir, his only daughter was created second zemindar of *Sivagiri* (Exhibits E 1 and E 2). She died in 1835, and was succeeded by her elder son *Varaguna Rama Pandia Chinnatambiar* (Exhibit E 7), the third zemindar. During his time a new sannad was applied for, in consequence of the original being lost, and was issued to him in October, 1841. Exhibits E 11 to E 19 give the history of the sannad, a copy of which is Exhibit 18. It is in the usual form and concludes with the words 'you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment herein named the zemindary of *Sivagiri*.' This man died the 27th of September, 1873, and has been succeeded by his son *Sangili Vira Pandia Chinnatambiar*, the fourth zemindar, the Defendant" (Respondent).

In the course of his judgment the District Judge, speaking of suit No. 8 of 1867, made the following observations. He said :—

"This suit ended in a *razinama* by which the zemindar pledged himself to pay Rs. 55,872 with interest, and he pledged a certain tank in the village of *Sivagiri* as security for the amount.

"It was while that suit was in course of execution that the whole zemindary was attached by this Court, and for three years taken into this Court's management for the liquidation of the judgment creditors, and these Plaintiffs received their shares in the rateable distribution from the produce of the whole estate, viz.,—

"Rs. 7,452. 13. 7 on the 1st of July, 1872,
" " 4,230. 5. 9 on the 21st of November, 1872,
"Rs. 7,609. 10. 10 on the 29th of January, 1874, and
"Rs. 3,777. 3. 5 on the 14th of April, 1874,
in all, Rs. 23,070. 1. 7 in payment of this *razinama* A 2.

"This suit is brought for the balance of that *razinama* debt, and the whole arguments of the Plaintiff's counsel have been directed to shew that the claim is due from the whole estate. Even under the *razinama* A 1, which is the basis of this suit, the lien could have only been against the land therein named, viz., certain lands under one tank, but, under the provisions of sect. 271, the Plaintiff as mortgagee, if he wanted to hold his lien upon this one tank, cannot, of course, partake in the rateable distribution, and he would have to reimburse, with its accumulated interest, the Rs. 23,070 which he has received before he could seek to exercise his right as a mortgagee under sect. 271. This principle has been maintained by this Court with regard to other of the judgment creditors who shared in this distribution, and who, like this Plaintiff, having benefited by the attachment of the whole estate and shared in its produce, although he had merely an interest in a fractional portion thereof like this Plaintiff, also sought to get an interest which, if he ever possessed it, he had waived by taking part in the distribution."

He then, after examining the evidence as to the receipts, the peishcush, and the expenses of the estate, proceeded as follows :—

"I find, therefore, upon the record as it is now before the Court, that this Plaintiff cannot succeed in the present suit,—

"1st. Because this claim is based upon a debt which is covered by a decree now in course of execution.

This ground has, however, been reversed by the High Court in their judgment.

"2ndly. I find that he cannot succeed as, having taken his share of the rateable distribution of the proceeds of the whole estate, he is legally prevented by the proviso of sect. 271 from still enforcing his share over his mortgage property. This opinion, before stated, has been confirmed by the High Court in appeal in Civil Miscellaneous Regular Appeal, No. 260 of 1876.

"Further, though the Plaintiff's counsel urged the Plaintiff's lien over the whole estate, there is no foundation whatever upon the record for such a plea.

"He sought to establish that the debt was one of family necessity. I find it not to be so established. . . .

"The Plaintiff says that this debt is one which the son is legally bound to pay for his father. I find that it is not so. . . .

"The Plaintiff has urged that the zemindary was the self-acquired property of *Varaguna Rama Pandia Chinnatambiar*, the Defendant's father, and that he could therefore alienate the whole of it at will without reference to his sons, and that it is to be governed strictly by Hindu law. I find that it was not his self-acquired property, although it came to him through his mother, but as ruled in his case by the Sudder Court in Appeal Suit, No. 90 of 1851, wherein the whole of the Plaintiff's present argument was advanced and disposed of. I therefore find that the late zemindar had power only to alienate his life interest for his debts, and not to alienate his son's reversion, and moreover that, in point of fact, he did not attempt so to alienate it for the present Plaintiff's debt.

"For all these reasons I find that the estate now in the hands of the zemindar (Defendant) is not liable to satisfy the Plaintiff's judgment claim against the late zemindar, and further that the Plaintiff is, as above stated, legally debarred from bringing this suit.

"I therefore dismiss this suit."

Their Lordships think it right here to remark that there was great irregularity in the District Judge's proceeding to a final hearing without issues having been settled, so that the parties might before the trial know to what points they would have to address themselves, and also in his having, in direct opposition to the judgment of the High Court, held in his judgment, after the remand, that the Plaintiff was legally debarred, as above stated, from bringing his suit.

The Plaintiff appealed from the decree of the District Judge to the High Court upon the following grounds, viz. :—

1. That the Plaintiff was entitled to a decree for the amount claimed.
2. That the zemindary of *Sivagiri* came to the Defendant burdened with the debts of his father, whethere incurred before or after Defedant's birth, and having assets of his father in his possession he was liable for his father's debts to the extent of the assets.
3. That the District Judge was in error in holding that the Hindu law did not apply.
4. That the zemindary was the self-acquired property of the Defendant's father, or at all events it was not property in which the Defendant acquired any rights by reason of his birth. The Defendant merely succeeded to the estate left on his father's death and had no independent rights in the property.
5. That if the zemindary should be held to be ancestral property in which the Defendant acquired rights by his birth, the Plaintiff was still entitled to charge his debt upon the zemindary, the Plaintiff's debt having been incurred in circumstances which would make it a binding charged upon the estate.
6. That the Plaintiff was not precluded, as the Judge held, from maintaining the suit.

Upon that appeal the High Court, after

adverting to the nature of the suit and to the contentions of the Plaintiff and Defendant respectively, proceeded as follows :—

"The lower Court originally held that the suit was not maintainable, but on appeal it was decided by this Court that the question of the liability of the estate in the hands of the Defendant to satisfy the decree against his father was one of considerable difficulty, and that a regular suit was the most appropriate mode of determining it. The history of this zemindary, in so far as it is necessary for the purpose of this suit, is sufficiently set forth in paragraph 8 of the judgment appealed against. In his revised judgment the District Judge considers that, as the second zemindar was a woman, the third zemindar would, under the ordinary Hindu law, have held the zemindary as his self-acquired property, but that he had not held it as such by reason of its being an impartible estate, held exceptionally under a sannad (Exhibit E 18) from the Government. The first question for decision is whether the Hindu law is not applicable in this case. It seems to us that the sannad only rendered permanent the peishcush or assessment, which had varied from time to time, changed the character of the estate, which had till then been that of a southern polliem, into that of ordinary Hindu property, and recognised the ordinary Hindu law as governing the succession to it in order to determine the right of interference exercised by Government on the ground of tenure, without prejudice to impartibility or any other special incident which had already attached to the estate by the custom of the family, originating no doubt in the ancient tenure. We are therefore of opinion that the zemindary, though impartible by custom, is doubtless governed by the Hindu law, subject, as observed by the Privy Council in 9 Moore, I. A., 685, to such modifications as flow from its impartibility.

"This view brings under our consideration the next question, whether, when the zemindary vested in the Defendant's father, it became his self-acquired property. In support of this contention it is urged for the Appellant, 1st, that the second zemindar was a woman ; 2ndly, that she took an obstructed heritage ; and, 3rdly, that when it passed into her son's possession it ceased to be ancestral property in which his son (Defendant) had ownership by birth.

"For the reasons mentioned in our judgment in the *Shivagunga* case, we think that though a daughter, inheriting to her father, succeeds as heir, and does not take, as is at times stated, merely a life estate, still she takes but a qualified heritage, which, under the text of Catyayana, passes upon her death to her father's in preference to her own heirs. Her succession being thus rather a case of obstruction or interposition than of regular inheritance for herself and her own heirs, and the estate taken by her being, moreover, as observed in that judgment, not her stridhanan, her intervention as heir does not, in our opinion, alter what was originally ancestral into self-acquired property. According to all the texts of the Hindu law of which we are aware, the absence of paternal or maternal property or of any aid from it is a necessary ingredient in the conception of self-acquired property, and the author of the Mitakshara defines it as property which has been acquired by the coparcener himself without any detriment to the goods of the father or mother (Mitakshara, chap. 1, sect. 4, c. 2). We think it is clearly erroneous to say that property inherited through a mother is self-acquired as between her son and grandson.

"It may not be ancestral in the sense in which property inherited by the father from the *paternal* grandfather is liable to partition under the Mitakshara law at the instance of the son, but it is not self-acquired property on that ground for purposes other than those of partition."

The High Court then, after considering the question whether the restriction as to the alienation of ancestral property, imposed upon a father by the Mitakshara law in regard to property descended from his father or paternal grandfather extended to property descended from his maternal

grandfather, expressed their opinion that the contention of the Plaintiff that the zemindary should be treated for the purpose of alienation as if it had been self-acquired by the father was not well founded.

They then proceeded thus:—

"The next question for decision is whether the debt sought to be recovered, which though in part improvident, is neither immoral nor vicious, and which 'is further partly secured by a mortgage,' is binding on the present zemindar, 'the Defendant in the suit and the Respondent in the appeal, who was not born when it was contracted.'"

In determining that question they say:—

"As to the contention that a debt may not have been incurred for family necessity and may still be binding on the son, provided that it is neither immoral nor vicious, we do not clearly see our way to uphold it. According to the text of *Yagnyavalcya*, the alienation of immoveable property without the son's consent is forbidden, and, according to the text of *Vrihaspati*, the father can only alienate it where there is a family necessity. It is then argued that, as observed by the Judicial Committee in *Girdharee Lall* v. *Kantoo Lall* (1), the son is under a pious obligation to pay the father's debt where such debt is neither immoral nor vicious.

"There can be no doubt that it is the pious duty of a son to pay his father's debt. *Narada* says that fathers desire male offspring for their own sake reflecting 'this son will redeem me from every debt due to superior and inferior beings.' Therefore, a son begotten by him should relinquish his own property and assiduously redeem his father from debt lest he fall into a region of torment. If a devout man or one who maintained a sacrificial fire die a debtor, all the merit of his devout austerities or of his perpetual fire shall belong to his creditors. (1 Dig. Higg. Edition 202.)

"If this text is to be enforced as imposing a legal duty, we shall have to compel sons who have inherited no property from their father, either ancestral or self-acquired, to pay the father's debt, for the text directs him to pay it from his own property. Again, this pious obligation is confined to the son and grandson, and does not extend to the great grandson, and in the case of the grandson it is limited to the payment of the principal. *Vrihaspati* says, 'the sons must pay the debt of their father, when proved, as if it were their own, or with interest; the son's son must pay the debt of his grandfather, but without interest, and his son or the great grandson shall not be compelled to discharge it unless he be heir and have assets.'

"*Vishnu* observes likewise, 'If he who contracted the debt should die, or become a religious anchoret, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will' (1 Dig. Higg. Edition 185.)

"Thus, the obligation does not depend on the relation as partakers of the same funeral cake, and is not co-extensive with the capacity to inherit.

"Consequently, if there are sons, grandsons, and great grandsons, the obligation must be held to be valid to the full extent of the debt as against the first, to the extent of the principal as against the second, and not at all as against the third. Again, the allusion in the text of *Narada* to 'every debt due to superior and inferior beings' would seem to favour the view that pious duties were enforced by Hindu tribunals in the exercise of their jurisdiction over matters which are purely spiritual. When the learned Advocate-General is pressed with these difficulties in recognising the son's pious obligation as a legal obligation, he argues that though it is not to be enforced as such where no assets are inherited, still the son's ownership in ancestral property is subordinate to that of the father, and the father's predominant interest gives it the character of a legal duty with respect to the alienation of ancestral property. But in chapter 1,

(1) Law. Rep. 1 Ind. Ap. 321 : 3 P. C. I. 380.

sect. VI., 9, the author of the Mitakshara says, 'The grandson has a right of prohibition, if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no rights of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce because he is dependent.' In p. 10 he states, 'Consequently the difference is this: Although he has a right by birth in his father's and grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it).' According to *Vignyanesvara Yoga*, the author of the Mitakshara, the son's ownership in ancestral estate is not subordinate but co-ordinate, and it is dependent only where the father himself acquires the property. The course of decisions in this Presidency from the date of the case cited in Mad. High Court Rep. 47, has been to recognize equal ownership by the son in the grandfather's estate, though it may not be divided between the father and the son, and to uphold the father's alienation only to the extent of his share, though in *Bengal* it has been held that an undivided share is not alienable. This difference in the view of the two High Courts is referred to by the Judicial Committee in *Deen Dyal Lal* v. *Jugdeep Narainsingh* (1).

"In these circumstances, it is not easy to conclude that the Lords of the Judicial Committee intended to vary the course of decisions in this Presidency. In the decision in *Kantoo Lall's* case there are remarks which shew that the father and son were probably acting in collusion with one another against the purchaser, and that the suit was not brought till ten years after the sale was completed.

"The pious duty of a son may be a foundation for presuming the son's concurrence in the alienation by the father when, with the knowledge of it, the son elects to remain in coparcenery with the father, and takes no step to set aside the alienation, until the father becomes destitute after a considerable lapse of time, when, acting in collusion with him, he tries to upset a transaction in which he may be fairly presumed to have acquiesced in the special circumstances of the case. Furthermore, the property now in litigation is an impartible zemindary, in which the son cannot protect his interest as in ordinary property by electing a division. The only question then which remains to be considered is, whether the debt now in dispute was incurred under family necessity. The Court below holds that there was no necessity for contracting the debt. Though we concur in the view that, under more prudent management, the arrears of peishcush in 1853 might have been avoided, still we think that, in so far as the plaint debt was applied to the liquidation of debts which had been contracted for paying the assessment, it is binding on the Defendant. The original lender advanced the money to relieve the zemindary from attachment for arrears of peishcush, and he was bound only to look to the immediate pressure on the estate and the benefit accruing to it from the advance. There is nothing in the evidence to lead us to the conclusion that this was a fraudulent contrivance between the late zemindar and the creditor to enable him to apply the income from the estate to purposes other than those warranted by the law. To this extent we think that the debt is binding upon the zemindary.

"We shall, therefore, vary the judgment appealed against so as to adjudge to the Plaintiff Rs.26,049. 4*a*. 7*p*., with proportionate costs on the security of the zemindary, and otherwise confirm it."

Upon that judgment the following decree was recorded:—

"This Court, in variance of the revised decree of the Lower Court, doth order and decree that the Plaintiff do recover the sum of Rs.26,049. 4*a*. 7*p*., with

(1) Law Rep. 4 Ind. Ap. 247; 3 P. C. J. 730.

proportionate costs in this Court and in the lower Court on the amount now adjudged; and this Court doth further order and decree that the zemindary of *Sivagiri* shall be liable for the satisfaction of the decree amount and costs now adjudged, and that the decree be in other respects confirmed."

From that decree a petition of review was presented by the Plaintiff.

The Defendant also applied for a review of judgment upon the ground that the calculation upon which the decree was based was erroneous, and that the amount decreed was too high.

The reviews were admitted and in delivering his judgment the learned Judge, Mr. Justice *Muttusami Aiyar*, before whom the reviews were heard, declared that he still adhered to the principles on which the decision passed by the late Chief Justice Sir *Walter Morgan* and himself rested, and confined himself in dealing with the petitions of review to errors of calculation and to those matters which shewed that the decree had not been drawn up in conformity with the judgment, and then after dealing with the errors in calculation and declaring that the error should be corrected in the mode indicated, proceeded,—

"It is also from oversight that the decree contains no provision for payment of interest at 6 per cent. per annum until date of payment. The Respondent has no objection to the amount decreed being held to be a special charge on the village mentioned in the plaint. The decree should be amended in this respect also."

The first decree of the High Court was accordingly amended, and the final decree passed on review was entered as follow:—

"This Court, in variance of the revised decree of the lower Court, doth order and decree that the Defendant do pay to the Plaintiff the sum of Rs. 35,132. 11*a*. 9*p*., with further interest at 6 per cent. per annum upon Rs. 32,284 from the 22nd of February, 1875, the date of the plaint, till date of payment, and that the zemindary of *Sivagiri* be liable for the satisfaction of the decree, amount, and costs, now adjudged. And this Court doth further order and declare that the said amount forms a valid charge over the property mortgaged to the Plaintiff and described in the schedule hereunto annexed. And this Court doth further order and decree payment of proportionate costs incurred both in this Court and in the lower Court upon the amount allowed and disallowed respectively. And it is hereby ordered that the Defendant do pay to the Plaintiff Rs. 1,692. 6*a*. 6*p*., being the amount of nett costs as admitted by both parties due to Plaintiff after deducting the costs due by him to the Defendant.

"*Schedule.*

"*Rasingaperikulam*, consisting of 589 kotas, 4 merkals, and ½ measure seed, wet land, inclusive of maniam lands, in the cusba village of *Sivagiri*, in the Defendant's zemindary."

From that decree the present appeal was preferred. The Defendant did not appeal or file any cross appeal.

It was contended on the part of the Plaintiff, first, that the zemindary, having descended to the Defendant's father from his maternal grandfather, was his self-acquired property, or at any rate that he was not as regards his son under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly, that the whole zemindary, or at least the interest which the Defendant took therein by heritage, was liable as assets by descent in the hands of the Defendant, as the heir of his father, for the payment of his father's debts. Their Lordships are of opinion that the Appellant is entitled to succeed upon the second ground, and they therefore think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the Defendant's father.

As to the second ground, they consider that the case is governed by the case of *Girdharee Lall* v. *Kantoo Lall* (1). The doctrine there laid down was not new, but was supported by the previous cases therein cited. The principle of that case was adopted by this Board in the case of *Suraj Bunsi Koer* (2), and has been very properly acted upon in *Bengal*, and *Bombay*, and in the North-West Provinces, and although it was not acted upon by the High Court in *Madras* as it ought to have been in the case now under appeal, it has since been acted upon in a Full Bench decision by all the Judges of that Court, except two who dissented, of whom Mr. Justice *Muttusami Aiyar* was one, in *Ponneappa Pillai* v. *Pappuviengar* (3), decided the 1st of April, 1881.

The reasons given in the judgment of the High Court in the present case constitute no ground for the opinion that the case of *Kantoo Lall* does not apply to the *Madras* Presidency. It was said in the judgment in that case: "There is no suggestion either that the bond or the decree was obtained *benamee* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved." That statement certainly did not justify the assertion of the High Court, which was clearly a mistake, that "in that case there were remarks which shew that the father and son were probably acting in collusion with one another against the purchaser."

One of the grounds relied upon by the High Court for considering that the case of *Kantoo Lall* was not applicable to the *Madras* Presidency was that the course of decisions in the *Madras* Presidency had been to uphold the father's alienation to the extent of his own share, though it was said to have been held in *Bengal* that an undivided share is not alienable, a difference referred to by the Judicial Committee in *Deen Dyal Lal's Case* (4). Assuming without admitting that the difference exists (see the remarks in 6 Law Rep. Ind. App. 102) it is impossible to see how the father's power to alienate his own share could constitute a valid reason for supposing that where that law existed the son's share taken by heritage from the father was thereby exempted from liability for the payment of his father's debts. The fact of the zemindary being impartible could not affect its liability for the payment of the father's debts when it came into the hands of the son by descent from the father. Their Lordships are of opinion that no order ought to be made for cancelling the orders of the 23rd of February, and the 18th of April, 1874, or for upholding the attachment made by the Plaintiff in Suit No. 8. By such a decree, the rights of other creditors and those of the purchaser under the sale of the 25th of February, 1874, might be affected, and none of them are parties to this suit. Those orders and that attachment do not affect the rights of the Plaintiff as against the Defendant. It would seem from the proceedings in the District Court of *Tinnevelly*, of the 18th of April, 1874, and the statement in the 10th paragraph of the plaint taken together, that the life interest of the late zemindar, the father of the Defendant, in the whole zemindary, including the part hypothecated, have been sold to a *bonâ fide* purchaser. That sale cannot be affected as to whatever legally passed under it by any decree in this suit. The learned Judge of the High Court who heard the case in review, and who declared in the decree that the amount decreed forms a valid charge over the property mortgaged to the Plaintiff, did not allude to the decision of the District Judge as to the abandonment by the Plaintiff of his lien under the hypothecation by partaking of a rateable distribution with the other creditors of the father, not did he intend to affect nor could he affect by that declaration the rights of per-

(1) Law Rep. 1 Ind. Ap. 321; 3 P. C. J. 380.

(2) Law Rep. 6 Ind. Ap. 88; *Ante* p. 1.

(3) Ind. L. R. 4 Madras, 1.

(4) Law Rep. 4 Ind. Ap. 262; 3 P. C. J. 730.

sons not parties to the suit, nor did he intend to nor could he by declaring that the zemindary of *Sivagiri* should be liable for the satisfaction of the decreed amount and costs affect the rights of the purchaser under the sale admitted by the Plaintiff in the 10th paragraph of his plaint. The Defendant is liable for the debts due from his father to the extent of the assets which descended to him from his father, and all the right and interest of the Defendant in the zemindary which descended to him from his father became assets in his hands, and that right and interest, if not duly administered in payment of his father's debts, is liable as against the Defendant to be attached and sold in execution of the amount that may be decreed against him.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the High Court and of the District Court respectively, and to decree and declare that the Defendant, as the son and heir and legal representative of *Varaguna Rama Pandia Chinnatambiar*, deceased, the late zemindar of *Sivagiri*, do pay to the Plaintiff, out of the property which was of the said *Varaguna Rama Pandia Chinnatambiar*, deceased, and which came to the Defendant by heritage, the amount due on the 2nd of March, 1875, under the decree of the 4th of September, 1868, mentioned in the plaint filed in the Suit No. 13 of 1875 in the District Court of *Tinnevelly*, together with interest on the amount so due, at the rate of 6 per cent. per annum, from the 2nd March, 1875, to the time of realization, and, further to declare that, so far as the Defendant is concerned, all the right, title, and interest, which descended to him from his father and came to him by heritage, as well in that part of the zemindary of *Sivagiri* which was hypothecated by his father, as in that part thereof which was not hypothecated, are liable, so far as they had not been administered in payment of his father's debts, to be attached and sold in execution of the amount for which it shall be declared that the Defendant is liable, together with such interest as aforesaid, after giving credit for any portions thereof, if any, which since the said 2nd day of March, 1875, have been paid or satisfied; and, further, that the case be remanded to the High Court with directions to ascertain and determine what amount was on the said 2nd day of March, 1875, due under the said decree of the 4th of September, 1868, and whether any and what portion or portions thereof has or have been satisfied or discharged since the said 2nd day of March, 1875, and to pass a decree in accordance with the above directions, and awarding costs both in the District Court and in the High Court in proportion to the amounts decreed and disallowed respectively.

And it is hereby ordered that the costs of this appeal be paid by the Respondent.

Solicitors for the Appellant: *Burton, Yeates, Hart, & Burton.*

20th April 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURO PERSHAD ROY CHOWDHRY (Plaintiff) } *Appellant,*

and

GOPAL DAS DUTT and others (Defendants) ... } *Respondents.**

Limitation—Bengal Act VIII of 1869, s. 29—Suit for arrears of rent.

After the expiration of the period prescribed by s. 29 of the Bengal Act VIII of 1869, a Plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it.

* 9 Cowell's Ind. Ap. p. 82; I. L. R. 9 Cal. 255.

In *Ranee Surnomoyee* v. *Shoshee Mookhee Burmonea* (1). the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present.

The Plaintiff's ancestor purchased a talook from the Government, subject to an ijara therein held by the Defendants, which expired in 1866. A suit brought by the Plaintiff in 1874 for possession was dismissed finally in 1876, the Defendant's claim to remain in possession under another tenure being allowed. The Plaintiff in 1876 sued the Defendants for arrears of rent for the years 1866—1872

Held, that the suit was barred under s. 29, notwithstanding the proceedings of 1874

Appeal from a decree of the High Court (May 16th, 1878) affirming a decree of the Subordinate Judge of the district of the 24-Pergunnahs (20th November 1876.)

The suit out of which this appeal arose was to recover from the Defendants, who held certain chakdari tenures within the Plaintiff's zemindary of *Kassinagar* in the 24-Pergunnas, the rent of their holdings from April 1872 to July 1876. Both the Courts in *India* held the claim barred by limitation under s. 29 of Act VIII. of 1869, the "Landlord and Tenant Act, 1869," prescribing a three years' limitation in suits for rent

The question raised was whether limitation had been prevented from running by the continuance of litigation between the parties.

The predecessors in estate of the Respondents had formerly been proprietors of *Kassinagar* in which their zemindary interest was brought to sale by the Government for arrears of revenue in 1838. The Government at the sale purchased the proprietary right, and having held it khas for some years, granted portions of it in ijara to members of the family of the former proprietors. These leases expired in 1866. Meantime in 1861 the Government had sold to *Tarapersad Rai*, father of the present Appellant *Huropersad Rai*, the zemindary interest in *Kassinagar*.

In 1866 *Huropersad Rai* having succeeded his father as zemindar, sued those who had been the lessees under the expired ijaras to obtain direct possession. These tenants then alleged their right to remain in possession under certain old chakdari tenures existing within the zemindary, and held by them under their own relations from before the time of the settlement and subsequent sale, as abovementioned, of *Kassinagar*. Litigation ensued, commencing in 1872, when *Huropersad Rai* filed his plaint for possession, contending that these tenures, of which he denied the existence, had been, if they ever existed, rendered void by the sale for arrears of revenue in 1838, and the dealing with the estate by the Government afterwards. In 1874 this suit was dismissed, and in January 1876 the High Court confirmed this decision. *Huropersad Rai* then brought the present suit on the 7th February 1876, to recover arrears of rent from the years 1866 to 1872 on the basis that the chakdari tenures existed.

Meantime he appealed to Her Majesty in Council against the decision of the High Court of January 1876, but without success. In advising the dismissal of the appeal, on the 26th May 1881, their Lordships expressed their opinion that the Defendants, even if not in possession under a well-proved legal title, were in possession under colour of a title which had not been avoided, though it might have been, as far back as the year 1838, and that since then time had run in their favor. It had not been shown that the Government did anything to avoid the tenures under which the Defendants were in possession.

The Subordinate Judge of the 24-Pergunnahs district dismissed the suit for rent on the issue of limitation under s. 29 of Act VIII. of 1869. The High Court on appeal upheld that decision. The judgment of the Court (GARTH, C.J, and MCDONELL, J.)is reported in I. L. R., 3 Calc., 819.

Mr. *R. V. Doyne* appeared for the Appellant.

The Respondents did not appear.

(1) 12 Moore's I. A., 244; S. C., 2 B. L. R, P. C., 10: 2 P. C. J. 424.

The judgment of their Lordships' was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

In this case, the sole question is as to the application of the Law of Limitations. The claim is for rent from April, 1865, to June, 1872. The terms of the 29th section of Act VIII. of 1869 of the *Bengal* Council are these : "Suits for the recovery of arrears of rent shall be instituted within three years from the last day of the *Bengal* year, or from the last day of the month of Jeyt of the Fasli or Willayuttee year in which the arrear claimed shall have become due." It is admitted that in this case the suit was not instituted within three years from the end of the year when the last rent became due, and therefore *primâ facie* it is barred by the Law of Limitation. This *primâ facie* case is endeavoured to be answered in this way : The Plaintiff says that in 1874, that is to say, two years after the last instalment of the rent sued for had accrued due, the statute ceased to operate, because he instituted a litigation which had the effect of preventing it from running, and that therefore a portion at least of his claim is not barred. That litigation was this : He brought three suits in the year 1874 against the tenants with respect to whose arrears of rent the present action is brought, for the purpose of ejecting them from their holdings, which were called chuckdari holdings, in a certain zemindary of which he was possessed These suits were dismissed by the first Court, and on the 25th of July, 1876, by the Appeal Court, on the ground of limitation. On the 7th of September, 1876, the Appellant commenced the present suit, concurrently with which he prosecuted an appeal to Her Majesty in Council from the decree of the 25th of July, 1876. His appeal was dismissed on the 26th of May, 1881.

The Appellant contends that the statute did not run against his claim for rent after the year 1874, when he commenced these suits ; and for that proposition he relies solely on the authority of the case of *Ranee Surnamoyee* v. *Shoshee Mookhee Burmonea* (1). Both Courts in *India* have decided against the Appellant upon the ground that the statute applies, and that his case does not come within the exception to the operation of the statute established in the case of *Ranee Surnomoyee*—an exception rather apparent than real.

The effect of that case may be very shortly stated. The zemindar brought a certain patni talook to sale and sold it to a purchaser who was put in possession of it, and out of the purchase-money the arrears of rent were paid. Subsequently this sale was set aside for irregularity ; the zemindar had to refund the purchase-money received by her, and the patnidar, who succeeded in setting it aside obtained also the mesne profits for the time during which he was ousted. Under those circumstances this Committee, whose judgment was delivered by Sir *James Colvile*, observed : "It is clear that until the sale had been finally set aside, she"—that is, the Plaintiff—"was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect" In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the patnidar having recovered possession together with mesne profits, it was equitable that he should pay the amount of rent which was in arrear ; but that amount of rent did not accrue untill the sale of the patni had been set aside, and therefore until that time the statute could not run. This examination of that case shews it altogether to differ from the present. Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the statute might not have run.

This case, therefore, being inapplicable, and no other case being relied upon, their Lordships have only humbly to advise Her Majesty that the judgment appealed

(1) 12 Moore's Ind. Ap. Ca. 244; 2 P. C. J. 424.

against be affirmed, and that this appeal be dismissed.

Solicitors for the Appellant: *Barrow & Rogers.*

25th and 26th April 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Bombay.

PURMANUNDASS JEEVUNDASS (Defendant) ... } *Appellant,*

and

VENAYEKRAO WASSOODEO (Plaintiff) and THE ADVOCATE-GENERAL FOR BOMBAY (Defendant) ... } *Respondents.**

Charitable Trusts—Dedication—Mitakshara law of inheritance.

A Hindu testator in Bombay who left a nephew, (son of a deceased brother,) made a bequest for charitable purposes. The nephew, entitled either as heir or as legatee of the residue of the estate, contended that the only property of which the testator during his life-time was in possession was joint family estate, and that under the law of the Mitakshara the testator had no power to dispose of it as he had attempted.

A specific part of the testator's estate having, after his death, been set apart as applicable to the trust for the charitable purposes, and the nephew having received the residue, he agreed with the executors that he would act jointly with them in carrying out the trust, and became one of the trustees.

Held that the property had been validly dedicated to the charitable purposes; whether or not the will alone was sufficient, with regard to the nature of the testator's interest in the estate, to constitute the trust as against the heir.

Appeal from a decree of the High Court, (18th January, 1879,) affirming a decree of the same Court in its original jurisdiction, (7th March, 1878).

Mr. *Fooks*, Q. C., Mr. *A. R. Scoble*, Q. C., and Mr. *W. Fooks* appeared for the Appellant.

Mr. *J. T. Leith*, Q. C., and Mr *Parke* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The suit which gives rise to this appeal is founded on the will of one *Runchordass Chuttoor*, who was a merchant carrying on business in the city of *Bombay*. By his will he devoted a lac of rupees to the establishment and maintenance of a *dhurumsala* in *Bombay* for the benefit of *Sadhoos* and of Sants. The Plaintiff and the present Respondent is one of the trustees named in the will, though he appears never to have acted in the trusts until he came forward to institute the present suit. His plaint is very brief. It consists substantially of a statement of the will; and a further statement that the directions of the testator were carried out by the acting executors, and that the *dhurumsala* was founded and endowed in compliance with those directions. Then he shews how it is that new trustees are wanted, and he prays that a new trustee or trustees be appointed under the order and direction of the Court to carry out the trusts "hereinbefore mentioned," meaning the trusts of the will. He prays no other specific relief; and the Court, in granting the relief that he prays for, have only made such declarations and given such consequential directions as are necessary for the purpose of that relief.

The Appellant, who was Defendant in the suit below, is the son of the testator's only brother, who was dead at the date of the will; and the testator mentions the Appellant as being to him as a son. Either as heir or as the residuary devisee and legatee of his uncle the testator, he is entitled to the whole residue of the testator's property. He resisted the appointment of new trustees, and in his written statement he grounded his objection on the allegation that the will of the testator is void and inoperative under

* 9 Cowell's Ind. Ap. p. 86 I. L. R. 7 Bom. 19.

the Hindu law. He contended that no effect should be given to the provisions thereof, except to such extent and in such manner as he, the Appellant, might consent and agree that the same should be effective. The meaning of that plea is further explained in the written statement, and by the evidence and arguments in the case. In effect the Appellant contends that the property of which the testator was in possession during his lifetime was joint family property, and that under the provisions of the Mitakshara law the testator had no power of disposing of it to the *dhurumsala* or other charitable objects indicated by his will.

In the decree pronounced at the hearing by Sir *Charles Sargent* the High Court has declared that the charitable trusts in the will of the testator *Runchordass* are well established, and that certain sums of money ought to be applied for the several charitable purposes mentioned in the will. It then goes on to order the Appellant to deliver to the Accountant-General certain notes and securities which have been ear-marked as the property belonging to the charitable trust, and it appoints two persons to be trustees jointly with the Respondent, and declares that the Appellant is entitled to share with the trustees in the management of the charity. That is substantially the whole of the decree. The question is whether it is right. The Appellant was dissatisfied with it, and he appealed to the Court of Appeal. His appeal there was dismissed, and he is now appealing to Her Majesty in Council.

There has been a considerable amount of argument, both in the Courts below and at the Bar here, upon the question whether or no the testator *Runchordass* had such an ownership of this property as entitled him to devote a lac of rupees to the charity in question. Their Lordships are not disposed to express any opinion upon that point, because they consider that if it were held that the power of the testator was doubtful, or even that it did not exist, the case must still turn upon the effect of transactions which have taken place since his death.

Those transactions are partly stated in and partly summed up and completed by a deed which was executed on the 11th of May, 1870 For the purpose of seeing the exact effect of that deed it will be desirable to state what are the provisions of the testator's will. The will was made on the 12th of May, 1859. The testator recites that his only brother *Jeevandass* is dead, and has left a son of the age of about eight years, and that the testator himself has no issue. Therefore he says that the Appellant, being considered by him as a son, has a right of inheritance to the whole of the moveable and immoveable property; and when he attains the age of twenty-one years the executors appointed in the will shall entrust to the Appellant the whole of the testator's property, moveable and immoveable, that may remain after defraying the expenses agreeably to all the conditions stated in the will. Then, after certain provisions for members of the family, he provides for the *dhurumsala* as follows:—"One month after my death a piece of ground shall be purchased in *Bombay*, and a *dhurumsala* be erected thereon to serve as a lodging for the *Sadhoos* and Sants. A sum to the extent of Rs.25,000 shall be expended thereon, and Government notes for Rs.75,000 shall be purchased for the maintenance of these *Sadhoos* and Sants, and that the maintenance expense shall be defrayed out of the amount of interest that may be realized therefrom; and all the executors appointed in my will shall, up to the time *Bhai Permanundass* attains the age of twenty-one years, conduct the management of this *dhurumsala*, and they shall, as long as the sun and moon exist, defray the expenses of the said *dhurumsala* out of the above-mentioned fund; and even after *Bhai Permanundass* shall have attained the age of twenty-one years, these executors and said *Bhai* shall jointly conduct the management of this charity. Perchance should any one of these executors die, so long as three of those persons are alive they and *Bhai Permanundass* shall jointly continue to conduct it, and even should any of them die, such of these executors as may be

surviving shall appoint a respectable and good man of my caste as a vakel; and they shall conduct the management of the said *dhurumsala*." It seems that by the word "vakel" there the testator meant a representative or an executor. It appears that the will was written in the Gujrati language.

The testator died two days after the date of his will. The executors named in the will are five persons:—*Bhai Lukmidass Damji*, who has been the principal acting executor, and who acted up to and after the year 1874, but who is now dead; *Shah Bhanabhai Dwarkadass*, who also acted in the trusts of the will, but he became blind and desired to be discharged in the month of September, 1874; *Bhai Jairaz Chapsi*, who also acted in the trusts of the will, and died on the 6th of June, 1873; and the other two are, one *Parsi Dhanjibhai Framji*, who has never acted at all, and the Respondent, whose position has been mentioned before.

It appears from the deed of the 11th of May, 1870, that the affairs were managed by the three acting executors up to that time, and at that date the Appellant had attained the age of nineteen years. He had not attained the age of twenty-one, at which time the testator said the property was to be transferred to him; but he was some years past his majority, and as there was no contingency in the gift on his attaining twenty-one and no gift over, he would clearly be entitled upon his majority to have the affairs of the estate adjusted, and to have so much as was attributable to clear residue handed over to him. The adjustment was made by this deed of the 11th of May, 1870, and it is necessary to state it with some particularity. The parties to it are the three executors who proved and acted of the first part, and the Appellant of the second part. First come several recitals of the state of the family and the property previous to the testator's will. Then the will is recited, and it is stated that the executors have acted in execution of the different trusts of the will. Then follow these recitals:—"And whereas the said *Purmanundass Jeevundass*, being satisfied with the management and administration of the aforesaid estates and property by them the said parties hereto of the first part, and the said parties hereto of the first part being willing to make over and assign to him, in manner hereinafter mentioned, the said estates and property remaining in their hands, not subject to charitable and other trusts, has agreed to execute the release and covenant hereinafter contained. And whereas the said parties hereto have in their possession as such executors as aforesaid the several particulars of moveable and immoveable estate mentioned in the several schedules hereto"—then the deed goes on to make some statements concerning the schedules, and amongst them is this, that in part 6 of Schedule A. are "certain Government promissory notes and shares and sums of cash which have been appropriated to the respective trusts and purposes in the same part 6 of the same schedule respectively mentioned." Turning to part 6 of the schedule, it is found that the promissory notes, shares, and cash therein mentioned are all appropriated to certain charitable trusts. They are headed as being "appropriated to trust." There are several trusts, but with reference to the *dhurumsala* occurs the following passage:—"The following charitable places and charities to be carried on by the parties to these presents jointly:—(*Sadavut*) charitable place at *Cowasjee Patell* tank of *Runsordass Chanjee*, where at present the *Sadhoos*, *Bhattas*, and *Brahmins* are feasted. Promissory notes and ready cash and documents of properties relating to this account are now in possession of the three executors." Then the schedule goes on to mention another charity, which has been spoken of as the *Purshotum* Charity. Returning to the body of the deed, we find further recitals as to certain amounts advanced on two mortgages, and then comes the witnessing part. That consists of the formal transfer of the various properties, excluding those contained in part 6 of Schedule A. After that has been effected, comes a release by the Appellant of the three executors, which is in these terms:—

"And this indenture also witnesseth that, in consideration of the premises, he the said *Permanundass Jeevundass* doth hereby release the said *Luckmidass Danjee*, *Dhanabhoy Dwarkadass*, and *Jairez Champsey*, their and every of their heirs, executors, administrators, assigns, and effects, from all and all manner of sums of money, actions, suits, accounts, claims, and demands for and in respect of the administration, disposition, and application of the property, estate, and effects of the said *Kahanjee Chattoor*, *Runchordass Kahanjee*, and *Jeevundass Kahanjee*, or any part thereof, or for or in respect of any sale, loan, investment, act, or thing made, done, or executed, or neglected or omitted, by the said *Luckmidass Damjee*, *Dhanabhoy Dwarkadass*, and *Jairez Champsey*, or any of them, in or about the property, estate, effects, or affairs of the said *Kahanjee Chattoor*, *Runchordass Kahanjee*, and *Jeevundass Kahanjee*, or any of them, or any part thereof, or in execution of the said recited wills or either of them, or in relation thereto, and for or in respect of any other thing in anywise relating to the premises." Then follows this proviso, on which the Appellant greatly relies:—"Provided always that nothing herein contained shall operate to release the said parties hereto of the first part, their heirs, executors, administrators, assigns, or effects, from any liability arising either under any covenant herein contained,"—that refers to covenants against incumbrances and for further assurance—"and on their part to be observed and performed, or under any of the trusts appertaining to the property, estate, and effects respectively mentioned and described in the 6th part of Schedule A. to these presents, or otherwise relating to the same property, estate, and effects respectivly."

It does not appear to their Lordships that that proviso has any effect in cutting down the general ratification by the Appellant of those actions of the executors with which he is said to be entirely satisfied. It seems to them that it is the ordinary case of a property not wholly administered, but so far administered that the executors are entitled to a release from the residuary legatee. In point of fact this property cannot be wholly administered at any time, because some of the trusts are perpetual. But it was administered so far as this, that the executors found themselves in a position to hand over the residue, which seems to have been very large,—eight or nine lacs of rupees,—to the residuary legatee, he undertaking to answer all remaining legacies and trusts for private persons to which the property was liable, and the executors retaining so much as was necessary to answer the purposes of the permanent or charitable trusts which remained to be performed. From these trusts of course the Appellant could not possibly release the executors; and it appears to their Lordships that this proviso, of which so much has been made, is the ordinary proviso which conveyancers, perhaps needlessly, are apt to put into a deed of release of this kind, merely for the purpose of shewing that the residuary legatee does not release, and does not affect to release, the executors from those trusts which yet remain to be performed. Therefore the effect of this deed is that the testator's estate is up to this point settled. Certain specific property is set apart to answer the charitable trusts, and by reason of its being set apart the executors find themselves in a position to put the Appellant in possession of the residue. Not only is the specific property set apart and ear-marked as applicable to the trust, but the Appellant himself becomes the trustee of it. By the words of the schedule he undertakes to act jointly with the executors as a manager of the charities: "The following charitable places and charities to be carried on by the parties to these presents jointly."

The effect of this is to make a valid dedication to charitable purposes of the property which is specified in the 6th part of Schedule A. It has been said in argument that all that this deed amounts to is only a statement of what the executors have done, and it is suggested that they have done it against the will

of the Appellant. All that their Lordships can say to that is, that it is directly contrary to the expressions of the deed. According to the deed the Appellant is perfectly satisfied with what has been done, and he is glad to have this property set apart and to receive all the residue himself; and he undertakes to join in the management of the dedicated property for the benefit of the charities. Whether the Appellant conceived that he was legally bound to acquiesce in the executors setting apart this property owing to *Runchordass'* power over it; or whether he considered that it was doubtful whether he was legally bound, but that, owing to that doubt and owing to the respect due to his uncle, he ought to have the property set apart; or whether he considered that he was under a moral obligation only; it is clear that in point of fact he did join in an arrangement by which there was a perfectly good dedication to charity. Now that arrangement cannot be altered; nobody has the power to alter it. It is said that the execution of this deed amounts only to that which is technically called an estoppel, which operates only between parties and privies to the deed. The absurdity of that position was exposed at once by the supposition that *Luckmidass*, who is a party to this deed, should have lived up to the present moment instead of dying. In that case Mr. *Fooks* was fain to admit that an estoppel would operate; but it is impossible that the true owners of this property can be damnified by the accident of *Luckmidass* having died before the institution of the suit. The true owners of this property are not *Luckmidass* or the Plaintiff, but the objects of the trust, the Sadhoos and the Sants, for whose benefit the fund is given. Such acknowledgment as there is operates not to the benefit of *Luckmidass* and his two co-executors alone, but for the persons whom they represented—that is to say, the charity at large.

That, in their Lordships' opinion, disposes of the case; and the only importance of the subsequent transactions is to shew exactly how the dispute arises, because attempts have been made to appoint new trustees and to alter the management of the charity. On the 6th of November, 1873, another deed was executed between *Luckmidass* of the first part certain widows entitled to maintenance of the second and third parts, and the Appellant of the fourth part. In the recitals of that deed there is no sort of dissatisfaction shewn with the arrangement that was made three and a half years before, but, on the contrary, there is a recital to this effect:—"Whereas there is now in the hands of the said *Luckmidass Damjee* certain promissory notes of the Government of *India* of a nominal value of rupees one lac thirty-nine thousand and five hundred, with the unexpended interest accrued thereon, as appears by the account relating thereto and kept by the said *Luckmidass Damjee*, being the amount set aside by the executors of the said *Runchordass Canjee* for the purchase, erection, and maintenance of a *dhurumsala* in *Bombay* for *Sadhoos*, as directed by the will of the said deceased." There is a distinct reference to the will of *Runchordass* as directing the maintenance of the *dhurumsala*, and a statement that there is now in the hands of *Luckmidass*, who appears to have assumed the sole management to the exclusion of his two co-executors, this sum of Rs.1,39,500. The operative part of the deed is mainly for the purpose of settling disputes which had arisen between the widows and the Appellant; but it also relates to the charitable trusts, and the first clause of it is to this effect:—"The said sum of Rs.1,39,500, together with the interest accrued due thereon as aforesaid, shall be set apart in trust for the benefit of the said *Sadhoo dhurumsala*, in compliance with the direction in that behalf contained in the said will of the said *Runchordass Canjee*, and shall be indorsed in the joint names of the said *Luckmidass Damjee*, *Purmanundass Jeevundass*, *Venayekrao Wassoodeo*, *Khuttas Mucconjee*, and *Sunderdass Modjee*, who shall be the trustees of the charity, and that the said *Luckmidass Damjee* shall during his life be the sole managing trustee and keep the account

of the said charity, and that after his death or resignation the said *Purmanundass Jeevundass* shall be the managing trustee, in like manner and with the like powers, but that the said promissory notes shall be kept in the custody of the said *Purmanundass Jeevundass*." Now nothing is clearer there than that the parties conceived that they were acting under the will, though they did more than the will authorized. The power to appoint new trustees had not arisen. Neither had they power to make any binding appointment of a sole manager. If indeed all they meant was. The trustees shall be responsible for the management, but we will agree that one shall do the work, then they would be making an arrangement *inter se* which is common enough among trustees; but if they meant that which is now relied upon by the Appellant, if they were intending to constitute a wholly new bssis for the trust, then they were departing from the provisions of the will, which they evidently intended to abide by.

There is one subsequent deed of the 9th of September, 1874, made between *Luckmidass* the Appellant, and the Respondent of the first part, *Bhanabhoy* of the second part, and the three parties of the fiirst part, with *Khuttas Mucconjee* and *Sunderdass Modjee* of the third part. The object of that deed was to appoint five trustees of the charity. *Bhanabhoy* was then blind and desired to retire; *Jairaz Champsey* was dead; and the consequence was that the trust was not sufficiently manned. The appointing parties are the three remaining executors and the Appellant, who was recognised by the testator as entitled to act with the executors in the management of the trust. They assume that they have a power of appointment which under the terms of the will they really have not. But they still wish to act in accordance with the will, and in the recital which immediately precedes the witnessing part of the deed it is said that the parties of the first and second parts, in execution of the power reserved to them in the will of *Runchordass Canjee* and of all other powers, have proposed to nominate and appoint two new persons to be trustees in the room and stead of *Jairaz*, who was dead, and *Bhanabhoy*, who was blind; and they effect the appointment accordingly. Then they provide in a subsequent part of the deed that one trustee for the time being shall be the manager; that *Luckmidass* shall be the first manager, and that when he ceases to be a trustee the Appellant shall be the manager. They may have thought that they had power to appoint one of their own body to be manager, taking the responsibility for the whole. It is not an unreasonable arrangement from the point of view of the trustees *inter se;* but that they intended at this time to depart from the trusts of the will is conclusively negatived by the recital which has just been read. If they did intend it, their intention could not take effect.

That being so, it is difficult to see on what point the decree is wrong. Once establish the will and all the rest follows. It is quite right to constitute the trust fully; and the Court has not gone beyond its proper discretion in appointing two new trustees. It is quite right that all the notes and securities shall be put in proper custody; and that the Court has ordered.

With reference to the question of costs, it is suggested that an injury is done to the Appellant by the order that though the costs of the other parties shall be paid out of the charity fund, he shall be left to bear his own costs. On considering that matter, their Lordships do not see their way to alter the decree of the Court below. It would be departing from the general rule that the discretion of the Court below with respect to costs is not altered when there is no substantial alteration made in the decree itself. It is not a universal rule, but it is a general rule and a sound one. In this case their Lordships see no reason to depart from the rule. If the Appellant had on attaining age disputed the right of the testator to establish this charity, there would undoubtedly have been a suit instituted for the administration of the

trusts of the will and the establishment of the charity by setting apart a proper portion of the testator's estate to answer it; and the costs would have fallen on the residue of the estate. By the arrangement made in 1870 the Appellant himself comes forward to assent to the appropriation of a proper sum to answer the charitable trusts, and he takes all the residue clear of that liability. He therefore has, by not disputing the will at that time, escaped the liability to costs which would certainly have fallen on the residue of the estate. Their Lordships entirely acquit the Appellant of any covetous or sordid motives in this litigation. He has been willing to part with the money and to establish the charity which his uncle desired; but he has also desired to get that which the will did not give him, —the entire control over it, and that is the cause of the dispute. Their Lordships think his own costs must now be borne by himself. He does escape the costs of the suit so far as the Plaintiff and the Advocate-General have incurred any, for those are to come out of the fund; and their Lordships think that he has obtained quite sufficient advantage by the decree as it stands in respect to costs.

The result is, that their Lordships will humbly advise Her Majesty to dismiss the appeal; and the Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Hughes & Sons.*

Solicitors for Respondent: *Pollock & Co.*

25th April 1882.

PRESENT:

Members of the *Judicial Commitee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Righ Hon'ble Sir Aurthur Hobhouse.

The judgment of the High Court at Calcutta affirmed.

BAIJNATH SAHAY, (Plaintiff,) ... } *Appellant,*

and

RUGHONATH PERSHAD SINGH (Defendant).... } *Respondent.**

Burden of proof—Benamidar—Certified purchaser.

The burden of proof is upon him who alleges that the certified purchaser and registered owner is a *benamidar.*

Appeal from a decree passed by the High Court at Calcutta.

The Appellant in this case is the registered owner of one-third part, or 5 annas 4 pies of the mouzah *Hardeya,* in the district of *Shahabad.* The question is whether he is also the beneficial owner or only *benamidar* for the Respondent. That question was decided by the Subordinate Judge of *Shahabad* in favour of the Appellant and by the High Court in favour of the Respondent. The property in dispute belonged to a family who in this litigation are called the *Singhs*; and at the time when the transactions giving rise to the present question commenced, there were five branches of the family co-sharers of the property. The shares of three have been subjected to a different course of dealing from the shares of the other two. For the present purpose it will be convenient to speak of the five annas four pies as the five annas share, of the three-fifths as the three annas share, and of the two-fifths as the two annas share. It will also be convenient to speak of proceedings taken by any representative member of the family as proceedings of the *Singhs* collectively.

* 12 Cal. Law Rep. p. 186.

The Appellant and his father *Mannu Lal* carried on the business of bankers in partnership together at some place in the district of Arrah, and throughout the transactions now under review there has been identity of interest between the two. Whether the name of the one or the other is used in any transaction it must be taken that, up to the time of *Mannu's* death, both were equally concerned in it. There is another joint family who play a large part in the history of the present dispute, the family of the *Sahus*. They appear sometimes by one representative and sometimes by another. It will be convenient also to speak of proceedings by any of the *Sahu* family as proceedings by the family collectively. In the year 1852 the *Singhs* mortgaged their five annas to the *Sahu* to secure Rs.21,213. This mortgage was affected by a lease called a *zaribhurna* lease granted to the *Sahus* for twenty years under sublease called a *Kutkina* lease granted back again by the *Sahus* to the *Singhs* at a certain rent. On the 7th June 1858 the three-anna share was put up to sale by auction, under a decree obtained by one *Sri Aus Koer* against the co-sharers who owned it, and it was bought by *Mannu* for the sum of Rs. 1,350. At that time the property of the *Singhs*, who were implicated in the rebellion was under attachment by the Government, and the Government took objection to the sale. That objection was overruled and the sale to *Mannu* was established by the grant of a certificate and an order for delivery of possession, which is dated the 1st December 1858. On the 21st November 1859 the Revenue Commissioner made an order by which the property was released from confiscation, and on the 6th February 1860, such release was publicly notified. At that time the *Singhs* petitioned the Deputy Collector that he would order the tenants to pay rent to them; but he prudently declined to do that, and intimated that they and the auction-purchasers should enter into a mutual settlement. In the year 1859 *Mannu* brought five suits against a ryot named *Obhoy Pandey* and four other ryots of *Hardeya* for rent of small portions of the three-anna share. In these suits or in one of them, the *Singhs* appeared and objected. The issue was, whether or no, *Mannu* had obtained possession. It was held by the first Court on the 10th April 1860, and by the Judge of *Shahabad* in appeal on the 15th December 1860, that he had obtained possession, and decrees for rent were granted to him in the five suits. Pending this litigation, *Mannu* applied to the Collector of Shahabad to effect a mutation of names in the register. The Singhs opposed the application, and the suit was heard on the 30th April 1860. The Collector decided that mutation follows possession, that *Mannu* had dispossessed the *Singhs* and got possession for himself; and that he was entitled to be registered accordingly. It appears that the five-anna share stood in the name of *Koer Singh*. The actual operation effected in the books was first to enter the names of the three co-sharers of the three-anna share along with *Koer Singh*, and then to expunge their names and enter that of *Mannu* in their stead. This proceeding left the *Singhs* at liberty to assert their title in a suit framed for the purpose which they did without much loss of time. They sued *Mannu* to recover from him the three-anna share on the ground that the sale of the 7th June 1858 was made during the confiscation, and was therefore invalid. Of that opinion was the first Court, which gave the *Singhs* a decree on the 7th March, 1861. It is observable that the suit was not for recovery but for confirmation of possession; and that the decree did not purport to give possession, but to confirm it. At the same time the *Singhs* sued *Baijnath* to recover a *mouzah* called *Manyan*, and also sued *Baijnath* and one *Sunder Dass* to recover another *mouzah* called *Manaich*. These two *mouzahs* were purchased some time in the year 1858 at an execution sale held in pursuance of a decree obtained against the *Singhs* by *Mussamut Kunder Koer* The first Court dismissed this suit. *Mannu* appealed from the decree dismissing the *Hardeya* suit and the *Singh* appealed from the decree dismissing the

Manyan and *Manaich* suits. Before the appeals were heard, and on the 13th February 1862, the parties came to an agreement that the titles of the execution-purchasers should be affirmed, and that the suit should be stopped, each party paying their own costs. In accordance with this agreement, and on a petition of the *Singhs* expressly admitting the validity of the sale of *Hardeya*, the Judge at *Shahabad* on the 7th May 1862 reversed the decree of the 7th March 1861. It is alleged by the Respondent that the real meaning of this compromise was that *Manyan* and *Manaich* should be abandoned by the *Singhs* to *Mannu* and *Baijnath*, but that *Hardeya*, though apparently abandoned likewise, should really be held by *Mannu* as *benamidar* for the *Singhs*. The motives suggested for placing the property in a fictitious name is that the creditors of the *Singhs* might be thereby baffled. Up to this time there were no relations between *Mannu* and the *Singhs* except the hostile ones above narrated. But simultaneously was the promise, and by an *ikrarnama* dated the 15th February 1862, *Dulhin Badam Koer* and *Dulhin Champa Koer*, acting on behalf of the *Singh* family, opened a banking and agency account with *Mannu's* house in respect of a talook called *Rupper*. In the month of December 1858 the *Sahus* sued the *Singhs* for arrears of rent due upon the *Kutkina* lease; and *Mannu* who had then purchased the three-anna share was a Defendant to the suit. The *Singhs* disputed the validity of the *zaribhurna* and *Kutkina* leases. The *Sahus*, however, obtained a decree against them, and in the first instance against *Mannu*, but on appeal the decree against *Mannu* was discharged and all questions between him and the *Sahus* were left open. This suit was finally decided on the 17th June 1861. In the meantime and on the 5th March 1860, the *Singh's* five-anna share in *Hardeya* was put up for sale by auction at the suit of *Mahessur Bux Singh*, and was purchased by the *Sahus*. This purchase was made with notice of the previous purchase of the three anna share by the *Mannu*. The *Singhs* objected to the sale upon the same ground on which they impeached the previous sale of the three-anna share of *Hardeya*, *viz.*, the confiscation. But before the sale to the *Sahus*, the land had been released from confiscation and the objection was overruled. On the 13th June 1860 an order was made for confirmation of sale and delivery of possession. In the month of October 1865, the *Sahus* instituted a suit against the *Singhs* and *Mannu* for possession of the five annas, and to have the name of their representative, *Chooni Sahu* registered as owner. They relied entirely on their purchase of the 5th March 1860, and not on the mortgage of 1852. The battle was fought with various fortune up to the High Court which on the 1st February 1867 made a decree which, as regards this suit, was final. The result was, that the *Sahus* failed in getting a decree for possession of the three annas purchased by *Mannu*, but succeeded as to the two annas not so purchased. The next stage in the contest was a suit by *Mannu* against the *Sahus* to recover the sum of Rs. 62-10 due for the costs of the suit of 1865. Under the decree in this suit the *Sahus'* interest in *Hardeya* was put up to sale and was purchased by *Mokund Lall*, on the 28th April 1868, for the sum of Rs. 120. *Mokund* was the brother-in-law of *Mannu*, and it is clear now, and not disputed by the Appellant's Counsel that his name was used on *Mannu's* behalf. Just after this sale was effected, *viz.*, on the 6th May 1868, the *Sahus* instituted a suit against *Mannu* and the *Singhs* for possession of the three-anna share, by setting aside the order of the 7th May 1862 on the ground of collusion between the parties to the compromise. On the face of the proceedings it does not appear that the *Singhs* took any active or separate part in defending this suit. The Munsiff dismissed the suit mainly on the ground that the *Sahu's* interest was gone out of them by *Mokund's* purchase of the 28th April 1868. He also considered that the question was settled by the High Court decree of the 1st February 1867. On appeal the first Subordinate

Judge of *Shahabad* agreed with the Munsiff on both points. On special appeal the High Court remanded the case. The judgment on this appeal does not appear in the record, but from the judgment of the High Court in the present suit it would appear that the direction to the Court below was to inquire whether the sale of *Mokund* was a fraud, and whether *Mokund* was *benamidar* for *Mannu*. *Mokund* was thus made a party to the suit. On remand the Munsiff gave the *Sahus* a decree, which was reversed by the Subordinate Judge, who dismissed the suit on the ground that no interest passed to the *Sahus*, on the 5th March 1860 because of *Mannu's* previous purchase. The *Sahus* then appealed to the High Court where the case was compromised. The *Sahus* instituted another suit against *Mannu* and *Mokund* to recover possession of the two-anna share by setting aside the sale of the 28th April 1868. This suit also found its way up to the High Court, was remanded, and travelled up to the High Court again where it was compromised along with the suit for the three annas. The terms of the compromise were as follows: That the *Sahus* should receive Rs. 12,000; that the validity of *Mokund's* purchase should be affirmed; that the *Sahus* should abandon all claims against *Hardeya* under the *zaribhurna* and *kutkina* leases, and under the decree of the 17th June 1861; that they should retain their personal remidies against the *Singhs* in respect of the *zaribhurna* and *kutkina* leases; and that all claims for costs and mesne profits should be given up on all sides. As there were three appeals, one by the *Sahus*, one by *Mannu* and one by *Mokund*, this compromise was carried into effect by three orders, one in each appeal, and each dated the 30th June 1871. The Rs. 12,000 were duly paid to the *Sahus*, and on the 10th July 1871 an *ikrarnama* was executed by them, acknowledging the receipt of the money and reaffirming the terms of compromise. It is contended by the Respondent who has come to represent the *Singh* family that the *Singhs* were the substantial Defendants in the suits brought by the *Sahus*, and that the compromise was effected entirely on their behalf. This contention and the contention with respect to the compromise of 1862, are the main questions in the present appeal, but before discussing them some further legal proceedings must be stated. On the 8th July 1872, *Mokund* executed a deed of sale of the five annas to *Mannu* in consideration of Rs. 13,000. This must be taken as a purely formal transaction. On the 13th December 1872 the name of *Mannu* was registered instead of the names of two *Singhs*, who had till then remained registered in respect of the two-anna share. *Mannu* died shortly afterwards, and on the 15th April 1873, the name of *Baijnath* was substituted for that of his father. These mutations were made without any objection by the *Singhs* or any other person. In June 1873 the Appellant sued five ryots of *Hardeya* for rent of portions of the five-anna share, three of them disputed his title, and it is stated that these three were Defendants to the rent suits brought by *Mannu* in 1860, though, with the exception of *Obhoy Pandey*, the names are different. The Respondent intervened in the suits as an objector to the Appellant's title The proceedings in the suit against *Obhoy Pandey* are given in the record. *Obhoy* pleads that he has paid his rent to another, meaning the *Singhs*. The Respondent alleges that neither the Appellant nor his ancestor, nor their vendor, nor the *Sahus*, were ever in possession of this share (the five annas), by receipt and enjoyment of rent; that great confidence and friendship existed between *Mannu* and the Respondent's ancestors and that with a view to avoid certain dangers, this share was advisedly allowed to stand in the name of *Mannu* without giving him the beneficial enjoyment of the same; that the *Singhs* remained in actual enjoyment of the share, and that the Appellant's suit was in violation of trust and confidence. The suit followed the course which appears to have been customary with the property in question. The

Munsiff decided for the Defendant, the Subordinate Judge for the Plaintiff, and then came a special appeal to the High Court. On the 16th August 1875, that Court held that the sole question was who was in possession and in actual receipt of rent, and in as much as the Subordinate Judge had found that issue of fact in favour of the Appellant, he was entitled to a decree. As to the Respondent, the High Court held that he had no right to intervene for the purpose of proving the Appellant to be his *benamidar* which was his real object. "If the Appellant" said the Court "desires to raise that question and have it decided judicially he will have to bring a suit for the purpose." The Respondent did not bring any such suit. But it appears that contests arose between his partisans and those of the Appellant, and that the Magistrate of *Shahabad* was called upon to quiet the possession under the Criminal Procedure Code. On the 10th December 1875 he decided that the Respondent was in possession of the five-anna share except the holdings of the five ryots against whom the Appellant had obtained a decree; and he ordered that such possession should be maintained, and that both parties should enter into recognizances to keep the peace. After that decision the Appellant instituted the present suit for recovery of the property, except the holding of the five ryots. In his plaint he relies on the transactions of 1862 and 1871 as being in substance what they were in form. As regards the transactions of 1862, the Respondent alleges that it was intended that *Mannu* should give up *Hardeya*, but that owing to the pendency of a dispute with the *Sahus*, it was settled that the property should remain in *Mannu's* name as *furzider*. He also alleges that *Mannu* never obtained possession of *Hardeya* at all, but that the *Singhs* continued all along to hold possession of it. As regards the compromise of 1871, he alleges that the sale to *Mokund* in *Mannu's* suit was all effected by the *Singhs* that the *Sahus'* suits were defended on their behalf and that *Mannu* and *Mokund* were merely nominal parties throughout. He states that he entered into the final agreement with the *Sahus*. He does not make any specific allegations as to the source from which the Rs. 12,000 paid to the *Sahus* and the costs of suit were defrayed. The Subordinate Judge decided the substantial issues in favour of the Appellant, and the High Court in favour of the Respondent. Hence the present appeal. It is not to be denied but that very great obscurity hangs over every part of this case, and the Counsel on each side have to admit that there are circumstances bearing against them which they cannot explain. To a certain extent this quality of the case inclines the mind to a belief in the truth of the Respondent's contention, because secrecy, and therefore obscurity, is characteristic of *benami* transactions; whereas if it be true that the Appellant's absolute title to the three-anna share dates from February 1862 and to the two-anna share from July 1871 there seems to be no reason why he should not tell a plain and straightforward story from beginning to end. This remark will be found to gain in significance when the case made by the Appellant and the evidence adduced by him comes to be considered. Still it is incumbent on each party to discharge the burden of proof which rests upon him. The Respondent who alleges that the certificated purchaser and registered owner is a *benamidar*, must give substantial proof of that allegation. On the other hand the Appellant has been found by a tribunal of competent jurisdiction to be out of possession, and it is for him to prove that either that finding is wrong, or if right, the possession of the Respondent is a wrongful one and should be displaced in the Appellant's favour. Now this question of actual possession, that is to say, possession by actual receipt of rents and profits is by no means a clear one. But it appears to their Lordships that, amid the great intricacies and obscurities of the case, the group of facts relating to possession stands out in clearer light than any other group and affords the firmest standing ground for a decision. They

proceed therefore to inquire in whom the actual possession of the property in dispute has remained since the purchase by *Mannu* in the year 1858. The Appellant alleges in his plaint that his father was placed in possession by virtue of the order of the 1st December 1858. And in order to prove the possession from that time, the Appellant put in a number of *jummabundi* papers, purporting to have been kept by *Jota Lall* and others his *motsuddis* and to show regular payments of rents to them by the ryots for a number of years beginning with the month of September 1858. On these papers the High Court have made a number of detailed criticisms leading up to the following conclusion: "It appears to us that these *jummabundis* afford no evidence of possession, they are clearly full of inaccuracies if they are not as the Defendant contends they are, fabricated documents." Agreeing with the criticism of the High Court so far as they go, their Lordships consider that the spurious character of the papers in question is more conclusively proved on a different ground. For among the few matters of fact which come out quite clear in this case, is the fact that in June 1868 and down to the 21st November 1869 the Government were in possession of the whole of the *Singhs'* interest in *Hardeya*. They collected the rents by their own *Sarbarakar* and retained, if not the whole, at least a large portion of them, to pay a fine of Rs.3,500 inflicted upon the *Singhs*. It is impossible then that there should have been such collections as shown by the earlier *jummabundi* papers. They must be forgeries and the same taint must affect all the papers of the same character proceeding from the same quarter. Unfortunately the discovery of falsehood in a portion of a case is not in Indian litigation so conclusive as to the whole as it is apt to be in England. But it is a highly material circumstance that the Appellant, who has been personally engaged in the transactions from begining to end, sets out with a false allegation and supports it by forged papers. The next incident is the litigation set on foot by *Mannu* against the five ryots, and when the *Singhs* intervened, against them too. The precise date at which this litigation commenced does not appear, but it was probably late in the year 1859, and it may have been just after the Government released the estate. In these suits, and in the simultaneous suits for the mutation of names, judgment went in favour of *Mannu* and against the *Singhs* on the ground that the former was in possession. It is not quite clear what the Courts meant by possession in these cases. In the rent suits it does not appear that any evidence of actual possession by receipt of rents and profits was given. No evidence is specified by either Court except *Mannu's* purchase deed and the order of possession which followed it, and it is quite clear that the Court of Appeal rested on these documents alone. In the mutation proceedings it appears that three witnesses were cited by *Mannu*, who, it is said, all speak with one voice that he has holding and possession of the property in dispute. But upon this it is to be observed that the Collector's business was to decide whether the title had been duly transferred, and not to proceed upon the basis or to decide the fact of possession. Two of the five decrees against the ryots were actually executed, and the sum of Rs. 23-11 was recovered on the 2nd December 1861. This sum is entered in one of the Appellant's accounts, on which some observations will presently be made. It there appears to be the earliest receipt by the Appellant's house on account of *Hardeya*. It appears also that the enforcement of the decrees led to a serious affray, in which one *Padarath*, the *butwari* of the mouzah, took part on the side of the *Singhs* and against the Appellant. For this conduct an order was passed on the 21st December 1861 dismissing him from his office, but it seems that the dismissal was not enforced. Probably the proceedings taken against him were discontinued as part of the compromise effected about that time. The state of things then between the release of the property by the Government and the compromise of 1862 was this:—*Mannu*

had a legal title which was impugned by the *Singhs*, and he was striving to get possession in the sense of receiving rents. The *Singhs* were holding him at bay and encouraging the tenants to resist payment while they proceeded by legal methods to destroy his legal title. It has been before observed that the suit which was brought by the *Singhs* for this purpose, and the decree which they obtained therein, both assume that possession is in the *Singhs*. It is not necessary to decide with any precision what might be the legal effect of a disputed possession of this kind, because it is after and not before the compromise that the fact of possession becomes critical for the purposes of this suit. But it is important to show the actual condition of things for two reasons; first, because it proves that the regular collection of rents shown by the Appellant's *jummabundi* papers was nearly as impossible up to the date of the compromise, as it was prior to the release of the estate by the Government; and secondly, because in their Lordships' opinion it tends to show the true nature of the compromise. The arguments in favour of the Appellant's theory of the compromise are as follows:—That the *Singhs* had a hopeless case, that they escaped the costs of the two suits, that they gave up nothing substantial, because the sale to the *Sahus*, in March 1860 had dislodged them from their position in *Hardeya* whether as old proprietors or under the *kutkina* lease, and that it is highly unlikely that of all persons in the world they would choose their active adversary to be their secret trustee. To this it is answered that the case made by the *Singhs* to impeach the sale of *Hardeya* was at least an arguable one, that whatever it was, they had actually got a decree; that the costs were a mere trifle, probably under Rs. 100; that though the *Sahus* had bought their interest, the *Singhs* were keeping them out of possession and disputing their title; that the *Singhs* certainly believed they had a substantial interest, as is conclusively shown by their bringing the suit against *Mannu* after the purchase by the *Sahus*; that *Mannu* also was afraid of the *Sahus*; that all parties believed that the decree obtained by the compromise was an obstacle in the way of the *Sahus*, as is shown by the course of the subsequent litigation; and that the choice of a trustee is fully explained by the circumstance that at the same moment the Appellant's house became the bankers and agents of the *Singhs*. If this were all, the probabilities relied on by the Appellants would at least be balanced by those relied on by the Respondent, and there would remain the great improbability that the *Singhs* should give up the whole subject of contention merely to escape a possible trifling liability for costs. Such a balance of a probability would no doubt be insufficient to discharge the burthen of proof which lies on the Respondent if it were not aided by other things, but it is so aided. It is a slight circumstance, but not wholly insignificant, that the petitions for compromise of the suit relating to *Manyan* and *Manaich* pray that the purchasers may be put into, and continue in possession of those mouzahs, where as the petitions and the order relating to *Hardeya* are wholly silent about possession. This may be an accident, but it tallies curiously with the Respondent's contention. Again the direct evidence is not such as to bear much strain upon it, but it cannot be wholly disregarded. *Harihar Churn Singh* says that he was present at a meeting which took place at *Baijnath's* house, between *Mannu*, *Baijnath* and *Kissen Pershad Singh*, when *Mannu* proposed that he should give up *Hardeya*, and that the *Singhs* should give up *Manyan* and *Mannich*, and that with reference to the claims of the *Sahus*, *Hardeya* should remain in *Mannu's* name, and he says that *Kissen Pershad* accepted those terms. *Lungut Singh*, who was present on the same occasion, substantially confirms this account though in different words. This is very weak evidence to prove a trust, and standing by itself would be quite insufficient; but so far as it goes it is not discredited by cross-examination or contradicted by other evidence. The accounts which

have been the subject of much discussion both in the High Court and here come before the Court in this way. The Appellant has produced no accounts on his own behalf. At the instance of the Respondent, the Court below made an order that the books of the Appellant should be examined by two persons, who extracted such figures as they thought expedient in the Respondent's interests and without any reference to the Appellant. The High Court found the abstracts so made to be worthless, and declined to use them except when they were admitted by both sides. But they sent for the original books and examined them for themselves. In the record we now have full copies of two accounts extracted from those books for the two years beginning with September 1861, and ending September 1863. The two accounts are the *Singhs'* account which was opened in February 1862, and another account called the *Hardeya Gaon* account, of which the Appellant says that it was a private account of his family, and the Respondent says that it was a private account of his family, and the Respondent says that it was kept on behalf of the *Singhs*. There are many difficulties in these accounts which it is impossible to explain, and the High Court have used them very strongly against the Appellant. But after repeated examination of such accounts as are contained in the record, and with every endeavour to extract some trustworthy conclusion from them, their Lordships are unable to do so in any instance. It would take a long time, and be an unprofitable use of it to show in detail how this negative conclusion is reached. But upon the accounts as a whole this general observation is to be made: that the Respondent having by his agents free access to the Appellant's books, and having at the hearing such extracts as those agents thought it expedient to make, has examined the Appellant, but has not called his attention to any of the difficulties now pressed against him. It is obvious that great injustice may be done by treating a banker's accounts in such a fashion. Of more importance is the fact that the Appellant has not chosen to bring forward any accounts in his own behalf. Such a thing can be done in *India*. By the 34th section of the Evidence Act of 1872 it is enacted that, "Entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire." It is impossible to suppose that this firm of bankers did not keep regular books of account showing all that they received and spent out of such a property as *Hardeya*. But the *Hardeya Gaon* account does not show that. It shows a quantity of receipts and some small outgoings all for estate expenses. In the first year there is a balance of receipts amounting to Rs. 516, in the second year a balance of Rs. 1,680. It does not appear to whose account these balances were placed or who ultimately got the benefit of them. And there is one, but only one, payment for revenue, *viz.*, a sum of Rs 16 appearing towards the end of the second year. If the Appellant had produced accounts showing that he and not the *Singhs*, paid the revenue for *Hardeya* and that the balances went into his private cash book, or were applied to his private purposes such evidence would have been admissible for him in an inquiry whether or no the estate was held *benami*. The admissibility of such evidence does not shift the burden of proof, but its non-production in such a case as the present one by a person in the Appellant's position is a circumstance which, when placed in the balance of probabilities, must weigh against him. After all, however their Lordships rest chiefly on the fact of possession, in the sense of receipt of rent, which they think must be decided in favour of the *Singhs*. It is certain that after the compromise, peace settled down upon the disturbed village; and it is very difficult to suppose that such would have been the case if this combative family who still continued to resist the apparently indisputable legal claims of the *Sahus* as to the two annas, had been deprived of their rents. Such a supposition is all the more difficult

because *Padarath*, the strong partizan of the *Singhs* and opponent of *Mannu*, was continued in his office of *batwari* though previously condemned to lose it. This time of peace which continued for the remainder of *Mannu's* life, is explicable on the theory that the mouzah in dispute was shared between the *Singhs* and the Appellant's house but is not explicable otherwise. It will be clearer at once to pass on to the subsequent evidence of possession, though in so doing we must anticipate much that relates to the two anna share and the compromise of 1871. No doubt the Appellant succeeded in his rent suits of 1873. But their Lordships think that the Subordinate Judge who decided in the Appellant's favour has given a far less satisfactory opinion upon the fact of possession than the Munsiff who decided against him. The Subordinate Judge rests his decision almost entirely upon the decrees in the rent suits of 1859, though he does add, but without referring to any evidence, that the Plaintiff has been receiving rent at least from those tenants whom he has sued. But in a very elaborate, and their Lordships must add a very clear, judgment, the Munsiff examines the evidence, both oral and documentary and weighs the witnesses one against another. He remarks that, except two of the Defendants who admitted his case, the Appellant did not produce a single ryot to prove payment of rent, nor a single receipt for payment. The Munsiff's conclusion is "that the possession of the Plaintiff is confined to the papers alone, and not in actual collection of rent and enjoyment of it." It is true that the findings of the Subordinate Judge, which was binding upon the High Court in special appeal is binding still as between the parties to the rent suits and as regards the lands therein compromised. It is true also that the *benami* question, which the Munsiff discusses incidentally, was not in issue. But it is difficult to say that the question of possession was not in issue. Of course, it was in issue as regards the three ryots who resisted the Appellant, and the dispute was of a nature to bring in the evidence that was actually given as to the possession of the other lands in the mouzah. And viewing the proceedings in those suits in their bearing upon the present case, their Lordships think that they go to prove the possession of the Respondent, and not that of the Appellant. It is remarkable that so convinced were the Government officers of the possession of the *Singhs*, that in the month of May 1875, after the decision of the Subordinate Judge in favour of the Appellant, an order was issued under the seal of the Magistrate of *Shahabad* directing the *Singhs* as proprietors of mouzah *Hardeya* to build a school house. An entirely independent inquiry was made by Mr. *Vowel*, the officiating Magistrate, who in December 1875 was called upon to maintain the possession of the person whom he should find to be in possession. He found that issue in favour of the Respondent. On that occasion the Appellant produced the evidence of many ryots and receipts for rent. But the Magistrate reasonably enough looked with suspicion upon evidence not produced two years before in the same dispute before the Civil Court. The result of this examination is to bring their Lordship to a reasonably clear conclusion that from the time of the compromise of 1862 till after the death of *Mannu*, the *Singhs* were in undisturbed possession of the three anna share of *Hardeya*. And adding to this fact the other evidence above mentioned as bearing upon the nature of the compromise, they are of opinion that the possession is referable to a rightful title, and that *Mannu* was *benamidar* for *Singhs*. It remains to decide what is the true position of the rest of the property under the compromise of 1871. That compromise embraced the whole five anna share which was conveyed or released by the *Sahus* to *Mokund* and by *Mokund* to *Mannu*. But with respect to the three annas it follows from what has before been said that *Mannu* was in a fiduciary relation to the *Singhs*, and therefore could not, without their concurrence acquire any interest in that share except for their benefit. As regards the two annas, the first thing to be

considered is the question who has had the possession? With regard to this share there is no doubt that, however valid the title of the *Sahus* may have been, they never succeeded in getting possession. The *Singhs* remained in possession during the long litigation, and were in possession in July 1871 when the *Sahus* released the property. After that event, there was mutation of names, as above stated, but that is quite consistent with the retainer of possession by the *Singhs*. With respect to actual possession after the compromise, the evidence relating to this share is the same with the evidence relating to the other share. *Baijnath's* rent suits, the order for erection of a school and the decision of the Magistrate apply to both shares alike. In one respect the case made on behalf of the Appellant in the Courts below, though it is not made by his Counsel here, with respect to the two annas fails more decidedly than that made with respect to the three annas. For in his plaint he sets up *Mokund* as a substantial owner alleging that he sold to *Mannu* and put him in possession. And several of his witnesses state that the share of rent was for a time paid to *Mokund* and afterwards to *Mannu*. All this must be pure fiction, for it is now no longer denied that *Mokund* is nothing but a shadow. Their Lordships therefore draw the conclusion that the two anna share has also remained in the possession of the *Singhs* up to the present time. Their possession after the acquisition of the apparent ownership by *Mannu* is not nearly so long as their possession of the other share, and therefore does not afford the same evidence of a rightful title. But it lasted from June or July 1871 till the death of *Mannu*, which must have been about the end of 1872 or beginning of 1873 a period of some eighteen months during which it is not likely that *Mannu* would remain wholly passive if he was being kept out of his property. And once having established a *benami* transaction for one share, it becomes a much easier process to conclude that there was a similar transaction for another. The real difficulty on this part of the case, and their Lordships do not underrate the magnitude of it, is that the Respondent has given no substantial evidence to prove payment by the *Singhs* of the Rs. 12,000 received by the *Sahus*. There is no question, but that this money was paid by the Appellant's bank. The Respondent makes no specific allegation in his written statement about it, and he gives no evidence personally. The only attempt made to prove payment by the *Singhs* is contained in the evidence of one *Gomani Lal* a servant of the *Singhs*. He says that in Cheyt or Bysack 1278 corresponding to March or April 1871 an interview took place between the Appellant and Respondent, at which it was agreed that the money should be paid to the *Sahus*, that the Respondent should find as much as he could, that the Appellant should advance the remainder, and that the Respondent should have given to him the property which was in the furza name of the Appellant. Then he says that the Respondent sent Rs. 1,500 at that time through *Hazari Lal* and Rs. 15,000 or Rs. 16,000 by five or seven instalments to the *Kooti* at *Arrah* (the Appellant's bank) from 25th Jeyt to 12th Assar 1278, *i. e.*, from the 29th May to the 13th June 1871. The *Kooti* granted receipt of acknowledgment on every occasion. He adds that the receipts were returned on a settlement of accounts Such a statement coming from a man who does not appear to have taken any personal part in any of the alleged payments and not supported by any kind of voucher, or by the Respondent himself, is hardly worthy of attention. And this defect of evidence would be fatal to the Respondent's case if it were not for blemishes in the case of the Appellant which afford a counterpoise to it. The Appellant's house were at this time acting as bankers of the *Singhs* and their agents in the management of *Ruppur*. They were in frequent receipt of money from the *Singhs* and their servants in respect of this business. Therefore they had the means of repaying themselves without any formal passing of money for the particular occasion. The importance of this relation between the

parties has been felt on the Appellant's side, because several of his witnesses say, and apparently have been tutored to say, that the banking and agency transaction had come to an end before the compromise of 1871. Thus *Mothura Lal*, who is a *mukhtar* says the transaction with *Mannu's* house had ceased since two or three years before the compromise with *Sahus* And several other witnesses speak to the same effect. But the mutual releases by which the *Singhs* and the Appellant's house closed their transaction have been proved and are found to bear date some time in September 1872. Another badge of insincerity in the Appellant's case is his anxiety to set up *Mokund* as having a substantial interest. The statement in the plaint has been referred to before. In his evidence the Appellant says, "Before the kabala (the conveyance) of *Mokund Lal* the income three annas and odd pie share is entered in my *bahi* (account). The income of *Mokund Lal's* share, which sometimes used to come used to be sent to him and sometimes used to be entered in his name." Such an attempt to set up the phantom *Mokund* as the real owner of the two anna share, supported as it is by the oath of the Appellant who knows all the facts cannot fail to throw great suspicion over the Appellant's title. Moreover, the arguments before drawn from the rules of evidence in *India* apply even more strongly to the present part of the case. It may well be that the *Singhs* did not keep accounts, but we know that the Appellant's house has kept minute and elaborate accounts, and it is impossible to suppose that the payment of Rs 12,000 was not entered in their books in the ordinary course of business, so as to show exactly from whose funds it came. If the payment was as the Appellant alleges, why should he not have taken the simple course of producing his books to show it? Under all these circumstances their Lordships think that they have no safe guidance except that which is afforded by the possession and that however strongly they may feel the difficulty and obscurity of his part of the case, they ought to hold that the Appellant is *benamidar* for the whole five anna share of *Haredya*, and that the decree of the High Court in favour of the Respondent is correct. They will humbly advise Her Majesty to affirm that decree and dismiss this appeal and the Appellant must pay the costs.

26th and 27th April 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Calcutta.

RAO KARAN SINGH (Defendant), ... } *Appellant,*

and

RAJAH BAKAR ALI KHAN (Plaintiff), ... } *Respondent.**

Act IX of 1871 (Limitation Act), Sch. ii, No. 145.—Limitation—Collector's possession not adverse to true owner.

Act IX of 1871, sch. ii, No. 145, enacting that suits for possession of immoveable property, or any interest therein, must be brought within twelve years from the time when the possession of the Defendant, or some person through whom he claims, has become adverse to the Plaintiff, differs form the rule formerly in force under Act XIV of 1859, s. 1, cl. 12. The latter was that the suit must be brought within twelve years from the time when the cause of action arose; and thus, the former rule that, where the cause of action arose upon an alleged dispossession, the burden was upon the Plaintiff to show that he, or some one through whom he claimed, had actual possession within twelve years before the institution of the suit, has been superseded by the above.

Where the Government, in the Revenue Department, has taken possession of land, it is the duty of the Collector, after payment of the revenue, and the expenses of the collection, to pay over the surplus proceeds of the estate to the true owner. The Collector's possession does not become adverse to the owner, by reason of his making this payment to another claimant.

* 9 Cowell's Ind. Ap. p. 99; I. L. R. 5 Alla. p. 1.

Appeal from a decree of a Full Bench (31st January, 1878), affirming a decree of a Divisional Bench (17th April, 1876), which upheld a decree of the Judge of the *Aligarh* District.

Mr. *C. W. Arathoon*, appeared for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *J. G. Witt*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is a suit brought to recover a sum of Rs.13,745 on two bonds, one dated the 7th of January, 1862, for Rs.4,000, and the other dated the 6th of October, 1862, for Rs.1,000. Those bonds were executed by *Baharjit Singh*, the father of *Kharag Singh* and *Rudar Singh*, who were infants, for money advanced by the Plaintiff to enable them to defend certain suits brought by *Karan Singh*. It appears that *Badam Singh* was entitled to certain property, and that upon his death his widow took possession. *Karan Singh*, who is now the Appellant, brought a suit to turn the widow out of possession upon the ground that *Badam Singh* had made him his heir-at-law. That suit was defended by the widow, who died during the pendency of it; and the grandchildren *Kharag* and *Rudar Singh* were made parties to the suit, *Baharjit* their father acting as their guardian. The suit was determined in favour of the Defendants. After the death of the widow, *Karan Singh* claimed the property on behalf of his grandfather *Gholab Singh*, on the ground that the infants, who were sons of a daughter, were not, according to a custom of the family, entitled to inherit the estate. The father of the infants borrowed the moneys for the purpose of defending the suits, and it is now admitted that no question can be raised as to the validity of the bonds, the father having been justified under the circumstances in borrowing the money, and the Plaintiff in lending it, for the benefit of the infants. The bonds are both in the same terms:— "I therefore covenant in writing that I shall pay the above-mentioned amount in full, with interest at one rupee per cent. per mensem, on demand, without raising any objection or pretext; that until the payment of the amount of this bond, the share in mouzah *Khurd Khera*, pergunnah *Barouli* (which is already hypothecated in satisfaction of the former loan), shall remain pledged and hypothecated in satisfaction of this loan also; and that I shall not alienate it elsewhere by means of mortgage sale." That is what is usually called a mortgage bond. The Plaintiff claimed to enforce payment of the money due under the bonds by sale of mouzah *Khurd Khera*, the estate which was hypothecated. The only question now remaining, the bond having been held to be a valid bond, is whether the Plaintiff in the suit is barred by limitation.

The second suit against the infants was referred to arbitration, under which, by an award dated the 5th of August, 1863, the village *Khurd Khera*, which was sought to be sold by auction, together with other villages and properties belonging to *Badam Singh*, were declared rightfully to belong to *Golab Singh*, the Defendant's grandfather, and not to *Kharag Singh* and *Rudar Singh*. The Defendant *Karan Singh*, as guardian of *Golab*, sued on the said award, and obtained a decree from the Principal Sudder Ameen's Court on the 31st of August, 1863, in execution of which he was put into possession in October of the same year.

Pending the disputes between *Karan Singh* and the infants, the Collector, in order to secure the Government revenue, attached and took possession of the property, and retained possession from 1861 until October, 1863, when, in consequence of the decree of the Principal Sudder Ameen, he delivered possession to the Defendant and paid over to him the surplus profits of the estate after deducting the Government revenue and expenses. The present suit was brought in the year 1874; and at that time twelve years had not elapsed from the time when the Defendant obtained possession from the Collector. It was contended that the Plaintiff must prove that he was in possession within

the period of twelve years; but when their Lordships come to consider the present law of limitations, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law it may be brought within twelve years from the time when the possession of the Defendant, or of some person through whom he claims, became adverse to the Plaintiff. His possession since 1863 was not twelve years' possession; but it is contended that he was justified in adding or taking to his possession the possession of the Collector from 1861. Their Lordships must assume that the Collector properly took possession for the purpose of protecting the Government revenue. It was the duty of the Collector, whilst in possession under the attachment, to collect the rents from the ryots, and having paid the Government revenue and the expenses of collection, to pay over the surplus to the real owner. If the Defendant was the real owner the surplus belonged to him; but if, on the other hand, the infants were the right owners, then the surplus belonged to them. The Plaintiff was not bound by the decision of the arbitrators, for his bonds were prior to the submission to arbitration. The Collector, by paying over the money to *Karan Singh*, did not give *Karan Singh* a title.

It appears now, as between the Plaintiff and the Defendant, that the infants were entitled to the property, because no evidence whatever has been given to shew that the custom of the family set up by the Defendant, namely, that the son of a daughter could not inherit, ever existed. According to the ordinary Hindu law the infants were entitled to inherit. Therefore, although the Collector gave up possession of the estate and paid over the surplus proceeds to *Karan Singh*, that did not shew that he was holding for *Karan Singh*. The Defendant does not claim through the Collector, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863.

Under these circumstances their Lordships think that the majority of the Judges of the High Court came to a correct conclusion that this suit was not barred by limitation, and consequently that the Plaintiff is entitled to recover.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Pritchard & Sons.*

11th May 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

PORESHNATH MOOKERJEE (Defendant.) ... } *Appellant,*

and

ANATHNATH DEB (Plaintiff) ... } *Respondent.**

Estoppel—Plea.

A *dur-putnidar* defeated a suit for rent brought by his *putnidar* (who was also zemindar) on the plea that he had parted with his *dur-putni* interest to his wife and son, who were accordingly sued, and their *dur-putni* interest sold in execution to the zemindar.

In a suit by the zemindar, suing as *dur-putnidar*, against his tenant, the Appellant intervened and claimed title to the *dur-putni* under a mortgage from the former Defendant (made subsequent to the dismissal of the former suit). He alleged that the wife and son were merely *benamidars* and that he had completed his title by a purchase in execution of a decree obtained on his mortgage:—

Held, that the Appellant, who admittedly would have been estopped as mortgagee by the plea of his mortgager from setting up his present claim, was in no better position by reason of his purchase in execution.

* 9 Cowell's Ind. Ap. p. 147.

Appeal from a decree of the High Court (Nov. 21, 1878) reversing a decree of the District Judge of zillah *Beerbhoom* (Jan. 18, 1877) whereby the Respondent's suit was dismissed with costs.

Leith, Q. C., and *Doyne*, for the Appellant, contended that it was not proved that the Respondent had been induced to purchase from the *benamidars* on the representation of *Ishan Chunder* that they were absolutely entitled. The evidence shewed that the Respondent had notice of the fact that the transfer by *Ishan Chunder* to his wife and son was *benami*. Even if that were not so, *Poreshnath* did not take directly from *Ishan Chunder* either as mortgagee or as assignee and was not bound by his representations. He obtained a decree on a mortgage bond, and at a sale in execution of that decree became the purchaser of the land in suit. Reference was made to the *Indian Evidence Act*, 1872, s. 115; *Co. Litt.* 352a; *Comyns'* Digest, Estoppel; *Richards* v. *Johnson* (1); *Dinendronath Sannyal* v. *Ramcoomar Ghose* (2).

Woodroffe, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in this appeal, which is from a decision of the High Court at *Calcutta* on an appeal from the District Court, is stated by the learned Chief Justice in giving the judgment of the High Court, in which he says:—"The point upon which, in our opinion, this case should be decided is rather of a peculiar nature. The Plaintiff is the zemindar of a share in a property called lot *Shahalumpore*, and he also claims to be the *dur-putnidar* of a portion of the same property. In his character of *dur-putnidar*, he brings this suit against the Defendant No. 1,"—*Bishtoo Chunder Roy*,—"as ijardar of part of the estate for rent and for road-cess. The Defendant resists the claim upon the ground that *Poreshnath*, the Defendant No. 2, is the real owner of the *dur-putni*; and the Defendant No. 2 has intervened for the purpose of supporting his title to the rent as against the Plaintiff. It appears that some time ago, in the year 1259 (A. D. 1852), one *Ishan Chunder* purchased and was the undoubted owner of this *dur-putni* estate. In the year 1265" (A. D. 1858), "*Ishan Chunder*, being in difficulties, sold or professed to sell the *dur-putni* to his wife *Kripamoyi* and his son *Dhun Krishna*; and thereupon the names of *Kripamoyi* and his son *Dhun Krishna* were entered in the Plaintiff's serishta as the owners of the *dur-putni*." It has been suggested that this is not correct: there is a question whether it was in the Plaintiff's serishta, but it is not material:—"After this sale, the rent of the *dur-putni* being in arrear, the Plaintiff (whether in ignorance of the sale or not does not appear) brought a suit for the rent against *Ishan Chunder*, who defended the suit upon the express ground that he was no longer the tenant, and that he had parted with his interest in the *dur-putni* to his wife and son; and he not only defended the suit on this ground, but he stated in his evidence that the sale to his wife and son was an absolute and *bonâ fide* one; that the *dur-putni* really belonged to them, and that he had no right or interest in it."

It appears from what has been stated by the learned counsel for the Appellant, that in this suit *Ishan Chunder* put in a written statement to this effect on the 7th of November, 1872, and the suit was dismissed on the 18th of November, 1872. The learned Chief Judge proceeds:—"Upon the strength of this evidence *Ishan Chunder* defeated the Plaintiff's suit, and the Plaintiff had to pay the costs of it. Having failed in that suit, the Plaintiff then brought another suit for the same rent against *Kripamoyi* and *Dhun Krishna*. He obtained a decree against them, and under that decree the *dur-putni* was sold, and the Plaintiff himself became the purchaser of it. Upon the title thus acquired the Plaintiff brings the present

(1) 4 H. & N. 660.

(2) Law Rep. 8 Ind. Ap. 71; *ante* p. 213.

suit against the Defendant No. 1," *Bishtoo Chunder Roy*,—" the ijardar of that portion of the property; and assuming that the title derived in this way is a good one, there is no doubt as to his right to recover the rent as against the Defendant No. 1." Then the learned Chief Justice alludes to the question of the amount to be recovered which the Appellant was willing to give up, and in order to avoid the necessity of a remand, says: " Consequently the only point for our consideration is, whether the Plaintiff on the one hand, or the intervening Defendant on the other, is entitled to the rent of the *dur-putni*. The claim which the intervening Defendant sets up is by right of *Ishan Chunder*. He says that *Ishan Chunder* mortgaged the property to him, and that such proceedings have been taken upon that mortgage that he is now entitled, in *Ishan Chunder's* rights, to the rent of this property as the owner of it."

The proceedings thus alluded to were these: on the 11th of January, 1873, about three months after the written statement had been put in by *Ishan Chunder*, and the suit had been dismissed, a mortgage bond was given by *Ishan Chunder* to *Poreshnath*, who brought a suit upon it and obtained a decree on the 6th of September, 1875; which Mr. *Leith*, who was counsel for the Appellant, stated, although the form of the decree does not appear, was the ordinary decree as upon a mortgage bond. On the 13th of September, 1875, he obtained an order for sale in execution of that decree, and the sale took place on the 18th of December, 1875, being a sale of the right, title, and interest of *Ishan Chuder*, and *Poreshnath* became the purchaser for the sum of Rs. 5,600. The certificate of sale was granted on the 24th of March, 1876, and in that it is stated that *Poreshnath* purchased the property for Rs. 5,600, and had put in a receipt crediting the amount of consideration against the decretal amount received by him. In fact he did not pay any money upon the purchase which he had made at the sale, but became the owner of the property in satisfaction of his mortgage. It was decided by the First Court that the intervening Defendant had a right to go into the question whether *Ishan Chunder* were the real owner of the *dur-putni* or not, and that Court found upon the evidence that the sale by him to his wife and son was a *benamee* transaction, and that *Ishan Chunder* was the owner. Consequently the question really is, whether *Poreshnath* is estopped by the written statement which *Ishan Chunder* made in the former suit. The learned Chief Justice says: " It appears to us that, inasmuch as the intervening Defendant claims under *Ishan Chunder*, and can take no better title than *Ishan Chunder* himself, and as *Ishan Chunder* has directly induced the Plaintiff to believe that he had sold his property absolutely to his wife and son and led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, it does not lie in the mouth of *Ishan Chunder*, or any one claiming under him by a subsequent title, to set up a claim to the rent in this suit as against the Plaintiff."

Their Lordships think that is a right conclusion; that, looking to what took place, *Poreshnath* cannot be considered as having put himself, by reason of his purchase at the sale which he had brought about in execution of his decree on the mortgage bond, in a better position than he was in as mortgagee taking from *Ishan Chunder*. It is admitted that, if he had claimed as a mortgagee or as an assignee of *Ishan Chunder*, he would be estopped; and their Lordships think that he is substantially in the same position, that he did not by purchasing in this way put himself in a better position, and consequently that he is estopped by the statement which *Ishan Chunder* made, and that the decree of the High Court is correct.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal; and the costs thereof will be paid by the Appellant.

Solicitors for the Appellant: *Ochme & Summerhays*.

Solicitor for the Respondents: *T. L. Wilson*.

12th, 16th and 17th May, and 23rd June 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir John Mellor.

On Appeal from the Court of the Commissioner of Lucknow and from the Court of the Judicial Commissioner of Oudh.

EDWARD D. SINCLAIR (Plaintiff) ... } *Appellant,*

and

L. P. D. BROUGHTON (Administrator General of Bengal, and Administrator to the Estate of Sir Henry Tombs, deceased), and THE GOVERNMENT OF INDIA (Defendants) ... } *Respondents.**

Liability of public servant for injury done by his act, illegal though bonâ fide—Act XVIII of 1850—Protection of Judicial Officers—Cantonments Act (XXII of 1864) s. 11—Lunatic Asylums Act (XXXVI of 1858) s. 4.

Act XVIII of 1850 is for the protection of Judicial Officers, acting Judicially, and of officers acting under their orders.

An officer commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the civil-surgeon of the station, for which purpose the same officer caused his further detention. The Commanding Officer, who under Act XXII of 1864, s. 11, had control and direction of the police in the Cantonment, did not proceed, or intend to proceed, under s. 4 of Act XXXVI of 1858.

Held, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not having any legal authority for what he had done, was not protected from liability in respect of the above acts.

Appeal, *in formâ pauperis* and by special leave, from a decree of the Judicial Commissioner of *Oudh* (17th November 1874,) which dismissed the Plaintiff's suit, reversing on appeal a decree of the Commissioner of the *Lucknow* division (2nd July 1874). The latter decree in part maintained, and in part altered, a decree of the Civil Judge of *Lucknow* (12th May 1874,) reducing the damages thereby awarded to the Plaintiff.

The Appellant appeared in person.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe* for the Respondent.

23rd June 1882.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal brought *in formâ pauperis* by the Appellant, Mr *Edward D. Sinclair*, by special leave of Her Majesty in Council, from a Judgment of the Judicial Commissioner of *Oudh*, dated the 19th of November, 1874, in a suit brought by the Appellant in the Court of the Civil Judge of *Lucknow* against the late Major-General Sir *Henry Tombs*, and also from a judgment of the Commissioner of *Lucknow* in the same suit.

The suit was commenced as far back as the year 1873, and was for the recovery of damages laid at Rs.25,000, alleged to have been sustained by the Plaintiff in consequence of the Defendant's having put him under an unlawful arrest of European soldiers of Her Majesty's Royal Artillery, and having wrongfully confined him in his own premises for three successive days, viz., from the 1st to the 3rd of November, 1872, and having caused violence to be used against his person and property. The Plaintiff also complained that the Defendant, subsequently to the first step, viz., on Sunday, the 3rd of November, 1872, forcibly delivered the Plaintiff into the custody of the late Lieutenant *Gubbins*, the then cantonment magistrate.

The Defendant, who was the officer in command of the military cantonments in

* 9 Cowell's Ind. App. 152; I. L. R. 9 Cal. 341.

Lucknow, put in a written statement, and thereby alleged that at about 8 A.M. on the 1st of November, 1872, he was riding towards his house in cantonment, when he noticed a flag flying from the thatched roof of a house in which Plaintiff resided, and saw Plaintiff walking about in a very strange and excited manner; that on being informed by Mrs. *Gully* (wife of Captain *Gully*, of the Royal Artillery), who resided in the house opposite that of Plaintiff, that she was alarmed at the conduct of Plaintiff, and on being asked by Mrs. *Gully* for protection against the Plaintiff (Captain *Gully* being absent from the house), Defendant caused due inquiry to be made regarding Plaintiff, and, on information received by him, he directed two medical officers, Doctors *Guthrie* and *Scott*, to examine the Plaintiff as to his soundness of mind; and that the medical officers, on examination of the Plaintiff, considered it necessary to recommend that he should be kept under an European guard until they could form a decided opinion as to his sanity. He further stated that, in the absence of the cantonment magistrate from the station on the 1st and the 2nd November, 1872, Defendant, as officer commanding the cantonments of *Lucknow*, and consequently in general control of the police employed in the military cantonments (see Act XXII. of 1864, s. 11), considered that he was bound and justified, in the interests of public safety, to act on the recommendation of the two medical officers aforesaid, and believing the Plaintiff to be dangerous, by reason of lunacy, actual or impending, placed over Plaintiff a guard of unarmed European soldiers, to prevent him doing harm to himself and others. That the substitution of unarmed European soldiers for native policemen was in accordance with the usual practice, in case of European lunatics, when European policemen are not available.

That on the return of Lieutenant *Gubbins*, the cantonment magistrate, to the station, on the 3rd of November, 1872, the Plaintiff was made over in due course to the said magistrate (sect 4, Act XXXVI. of 1858), to be dealt with according to law, and that Defendant was in no way concerned, nor could he be held responsible for any proceedings that might have taken place in the Court of the cantonment magistrate, or subsequently.

That Defendant acted throughout in perfect good faith, and in the interests of public safety, and that no violence was used by the Defendant's order, or at his request.

That the amount of damages claimed by the Plaintiff was excessive, with reference both to the Plaintiff's late position in life and the nature of the alleged wrong.

The case was tried in the first instance by the Civil Judge of *Lucknow*, who gave judgment for the Plaintiff, and assessed the damages at Rs. 3,000.

From that decree the Defendant appealed to the Commissioner of *Lucknow*, who upheld the decision, but reduced the damages to Rs. 300, and ordered the Plaintiff to pay the Defendant's costs on Rs. 2,700, the difference between the Rs. 300 and the sum awarded by the Civil Judge.

It appears that, on the morning of the 1st of November, 1872, the Defendant, who was then the commanding officer of the cantonment at *Lucknow*, having reason to believe that the Plaintiff was a dangerous lunatic, caused him to be confined on his own premises under a guard of unarmed European soldiers of Her Majesty's Royal Artillery, and caused him to be soon afterwards visited and inspected against his will by Drs. *Guthrie* and *Scott*, in order to ascertain the state of his mind. Those gentlemen on the same day reported that, having carefully examined the Plaintiff, they did not consider themselves justified in giving a decided opinion on the case until it had been longer under their observation, and that they considered it necessary to recommend that the Plaintiff should be kept under a European guard until the case should be decided on. The Defendant in his written statement admits that he felt himself bound, in the absence of the cantonment magistrate, to act upon the recommendation of the medical officers, though he there states his case as if the recommendation had

preceded the confinement, which was not the fact. However, the Plaintiff was kept under confinement from the 1st to the 3rd of the month, and the medical officers were ordered to visit him during his confinement, and did so against his will.

The Defendant signed on the report a memorandum as follows:—

"Mr. *Sinclair* is a civilian, not belonging to the cantonments, and it is hard on the troops to have to furnish a guard over him. I hope, therefore, Drs. *Guthrie* and *Scott* will not be long in making up their minds.

"I believe Mr. *Sinclair's* late chum, 'Mr. *Reid*,' could prove the insanity at once.

"Dr. *Cannon* is quite willing to receive him, and it is my opinion then that he should be observed before being sent to *Bhowanipoor* and not in cantonments.

"Make the substance of this known to Dr. *Guthrie*.

"Mr. *Sinclair* must be subsisted by the cantonment magistrate."

It is clear that the district magistrate, or the officer exercising the powers of the district magistrate, would have had jurisdiction in the case if the Plaintiff had been taken before him under Act XXXVI. of 1858, sect. 4. It is clear, however, from the memorandum signed by the Defendant, that he intended to keep the Plaintiff under the European guard until the medical officers could decide on the case, a detention which he was not authorized to inflict.

The report of the medical officers, with the memorandum thereon signed by the Defendant, was delivered to Captain *Beadon*, the brigade major, and on the following day, Saturday, the 2nd of November, Drs. *Guthrie* and *Scott* forwarded a further report to the effect that they considered the Plaintiff perfectly sane, but that they recommended him to be placed under the observation of the civil surgeon. This recommendation, it must be observed, was quite in accordance with the opinion of the Defendant expressed in the memorandum on the first report of which he directed that the substance should be made known to Dr. *Guthrie*. The certificate is, unfortunately, not forthcoming, and has not been accounted for, but it appears from the evidence of Major *Beadon*, the brigade major, that he forwarded it on the 2nd to the Officiating Deputy Commissioner, with a docket, which was in the following terms:—

"No. 4071. *Lucknow* Brigade Office, 2nd November, 1872.

"Forwards medical certificate regarding Mr. *Sinclair's* state of mind, and to request that very early steps may be taken to remove him to the charge of civil surgeon.

"Mr. *Sinclair* is at present under restraint and in charge of a military guard.

(Sd.) "R. BEADON,
Captain, Brigade Major.

"To the Officiating Deputy Commissioner, *Lucknow*."

In answer to that request Major *Beadon* received from the Deputy Commissioner the following communication:—

"No. 4928. 2nd November, 1872.

"To the Brigade Major *Lucknow*.

"Sir,—In reply to your memorandum, No. 4071, dated 2nd instant, I have the honour to state that, the medical officers who have examined Mr. *Sinclair* having reported him to be perfectly sane, I should not be justified in placing him under restraint, or under observation, against his will, of the civil surgeon. The law relating to lunatics is clear on this point, that a magistrate has no power to act against any person (under Act XXXVI. of 1858), unless that person has been declared by medical authority lunatic.

"2. I therefore regret that I cannot comply with your request to move Mr. *Sinclair* to the charge of the civil 'surgeon.'

"4. The cantonment magistrate will be directed to give attention to Mr. *Sinclair's* proceedings, and, should occasion require, to bind him over to keep the peace, *and consign him to custody should sureties not be forthcoming*.

"I have, &c.,

(Sd.) "R. H. DE MONTMORENCY,
"Officiating Deputy Commissioner."

"No. 4929. 2nd November, 1872.

"Copy of the foregoing forwarded to the cantonment magistrate, *Lucknow*, for compliance with reference to the last paragraph.

(Sd.) "J. H. PHILLIPS,
Head Assistant for
"R. H. DE MONTMORENCY,
"Officiating Deputy Commissioner."

Major *Beadon* states his belief that he received that communication on Sunday, the 3rd of November, about 11 o'clock, but that, as he never did business on Sunday, he did not shew the letter to the Defendant on that day, but did so on the following Monday.

The Plaintiff was not released from confinement either on the second report of the medical officers received by Major *Beadon* on the Saturday or on the receipt of the letter from the Deputy Commissioner, at about 11 o'clock on the Sunday. On that day, however, a summons was issued by the cantonment magistrate directed to the Plaintiff requiring him to appear at one o'clock on that day, to enter into his personal recognizance in Rs. 500, and to sureties in Rs 250 each, to keep the peace for six months. That summons was delivered to and treated as a warrant by Major *Beadon*, who forwarded it on the same day to the officer commanding the Royal Artillery, with a letter, of which the following is a copy:—

"Memorandum, No. Urgent.

"From the Brigade Major to the Officer commanding Royal Artillery. *Lucknow*, 3rd Nov. 1872.

"Has the honour to request that Mr. *Sinclair*, at present under a guard of the R. A., may be taken at once before the cantonment magistrate, in accordance with the inclosed warrant, when further orders will be given to the N. C. officer in charge as to his disposal.

(Sd.) "RICHARD BEADON,
Captain, Brigade Major."

The Plaintiff was accordingly detained in confinement in his own house until about two or three o'clock in the afternoon, when he was taken by the European guard against his will before the cantonment magistrate, not to be dealt with as a dangerous lunatic, but in consequence of the summons, and was committed for want of bail. Subsequently the Colonel commanding the European Artillery addressed the following letter to the Defendant:—

"*Lucknow*, 3rd November, 1872.

"Has the honour to report, for the information of the Major-General commanding, that Mr. *Sinclair* has been removed to the magistrate's office, as herein directed, but considerable delay has taken place in doing this, owing to Mr. *Sinclair* refusing to be removed, and refusing to put on his clothes.

"The bungalow in which Mr. *Sinclair* resided is not in charge of any servant, and there are several articles of his property there. A gunner has been left to the care of these things, as also two ponies supposed to be Mr. *Sinclair's*, till further orders are received as to their disposal.

(Sd.) "NEIL MACKAY, Colonel,
"Commanding R. A., *Oudh* Division."

It was contended by the Defendant in his written statement that he was not liable for the detention of the Plaintiff after he was made over to the cantonment magistrate, and the first two Courts very properly adopted that view. It does not appear, however, upon whose information and complaint the summons was obtained, and their Lordships cannot help remarking upon the great irregularity of the forcible execution of it as if it were a warrant. The Defendant, however, is not liable for any force used in compelling the Plaintiff to go before the magistrate.

Their Lordships must also point out that Colonel *J. Reid*, the Commissioner, in his judgment, has referred to several matters which do not appear in evidence. Their Lordships have, however, entirely rejected those statements from their consideration, and have not been in any manner influenced by them.

Sir *Henry Tombs* having died, the Administrator-General of *Bengal*, as administrator of his estate, appealed to the Judicial Commissioner of *Oudh*, who, on the 17th of November, 1874, held that

an officer commanding in cantonments is vested within cantonments with all the police powers which a magistrate of a district may exercise within his district, and that as there was a duty imposed on the Defendant, as officer commanding in cantonments, to take action in consequence of his *bonâ fide* belief that Plaintiff was dangerous by reason of lunacy, actual or impending, and that as the action taken was in prefect good faith, and in performance of the duty thus imposed, the Defendant was not liable at law for damages in consequence of any wrong that might have been unintentionally done to Plaintiff.

It may be taken as a fact upon the evidence and upon the findings both of the Civil Judge and of the Commissioner that the Plaintiff was not, at the time when the acts complained of were committed, a dangerous lunatic. At the same time, there can be no doubt that the Defendant acted *bonâ fide* in the discharge of a public duty, and under the belief that the Plaintiff was dangerous by reason of lunacy.

That belief might have justified the Defendant, who as commanding officer of the cantonment had the control and direction of the police, in directing proceedings to be taken by the police under the 4th section of Act XXXVI. of 1858, but it is clear that the Defendant did not proceed, or intend to proceed, under that Act.

The Commissioner in his judgment, referring to Acts XXII. of 1864 and XXXVI. of 1858, says:—

"It is not alleged that the Defendant proceeded under either of the Acts above cited, or, indeed, under any particular law, but it is contended that he felt bound to take immediate steps himself, in the absence of the cantonment magistrate and the magistrate of the district, and that he acted as a sensible and considerate man, and that subsequent inquiry into the legality of his proceedings shews that they were justifiable by the law."

The Legislature has been careful in providing for the protection of lunatics, and it would be extremely dangerous if the doctrine enunciated by the Judicial Commissioner could be held to be law. He draws no distinction between a mistake in fact and a mistake in law, if *bonâ fide*. He says, "The main point raised in the appeal to this Court is one of principle namely, when a public officer, who is bound by his duty to take some action, fully intending in good faith to do what is right, makes a mistake and causes wrong, is such officer liable to be mulcted in damages by a Civil Court?" And he held that he is not. Again, he says, "Holding, then, that there was a duty imposed on the Defendant, as the officer commanding in cantonments, to take action, in consequence of his *bonâ fide* belief that the Plaintiff was dangerous by reason of lunacy, actual or impending, and that whatever action was taken was taken in perfect good faith, and in performance of the duty thus imposed upon him, I am of opinion that the Defendant was not liable at law for damages in consequence of any wrong that may have been unintentionally done to the Plaintiff. I am of opinion, therefore, that a verdict should have been given for the Defendant."

There is no law which authorizes the police or a magistrate in the exercise of police duties, or an officer in command of a cantonment, in consequence of a *bonâ fide* belief that a person is dangerous by reason of actual lunacy, to put him into confinement in order that he may be visited and examined by medical officers, and to keep him in confinement until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *à fortiori*, this cannot be done in the case of a *bonâ fide* belief of danger from impending lunacy. The Defendant had no authority for causing the Plaintiff to be put under restraint for such a purpose, nor had he, after the report of the medical officers that the Plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the cantonment and placed under the observation of the civil surgeon, even though recommended so to do by the medical officers.

Neither the police nor a magistrate in the exercise of police duties could, under Act XXXVI. of 1858, have had any colour for doing that which the Defendant caused to be done.

The Appellant appeared in person, and argued his case with considerable ability.

The Respondent appeared by counsel, who, amongst other arguments, contended that the Defendant was protected by Act XVIII. of 1850. But there is no foundation for that contention. That Act was for the protection of judicial officers acting judicially and officers acting under their orders. It is clear that the Defendant was not a judicial officer, and that he did not act judicially. Mr *Woodroffe*, one of the learned counsel for the Defendant, cited many authorities, and amongst others, *Calder* v. *Halket* (1), *Spooner* v. *Juddow* (2), *Hughes* v. *Buckland* (3), and *Fergusson* v. *Lord Kinnoul* (4), but none of those authorities have any bearing upon the present case. He also referred to *Lucas and Nockels* (5), but there is a great distinction between that case and the present.

The Plaintiff has complained before their Lordships that he was not allowed by the Civil Judge to give his own evidence-in-chief on his own behalf, and that he was merely examined in the nature of cross-examination on behalf of the Defendant. It does not appear that the Judge refused to allow the Plaintiff to give evidence as a witness for himself; but, assuming that the Plaintiff is correct in his statement, the fact would be merely a ground of appeal from the Civil Judge, and such appeal is expressly excluded from the leave given by the order of Her Majesty in Council.

The Plaintiff is entitled to a decree, and the only question remaining is as to the amount of damages to which he is entitled. Their Lordships see no sufficient reason to alter the Judgment of the Commissioner of *Lucknow* in that respect. They will, therefore, humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and also to reverse the judgment of the Commissioner of *Lucknow* as regards the order that the Plaintiff shall pay the costs on Rs. 2,700, being the difference between the Rs.3,000 awarded by the First Court and the Rs. 300 awarded by the Commissioner, but to affirm the last-mentioned judgment in other respects. The Respondents must pay the costs of this appeal.

Appellant in person.

Solicitor for the Respondents: *H. Treasure.*

(1) 3 Moore's P. C. 28; 2 Moore's Ind. Ap. Ca. 293.
(2) 4 Moore's Ind. Ap. Ca. 353.
(3) 15 M. & W. 346.
(4) 9 Cl. & F. 251, 290.
(5) 10 Bing. 157.

18th May 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at fort William in Bengal.

RAJAH NILMONI SINGH DEO BAHADOOR (Plaintiff) ... } *Appellant,*

and

TARANATH MOOKERJEE (Defendant) ... } *Respondent.**

Superintendence of the High Court—24 and 25 Vic., c. 104, s. 15—Execution of decrees for rent—Act X of 1859, ss. 23, 77 and *160—Civil Procedure Code (Act VIII of 1859) ss. 284, 294—(Act X of 1877); ss. 223, 228.*

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic., c. 104, s. 15. Decrees for rent made by the Collector under s 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure

* 9 Cowell's Ind. App. 174; I. L. R. 9 Cal 295; 12 Cal. L. R. 361.

relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."

Appeal from an order of the High Court, (7th July 1880), made in exercise of its power of superintendence over all Courts subject to its appellate jurisdiction under 24 and 25 Vic., c. 104, s. 15. This stayed proceedings upon an order made by the Deputy Commissioner of *Manbhoom* on 11th March 1872 as Collector of the District, transferring a decree for rent made in that district to another for execution; it also cancelled a similar order dated 29th May 1879.

Mr. *R. V. Doyne* appeared for the Appellant.

Mr. *J. F. Leith*, Q. C., Mr. *T. H. Cowie*, Q. C, and Mr. *C. W. Arathoon* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The question presented to their Lordships in this appeal is, whether the Deputy Commissioner of *Manbhoom* who has made decrees in rent suits under the *Bengal Rent Act*, No. X. of 1859, can transfer those decrees for execution into another district. That officer possesses the jurisdiction conferred on Collectors of land revenue, and having made decrees in exercise of such jurisdiction has further proceeded to make two orders transferring two decrees and execution. The High Court, in the exercise of their power of revision, have substantially quashed his orders; in point of form, they have quashed one of the orders and they have stayed proceedings on another. It is hardly necessary to enter into the details of the litigation. The High Court have decided that the Deputy Commissioner, as Judge of the Rent Court of *Manbhoom*, had no authority to pass the orders under Act X. of 1859, or any other law applicable to rent suits in that district.

A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point, except that they entirely agree with the view taken by the High Court of their own jurisdiction.

The other question depends upon the construction of Act X. of 1859. That Act was passed for the purpose, among other things, of transferring suits for arrears of rent to the jurisdiction of the collectors of land revenue; and it provided by sect. 23, pars. 4 and 7, that all such suits "shall be cognizable by the collectors of land revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal, as provided in this Act, should not be cognizable in any other Court or by any other officer, or in any other manner."

It is not contended on behalf of the Appellant that Act X. of 1859 in any express way gave to the collector the power of transfer which has been exercised. Neither is it contended for the Respondent that the words which have been read would, without more, prevent the porvisions of Act VIII. of the same year from applying to the execution of a collector's decrees beyond the jurisdiction of his Court. The contention of the Respondent is, that there is something in the language of Act X. of 1859 which excludes this power from the jurisdiction of the collector sitting as the Judge of the Rent Court established by that Act. For that purpose the Respondent's counsel referred to a number of sections which may be illustrated by a single one. Sect. 77 deals with cases in which a third party appears to claim title in a rent suit; it gives the collector certain powers of deciding the question before him, and then contains this proviso:—"The decision of the collector shall not affect the right of either party who may have a legal title to the rent of such land or tenure to establish his title by suit in Civil Court." There are a number of other sections of similar frame; and the contention is, that the expression "Civil Court" is used in all those sections in such a way as to shew that the framers of the Act X. of 1859 did not consider that the Rent Courts established by that Act are Civil Courts.

It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in sect. 77, and the kindred sections mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely Civil questions between persons seeking their civil rights, and whether being a Civil Court in that sense, it does not fall within the provisions of Act VIII. of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute but that, if the Rent Court is a Civil Court within Act VIII. of 1859, the collector has under sect 284, the power of transferring his decrees for execution into another district.

The consequence of holding as the High Court have held is, that wherever Act X. of 1859 applies, persons seeking their rent against a tenant who is insolvent in the district in which he is sued have absolutely no remedy against him, though he may be possessed of great wealth in another district. No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt founded on rent and a person who is claiming a debt founded on any other transaction. The distinction does not exist in any other part of *India*, neither indeed does it exist in those provinces of *Bengal* in which Act X. of 1859 has been repealed, and the *Bengal* Act VIII. of 1869 has taken its place. Therefore although it is not impossible that the Legislature should have intended to establish in *Manbhoom* and adjacent districts a distinction between claims for rent and all other claims which does not exist elsewhere, it requires very clear and cogent evidence on the face of the enactments, to support the conclusion that they really do intend such a distinction.

That consideration is somewhat emphasised by referring to Act XXXIII. of 1852, which was an Act passed to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same. It provides that with respect to all Courts—not making a distinction between one Court and another, but with respect to all Courts,—judgments may be enforced in the manner provided in the Act, viz, by a transfer of the judgment out of the district of the Judge who pronounces it into the district of some other judge within whose jurisdiction the debtor possesses property. It is true that in this Act it is said that the word "judgment" means a judgment in a civil suit or proceeding. But suits for the recovering of rent are civil suits or proceedings; and nothing can be clearer on the face of this Act than that the Legislature intended that everybody who obtained a decree in a Court of justice should have a remedy against his debtor, wherever the property of that debtor might be.

The provisions of the Act of 1852 are substantially repeated in Act VIII. of 1859; and though that Act speaks of Civil Courts, and not all Courts as Act XXXIII. of 1852 does, yet the intention expressed is the same, viz., that all Courts entertaining civil suits of any kind should have this power of transferring their decrees for execution into another district. We find that Act XXXIII. of 1852 was repealed in the year 1861, and it is repealed as being simply obsolete, the only reason expressed for repealing it being that Act VIII. of 1859 had been passed. If Act VIII of 1859 covered the same ground as Act XXXIII. of 1852, the earlier Act had become useless and might be swept out of the Statute Book. But the earlier Act would not have become useless unless the later Act covered the same ground.

In the opinion of their Lordships it is clear that, looking outside Act X. of 1859, no intention of making a distinction between rent suits and other suits in respect to the point now under consideration can be ascribed to the Legislature.

Turning to Act X. of 1859, the preamble recites that "it is expedient to re-enact, with certain modifications, the provisions of the existing law in connection with demands of rent, to extend the jurisdiction of collectors, and to prescribe rules for the trial of such questions." It was pointed out by Mr. *Doyne* that the particular process now under consideration was not the trial of any question regarding rent. But when we look at the provisions of the Act, it is clear that they go beyond the trial of such questions, and provide for the execution of decrees. At the same time the scope of the Act appears to be only to provide for the execution of the decrees of the collector within his jurisdiction. There is nothing in the Act which provides for any execution beyond his jurisdiction. And there is nothing to forbid the conclusion that such executions are left to the operation of Act XXXIII. of 1852, or the corresponding portion of Act VIII. of 1859.

Sect. 160 of Act X. of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a collector or deputy collector shall lie to the zillah Judge. But the zillah Judge is a Civil Court to all intents and purposes. It was not disputed that if an appeal went from the collector to the higher Court,—to the zillah Judge or to the High Court,—and the decree of the collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII. of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree; as long as the decree remains the decree of the collector it is incapable of enforcement in any other district; but let the decree be affirmed by a Court of Appeal, and, though it is between the same parties for the same subject-matter, it then becomes enforceable in another district. It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature.

These considerations lead to the conclusion that the Rent Courts established by Act X of 1859 must be held to fall within sect. 284 of Act VIII. of the same year.

The result is that their Lordships will humbly advise Her Majesty that the order of the High Court of the 7th of July, 1880, be set aside and that it be ordered that the rule *nisi* of the 17th of May, 1880, therein referred to be discharged with costs. The Respondent must pay the costs of the appeal.

Solicitors for Appellant: *Lambert, Petch, & Shakespear.*

Solicitor for Respondent: *T. L. Wilson.*

29th June, and 15th July, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

MISIR RAGHOBARDIAL (Plaintiff) ... } *Appellant,*

and

RAJAH SHEO BAKSH SINGH (Defendant) } *Respondent.**

Res judicata—Civil Procedure Code, Act X. of 1877, s. 13—Competent Court.

The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive.

The words "Court of competent jurisdiction," used in s 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one.

* 9 Cowell's Ind. Ap. p. 197; I. L. R. 9 Cal. 439.

The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790.

Held, that the issue as to the amount of principal due on the bond had not been heard, and finally decided by a Court of competent jurisdiction within the meaning of s. 13.

Appeal from a decree of the Judicial Commissioner of *Oudh* (22nd November 1879,) dismissing an appeal from a decree of the Deputy Commissioner of *Sitapur* (25th February 1879.)

Mr. *J. F. Leith*, Q. C., and Mr *C. W. Arathoon*, appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought upon a bond, dated the 21st of November, 1875, given by the Respondent for Rs. 12,000, stated therein to have been borrowed from the Appellant, the principal to be repaid within three years, and interest to be paid monthly at the rate of Rs. 1. 8*a* per cent. per month. The three years having expired, the plaint was filed on the 7th of December, 1878, in the Court of the Deputy Commissioner of *Sitapur*. The Defendant (the now Respondent) pleaded "want of consideration, and that in a previous suit for Rs 1,665, interest on this bond, the issue regarding consideration was decided in favour of Defendant, the Court deciding that Defendant had received only Rs. 4.790 and not Rs. 12,000," which decision was upheld on appeal. Upon this a preliminary issue was framed by the Court as follows :—"Is the issue regarding consideration a *res judicata* (Sect. 13, Act X. of 1877) between "the parties?" The decision of the Deputy Commissioner upon this issue was in favour of the Defendant, and judgment was given for the balance found to be due of the principal sum of Rs.4790 and the interest thereon. From this decree there was an appeal by the Plaintiff to the Judicial Commissioner of *Oudh*, who dismissed it, and the Plaintiff has appealed to Her Majesty in Council from that dismissal.

The suit for interest was brought in December, 1877, in the Court of the Assistant Commissioner of *Sitapur*, it being alleged that Rs, 4,140 was due for interest on a bond for Rs. 12,000, and it being admitted that the Defendant had paid Rs. 2,475, the balance of Rs. 1,665 was claimed. The jurisdiction of the Assistant Commissioner was limited to suits where the amount or value of the subject matter did not exceed Rs. 5,000, and the Defendant objected that, if the Plaintiff insisted on the validity of the bond, the case could not be tried before him. The Assistant Commissioner held that the case was beyond his jurisdiction, but upon an appeal to the Commissioner, his order dismissing the suit was cancelled, and it was remanded for trial on the merits. The case was then tried by the Extra Assistant Commissioner, and evidence having been given on both sides, he found that the principal sum due on the bond was Rs. 4,790, and that the Plaintiff was entitled to interest thereon, and the Plaintiff having admitted the receipt of Rs. 2,475 on account of interest, which exceeded the sum he found to be due for interest by Rs 822. 7*a*. 9*p*., he dismissed the suit. An appeal from this decision to the Commissioner was dismissed, and an application made to the Judicial Commissioner to allow an appeal from that order was rejected by him.

The question now before their Lordships depends upon the construction of sect. 13 of Act X. of 1877. Before considering that question, it will be well to refer to the state of the law in *India* when that Act was passed. Sect. 2 of Act VIII. of 1859, the Code of Civil Procedure for which Act X. of 1877 was substituted, provided that the Civil Courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a Court of competent jurisdiction in a

former suit between the same parties or between parties under whom they claim. It is clear that this section would not have applied to the present case, the causes of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought the cause of action in the second had not arisen. But independently of this provision in the *Code of Procedure*, the Courts in *India* have adopted the rule laid down in the *Duchess of Kingston's Case* (1), and have applied it in a great number of cases. It was recognised as the law in *India* by this Board in *Khugowlee Singh* v. *Hossein Bux Khan* (2), where, after quoting the passage in the *Duchess of Kingston's Case* (1) in which the rule is stated, their Lordships say, "There is nothing technical or peculiar to the law of *England* in the rule as so stated. It was recognised by the Civil Law, and it is perfectly consistent with the 2nd section of the *Code of Procedure*, under which this case was tried."

Mussumat Edun v. *Mussumat Bechun* (3) may be referred to as the leading case on this subject. In that case the Chief Justice, Sir *Barnes Peacock*, held that the two Courts must be Courts of concurrent jurisdiction, and "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." As to what is a Court of concurrent jurisdiction, it is material to notice that there is in *India* a great number of Courts, that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction, and that by the *Code of Procedure* a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in *Bengal*, by the *Bengal Civil Courts Act*, No. VI. of 1871, the jurisdiction of a munsif extends only to original suits in which the amount or value of the subject matter in dispute does not exceed Rs. 1,000. The qualifications of a munsif and the authority of his judgment would not be the same as those of a district or of a subordinate judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a munsif upon (for instance) the validity of a will or of an adoption in a suit for a small portion of the property affected by it should be conclusive in a suit before a district judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the munsif's decision, but that upon the facts would be to the District Court and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in *India*, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case. It appears to their Lordships that if this case had arisen before the passing of Act X. of 1877, the High Courts in *India* would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond.

Sect. 13 of Act X. of 1877 is as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom

(1) 2 Smith's L. C. 760.
(2) 7 Bengal Law Rep. 673.
(3) 8 Suth. W. R. 175.

they or any of them claim, litigating under the same title."

The intention seems to have been to embody in the *Code of Procedure*, by sects. 12 and 13, the law then in force in *India*, instead of the imperfect provision in sect. 2 of Act VIII. of 1859. And, as the words of the section do not clearly shew an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration.

The first suit was for Rs.1,665, for interest only, the principal not being then due, and the matter in issue was whether that sum was due. The Plaintiff alleged that it was for interest on a bond for Rs.12,000, which the Defendant denied, and thus an issue was raised as to the consideration for the bond, but this was a collateral rather than a direct issue in the suit. The Plaintiff might have succeeded without having a finding upon it if he had proved an admission by the Defendant that the sum claimed was due for interest, or had shewn that the Rs.2,475 had been expressly paid on account of the larger sum which he said the Defendant owed for interest. If the decision of the Assistant Commissioner is conclusive he will, although he could not have tried the question in a suit on the bond, have bound the Plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by Court of competent jurisdiction Act X. of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction. In the judgment delivered by this Board in *Khagowlee Singh* v. *Hossein Bux Khan* (1), it said that the *eadem causa petendi* and judgment of a Court of competent or concurrent jurisdiction were both wanting in that case. This seems to shew what was considered to be a competent Court. Their Lordships think that sect. 13 of Act X. of 1877 should be so construed, and consequently they will humbly advise Her Majesty that the orders of both the Lower Courts should be reversed, and the suit be remanded for trial on the merits. The Respondent will pay the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

(1) 7 Beng. L. R. 680.

5th and 6th July 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court in the North-Western Provinces.

RAI BALKRISHNA (Plaintiff) ... } *Appellant,*

and

MUSSUMAT MASUMA BIBEE, MUSSUMAT SAID-UN-NISSA BIBEE, NAWAB MOHAMED HOSEIN KHAN, and the COLLECTOR OF GHAZIPUR on behalf of the Court of Wards (Defendants)... } *Respondents.**

Regulation LII. of 1803—Court of Wards—Incompetency of disqualified proprietor to contract.

Under s. 7 of Regulation LII of 1803, *lakharaj* lands belonging to a disqualified proprietor may be committed by the Government, (on its appearing that this will be for its interests and those of such proprietor), to the charge of the Court of Wards; and, thereupon, the whole estate and effects, real and personal, of such proprietor, become vested in that Court.

An estate consisting of *lakharaj* lands was duly placed under the management of the Court of Wards, the proprietress, a Mohammedan, being disqualified under the Regulation. This ward having then become a party to a mortgage of such lands to secure re-payment of money advanced to her, it was *held*: that she neither bound herself nor charged the estate.

* 9 Cowell's Ind. Ap. p. 182; I L. R. 5 Alla. p. 142.

This case distinguished from *Mohummud Zahoor Ali Khan v Taukooranee Rutta Koer* (1), where the proprietress, no intention to treat her as disqualified having been shown, was adjudged capable of contracting, though the Court of Wards was in possession of her estate.

On the facts of this case it was also *held*: that, although the Court had given to this ward an authority, under certain limitations of which the Plaintiff had notice, to borrow money for a special purpose, there had not been such a holding out to the world of her competency as would have induced any reasonable person to suppose that she had power to make the contract on which this suit was brought.

Consolidated appeal from two decrees of the High Court, (26th May 1879,) affirming decrees of the District Judge of *Benares*, (21st and 25th September, 1878).

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* for the Respondent, the Collector of *Ghazipur*, on behalf of the Court of Wards.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

Two suits have been here consolidated, brought by *Rai Balkrishna* against *Mussumat Masuma Bibee*, her daughter, her daughter's husband, and the Collector of *Ghazipur* on behalf of the Court of Wards.

The plaint in the first suit states that the claim is under a deed of mortgage executed on the 1st November, 1872, by the Defendants 1, 2, and 3, that Rs. 67,000 were borrowed of one *Bisheshur pershad*, and that as security for that amount the Defendants mortgaged a two annas share out of 16 annas of talooka *Sunwani*. It then states that the debt due to *Bisheshur* was purchased under a sale in execution of a decree by the Plaintiff, who obtained a sale-certificate, and thereby stood in the place of *Bisheshur*, and "that inasmuch as the *Sunwani* estate belonging to the Defendants is under the superintendence of the Court of Wards, and as the Collector of *Ghazipur* is the manager thereof on behalf of the Court of Wards, the Collector has also been made a Defendant." The Plaintiff prays judgment for the amount claimed.

The plaint in the second suit is very similar. It is upon a mortgage-bond for Rs. 39,900, executed, on the 7th of March, 1874, by the same persons, to *Rai Narain Dass* himself. This plaint also contains a statement that the *Sunwani* estate is under the control of the Court of Wards; and that therefore the Collector, who was in the management of it, is made Defendant.

A written statement was put in on behalf of the Court of Wards in the first suit, which stated, "That talooka *Sunwani* is the sole and exclusive property of *Masuma Bibee*," which is now admitted; and that she was a ward of the Court, and had no power to convey any portion of her estate by way of mortgage, that the property against which the Plaintiff seeks to enforce his lien belongs to No. 1 only,—that is, *Masuma Bibee*,—not to the other Defendants; and that the debt sued for was not borrowed with the consent or knowledge of the Court of Wards.

The material issues framed are, "Who is the proprietor of talooka *Sunwani*, and have *Nawab Mohamed Hosein Khan* and *Mussumat Said-ul-Nissa Begum* any interest in this talooka or the properties in dispute?" It is found they had not. "Was the proprietor of or were the persons who may be found to possess an interest in the property in dispute, legally competent to convey that property by mortgage or sale while the estate was under the superintendence and management of the Court of Wards?" "Is the Plaintiff, as auction purchaser of the deed of mortgage, competent to sue? Was the deed executed with the knowledge and consent of the Court of Wards? If the deed is not valid, are *Masuma Bibee*, *Said-ul-Nissa Begum*, and *Nawab Mahomed Hosein Khan*, or any of them, liable for the amount claimed, or for any other amount?"

The first suit was decided on what may be called a technical point. On issue 4 it was held that the Plaintiff was not the

(1) 11 Moo. I. A., 468.

auction purchaser of the deed of mortgage, and therefore could not sue; and the decision was therefore against him. The Judge appears also to have found the other issues very much as they were found in the other case.

With respect to the second suit the issues are very much the same, and the findings are in favour of the Defendants upon all the material issues. They are in their favour upon the issue that the Defendants, who may be reduced to one,—viz., *Masuma Bibee*,—were not competent to convey an interest in the property in dispute, and that the deeds sued upon were not known to the Court of Wards. Under these circumstances, in the second case, the Judge of the first instance dismissed the suit as against the Collector of the Court of Wards and as against *Masuma Bibee*, but granted the relief claimed against the daughter and the son-in-law, who were not under the Court of Wards. The two judgments have been confirmed in every respect by the Court above, and the appeals are from the judgments of that Court.

It has been contended on the part of the Plaintiffs in the first place that the estate in question, which seems to have been a large estate, was not properly put under the jurisdiction of the Court of Wards, so as to destroy the power which *Masuma Bibee* would have had of charging it; secondly, that even assuming that it was, still that the conduct of the Court of Wards has been such in allowing her and her son-in-law to manage the estate as to hold them out to the public and to creditors as capable of charging it.

It now becomes necessary to refer to some of the provisions of Reg. LII. of 1803, by which the Court of Wards was established. By sect. 2, "The Board of Revenue is hereby constituted a Court of Wards for the superintendence of the persons and estates of zemindars and other actual proprietors of land paying revenue to Government who are or may be disqualified for the management of their own lands, in consequence of their coming under any of the descriptions of disqualified landholders specified in sect. 3 of this Regulation." Those disqualified landholders are in the first place females, who are treated as disqualified if so reported by the Board of Revenue, unless the Governor-General in Council declares them competent; and there is another class of disqualified landholders consisting of minors, idiots, lunatics, and persons of bad character. This Act provides in the first place only for the case of proprietors of lands paying revenue to the Government, but the 7th section goes further, and provides "that it shall be competent to the Governor-General in Council to commit to the charge of the Court of Wards any estate paying revenue to Government, being the sole property of any disqualified person or of any two or more persons, both or all of whom may be disqualified, although the same shall not have descended to such person or persons in the regular course of inheritance;" and then it goes on to say—"and also any lakheraj lands belonging to such proprietor or proprietors, whenever the same shall appear to him for the interests of Government and the proprietor or proprietors," and so on. There are further provisions with respect to reports to be made to the Government, the appointment of a manager, and a number of details as to the duties of that manager, and the staff of assistants which he shall have, and so forth. Then by sect. 19 it is stated that the manager shall have "the exclusive charge of all lands, malguzarry or lakheraj, as well as of all houses, tenements, goods, money, and moveables of whatever nature belonging to the proprietor whose estates may be committed to his charge, excepting only the house wherein such proprietor may reside, the moveables wanted for his or her use, and the money allowed for the support of the proprietor," &c. So that according to the provisions of this section if the Governor-General in Council, or the Lieutenant-Governor who now exercises his powers, is of opinion that it would be for the benefit of the public or the estate to include any lakheraj lands under the management of the Court of Wards, he may do so; and then the whole estate

and effects, real and personal, of the proprietor are vested in the Court of Wards.

Undoubtedly, the evidence in this case is somewhat meagre and unsatisfactory as to the proceedings of the Court of Wards, both as to the circumstances under which they took possession of the estate and their dealings with it afterwards. What evidence there is consists mainly of what will be now referred to. It appears that on the 8th of October, 1868, the Collector of *Ghazipur* wrote a letter to the Commissioner of *Benares*, with a view, no doubt, of its being transmitted to the Board of Revenue, to this effect:—"I have the honour to request that you will obtain the sanction of the Board of Revenue to my placing the estates of *Masuma Begum*, and *Mussumat Said-un-nissa Begum*, (that is, the mother and the daughter,) under the Court of Wards. These estates are held rent-free; they were granted on the usual fees to *Munshi Shariatullah Khan* in *A. D.* 1784, for good services rendered by him, and have been in his family ever since. Lately, owing to the estates being in the hands of women, they have fallen into great disorder, large debts have accrued, and unless some steps are taken this fine property will, I fear, soon be split up and come into the possession of outsiders." He recommends accordingly, with a view to the preservation of the property, that it shall be taken into the custody of the Court of Wards. The next document is one of the 24th of February, 1869, in which the lady herself and her daughter pray that the estate may be put under the Court of Wards; and they make a proposal for the payment of some revenue to the Government with a view of authorizing the Government to take that step. The next document is a letter, No. 1,107 of the 18th of May, 1869, from Mr. *Simson*, Secretary to the Government of the *North-Western Provinces*, to the Secretary of the Board of Revenue, in which he says that he forwards an opinion of the Government Advocate on the proposal of the Board that the *Sunwani* talooka in pargunnah *Balia*, zillah *Ghazipur*, be placed under the management of the Court of Wards. Then he says: "I am to observe that to receive a small payment as land revenue simply for the purpose of bringing the property within Regulation. LII of 1803, is a proceeding to which the Lieutenant-Governor would have been unwilling to resort. But on a reference to the agents of the family who are now at *Allahabad*, it has been alleged by them that the family are in possession of a small assessed property. If this be the case, the Board are authorized to assume the property *Khalsa* and *Jagir* under their control, as the Court of Wards." The Government, therefore, put the construction upon the seventh section, which has been before read, that if any part of the property pays Government revenue, then there is a power to include all the lakheraj property; and this letter includes an opinion from the Government Advocate very much to the same effect.

We are informed incidentally of what was done by a letter of the 22nd of July, 1875, from the secretary to the Government of the *North-Western Provinces* to the secretary to the Board of Revenue of the *North-Western Provinces*:—"In reply to your letter, dated the 24th of June last, I am directed to say that the Board have correctly interpreted the grounds on which the Government in G. O. No 1107, dated the 18th of May, 1869"—which is the last letter referred to—"authorized the Board to assume charge of the *Sunwani* estate in the *Ghazipur* district as the Court of Wards, viz., on account of the incompetency of the proprietors to manage it." We have here, therefore, a statement that this estate was assumed on the ground of the incompetency of *Masuma Bibi*. Then the letter goes on to say:—"The orders as contained in Government Order No. 1107, dated the 18th of May, 1869, were made subject to the condition that some portion of the estate was assessed to revenue. The same condition was subsequently referred to in Government Order No. 1110"—which we have not—"dated the 20th of May, 1869. The Board, in their docket, No. 894"—which is not in the record—"dated the 18th of August,

1869, reported that the condition required to make the orders of 20th of May, 1869, absolute was satisfied." Then it goes on to say: "The proprietors are still deemed by the Government incompetent to manage their estate. The Board may therefore carry out their proposal to sell a portion of the taloka to discharge the debts contracted." We have from this letter information that the Government made some inquiries, and in the result were satisfied that *Masuma Bibi* had some rent-paying land, and if so, the condition under which they directed her estate to be put under the management of the Court of Wards was complied with; and further, it is here stated that the estate was put under the management of the Court of Wards because she was incompetent, and that she was so considered up to that time, namely, 1875. Their Lordships understand that the whole of *Masuma Bibi's* property, including a house in *Benares*, was taken under the management of the Court of Wards.

That being so, this case is distinguishable from a case which has been quoted from the 11th volume of *Moor's* Indian Appeals, page 468, in which under certain circumstances it was held that, although an estate was actually in possession of the Court of Wards, still the lady to whom it belonged, *Rutta Koer*, might be capable of contracting debts. The ground on which this case was decided appears from what is said in the judgment delivered by Sir *James Colvile*, at page 483 of the volume referred to: "The evidence in this case not only fails to shew that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the revenue authorities to treat *Rutta Koer* as a disqualified proprietor or a person incompetent to manage her affairs. It shews that when her title was attacked in 1855 they declined to act as a Court of Wards in its defence, but left her to sue or be sued as a person *sui juris*, on her own responsibility and at her own cost. It further shews that in 1856, and in the very month in which she is alleged to have executed the bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the taloek, as a proprietor competent to its management, on her entering into proper engagements for the payment of the Government revenue." In that case the estate had been put under the Court of Wards in the lifetime of the sister who was incompetent. It had come by inheritance to *Rutta Koer*, who, according to that part of the judgment which has been quoted, was not incompetent, and to whom the Board intended to transfer the estate, and would have done so but for the Mutiny. That case is altogether distinguishable from the present, where the Court of Wards did hold the lady to be incompetent; where, so far from leaving her to sue and to be sued, they now take her part and protect her; and further, where they have assumed the management and retain it to the persent day, holding her to be incompetent.

It now remains to deal with what may be called the substantial case on the part of the Appellants. They say that, assuming that the estate was properly taken possession of by the Court of Wards under a proper power, still that the conduct of the Court of Wards when they had taken possession was such as to hold out *Masuma Bibi* to the world as capable of contracting, and that the Plaintiffs have been induced thereby to contract with her. It is said that the Court of Wards have not assumed possession of the property in the sense of taking the rents and profits at all, and that they have appointed no manager. Undoubtedly, as before observed, the evidence on these subjects is meagre, but their Lordships by no means infer that the lady or her son-in-law, and daughter have remained in possession of the rents and profits all along; and with respect to a manager, whether or not a regular manager was appointed does not very clearly appear, but in the statement of the plaint the estate is said to be under the management of the Court of Wards, and appears undoubtedly in fact to have been so.

The argument last adverted to appears

to their Lordships not to have been set up in either of the Courts below. There is no issue addressed to it; the judgment of the Court below is not addressed to it; and even in the petition of appeal the point is not taken. There is, indeed, in the second ground of appeal, this statement: "The manner, the object for which, and the state of things under which the estate was brought under the management of the Court of Wards did not prevent the owner or owners of the estate from raising debt by the hypothecation of the estate." That refers to the object and the state of things under which the estate was brought under the management of the Court of Wards; but it does not set up the case that the Court of Wards, after it was brought under their management, so conducted themselves as to render this lady competent. She having been incompetent when they took possession of the estate, could any conduct of theirs in the first place, render her competent? In the second place, has their conduct been such that they are estopped, as it were, from disputing that she was competent? Those seem to be the questions. Assuming, however, that those questions, though not distinctly raised in the issues or in the judgments of the Court, or in the grounds of appeal, could now be gone into, their Lordships are of opinion, that, as a matter of fact, no such case is made out on the part of the Appellants. It does indeed appear that the Court of Wards allowed this lady and her daughter and son-in-law more freedom of action than probably they ought to have had or than was consistent with the Regulation which has been quoted. The circumstances under which they were permitted that liberty of action appear upon the record. In a petition of the 4th of January, 1872, by the son-in-law, who is called the Nawab of *Sunwani*, there is this statement: "The rent-free jagir of talooka *Sunwani* has been, at our request, placed under the management of the Court of Wards. Mr. *Nickels* holds a conditional deed of sale of the said property, the term of which has expired on the 4th of September, 1871. As it is impossible to liquidate the debt without raising a fresh loan, which we have arranged for with certain bankers of *Benares*, who have already paid into the *Bank of Bengal* a sum more than covering the debt in question, we are therefore placed under the necessity of asking your written permission"—this is, of the Court of Wards—"for contracting the mortgage loan, so that we may be enabled to complete the requisite transaction with the bankers, and the property be thereby saved from the liability of the deed of conditional sale. Petitioners pray for the issue of early orders, as they will be put to great expense for payment of interest pending receipt of permission." That petition is considered, and this Order is made: "Forward a copy of this letter to *Masuma Begum*, and request her to arrange that the money required for liquidation of the debt as claimed by Mr. *Smythe*, attorney for *Nickels*, may be at once deposited in the *Bank of Bengal*." It appears then that for the purpose of liquidating a debt of large amount to Mr. *Nickels*,—incurred antecedently to the assumption of the estate by the Court of Wards,—the power was given to borrow considerable sums of money, a power which probably ought not to have been given; but at the same time it is clear from the petition that the Petitioner recognised the estate as being under the Court of Wards, and was fully sensible that without express written permission from them no transaction of the kind could be effected. Probably the Court in granting this permission acted under sect. 23 of Regulation LII. of 1803, in which, among other things, it is said: "Th circumstances of all such debts,"—that is, antecedent debts,—"however, shall be immediately reported to the Collector, and by him without delay to the Court of Wards, with his sentiments on the best mode of satisfying the same, for their instruction, previous to any payment being made by the manager in discharge of them." It would seem that the Court thought that the best mode of dealing with this debt, incurred antecedently to their jurisdiction over the

estate, was to allow the lady herself and her daughter and son-in-law to contract fresh loans. Upon this permission they did contract them, and it appears that they entered into four bonds, one of them in favour of the present Plaintiff, *Rai Narain Dass*, dated the 25th January, 1872, for 17,000 rupees, and three others to other persons whose names are not material. The terms of these bonds are set out, and it appears that in the bond given to this Plaintiff, there is this statement: "That as the *talooka Sunwani* was held by the Court of Wards, they were forbidden by law to borrow debt without the sanction of the Court; they had obtained a written permission of the Commissioner, and executed the deed of simple mortgage." Thereupon the present Plaintiff advances this money, and received a bond, for the purpose of paying off an antecedent debt, which debt is paid off, and the Plaintiff is paid also; and on the face of this bond he has express notice that there is no power on the part of the lady to contract without the written permission of the Court of Wards, which has been given. That being so, when we come to the mortgage on which he sues,—and we are here dealing with mortgage given to himself,—this previous mortgage to him is recited, which contains a statement of the want of power in the lady to contract. He had, therefore, express notice when he entered into the mortgage of the 4th of March, 1874, that she was acting without authority, and when he took it he certainly took the chance which every man must do who deals with a person who he knows has no authority to contract.

It appears, then, to their Lordships that the giving on the part of the Court of Wards, whether prudently or not, of this limited authority to raise loans for the purpose of paying antecedent debts, was not such a holding out to the world of the competency of *Masuma Bibee*, and her daughter and son-in-law, as would induce any reasonable person to suppose that they had the power to contract debts; and that even if it were so, the Plaintiff at all events knew the true state of the case.

The case against *Rai Narain Das* on the second bond on which he sues is perhaps somewhat stronger than that on the first, because the first was given to *Bisheshar*; and the question would be what knowledge *Bisheshar* had. But when their Lordships consider the necessary notoriety of a large estate being put under the manangement of the Court of Wards, when they consider further that express notice was given to all creditors of the estate being under the management of the Court of Wards as early as December, 1869, that part of the estate was in *Benares* and that the family resided in *Benares*, and that *Bisheshar* was a banker of *Benares*, they cannot doubt that he must have been perfectly well aware, as *Rai Narain Das* himself must also have been, that this lady had not the power to contract.

Under these circumstances their Lordships are of opinion that the judgment in the second case, that of the bond of the 4th of March, 1874, is right.

With respect to the first case, their Lordships think the judgment dismissing the suit on the ground that the Plaintiff was not the purchaser of *Bisheshar's* mortgage, on the ground of the sale being irregular, and of the Court not having jurisdiction to execute the decree, was wrong. The irregularities referred to, if they existed, were cured by the certificate of sale; and though the Court may not have had jurisdiction to attach lands out of its district, it had jurisdiction to sell in execution the right to enforce the bond. But for the reasons which they have given with respect to the second case, they are of opinion that the judgment ought to have been the same as in that case, that is, a judgment dismissing the suit against the lady and against the Court of Wards, but giving it effect against the daughter and her husband. The judgment in the first case must be so far modified.

In the result their Lordships will therefore humbly advise Her Majesty that in Appeal No. 121 of 1878, the decree of the High Court of the 26th May, 1879, ought to be affirmed so far as it

ralates to *Masuma Bibee* and the Collector of *Ghazipur*, on behalf of the Court of Wards, and to the property alleged to have been mortgaged, and to be reversed as to the other Defendants; and that it be declared that *Said-un-nissa* and *Nawab Muhammad Husain Khan* are liable to pay the amount of principal and interest due on the bond in original suit No. 4 of 1878, such interest to be computed at the rate of nine annas per cent. per mensem from the date of the bond to the date of the Order of Her Majesty on this report, and at the rate of six per cent. from the date of the Order to that of payment; that the case be remitted to the High Court with directions to cause the principal and interest to be computed in accordance with the above directions. And that in Appeal No. 122 of 1878, the decree of the High Court ought to be affirmed.

The Appellant must pay to the Collector of *Ghazipur*, on behalf of the Court of Wards, his costs of these appeals to Her Majesty in Council, after deducting therefrom the costs of the Appellant caused by the opposition to the motion to consolidate the appeals.

Solicitor for the Appellant: Mr. *T. L. Wilson*.

Solicitor for the Respondent the Collector of (*Ghazipur*): Mr. *H. Treasure*.

15th November, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Fitzgerald, Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North-Western Provinces.

MUSSAMUT LACHHO (Plaintiff) ... } *Appellant*,

and

MAYA RAM, MOHAMMED IBRAHIM, and others (Defendants) ... } *Respondents*.*

Pre-emption of village lands—Construction of wajib-ul-arz.

The *wajib-ul-arz* of a village, divided into three thoks and comprising also undivided land, contained a clause giving the right of pre-emption to such brothers and nephews of the vendor as were sharers, "and in case of their refusal to the other owners of the thok:" *held*, that under this clause, an owner of one of the three thoks having sold all his interest in the village, no right of pre emption attached to the ownership of another of the thoks.

Appeal from a decree of the High Court (12th January, 1880,) reversing a decree of the Subordinate Judge of *Aligarh*, (11th December, 1878).

Mr. *R. V. Doyne* appeared for the Appellant.

The Respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that the judgment of the High Court was correct.

The question is, whether, upon the construction of the *wajib-ul-arz* in the record, the Plaintiff was entitled to a right of pre-emption in the Defendant's thoke. The words are:—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should

* 10 Cowell's Ind. Ap. p. 1; I. L. R. 5 Alla. p. 158.

be effected by him in favour of his own brothers and nephews, who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." The Lower Court seems to have treated the case as though the *wajib-ul-arz* had said, "in favour of the other owners or shareholders of the village;" but it is "the other owners of the thoke." Now whether the thoke comprised the divided lands which were recorded as belonging to *Ibrahim* alone, or included the undivided lands which were appurtenant to those divided lands, the Plaintiff was no co owner with *Ibrahim*. She was not a joint tenant, nor a tenant in common with him as to the divided portion of the lands; if she were a tenant in common of the undivided lands, that did not make her an owner of *Ibrahim's* share in those lands. A tenant in common is the owner of his own share; but he is not an owner of the other tenant in common's share. It appears, therefore, to their Lordships that the Plaintiff was not an owner of the thoke which was sold. The right of pre-emption is in favour of the tenant's own brothers and nephews. If they and the owner of the share were a joint undivided family, the brothers or nephews would be co-owners and sharers; there might also be other owners of the share with them. In such case, if the sharer wished to sell his share, his own brothers or nephews in the first instance, and in case of their refusal the co-owners, would be entitled to the right of pre-emption. In this case the Plaintiff was not an owner or shareholder in the share sold, nor had she any interest in it; consequently the High Court was right in deciding that she was not entitled to the right of pre-emption.

Under these circumstances, their Lordships will humbly advise her Majesty that the decree of the High Court be affirmed, and the appeal dismissed.

Solicitors for the Appellant: Messrs. *Oehme* and *Summerhays*.

15th and 16th November, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Fitzgerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURRISH CHUNDER CHOWDHRY (Judgment-debtor) ... ... } *Appellant,*

and

KALI SUNDERI DEBIA (Judgment-Creditor) .. } *Respondent.**

Transmission for execution of order of Her Majesty in Council—Civil Procedure Code, Act X of 1877, ss. 231, 588, 593 and 610—Evidence of Such order—Appeal against an order of a Judge of the High Court refusing transmission.—Letters Patent, 1865, s. 15—Execution on the applicatin of one of several decree-holders.

The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India.

Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: *Held* that a copy, though not certified by him, might accompany a petition for execution under s. 610.

A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s 15 of the Letters Patent of 1865, and is appealable to the High Court.

Held, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal.

* 10 Cowell's I. A 4 I. L. R. 9 Cal. p. 482.

Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court.

The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety of a taluk in the possession of the defendant, who then purchased the interest of one of them: *Held* that the other co-plaintiff could obtain execution according to the extent of her interest in the estate.

Appeal from an order of the High Court (13th January 1881) reversing an order (27th February 1880) made by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council. The order of the High Court directed transmission (Act X of 1877, s 610) which the Judge had refused, of an order of Her Majesty in Council (18th April 1878) for execution by the Subordinate Judge of the *Mymensingh* District. That order in Council had been issued upon a judgment to the effect that a decree of the High Court (5th August 1875) should be reversed, and that a decree (10th March 1874) of the Subordinate Judge of the *Mymensingh* District should be restored.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellant.

Mr. *R. V. Doyne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

In order to make the subject of this appeal intelligible a short statement is necessary. In the year 1819 *Sumbhoo Chunder*, by a sunnud, conveyed to his sister *Kassiswari* a certain talook. Upon the construction of this sunnud various questions have since arisen. *Kassiswari*, treating the sunnud as having conveyed to her an absolute estate, disposed of it by her will, the material part of which is this: —"Of the whole of the rest of the rent paying and rent-free immoveable properties in *benami* and in my own name, in my possession and not in my possession, in which I have a right and interest, a moiety shall after my death be received by my daughter *Chundermoni*, and if she adopt a son by that adopted son, otherwise by her daughters, *i. e.*, by my granddaughters,"—naming them—"in equal shares; and the children born of their wombs, or adopted by them, shall from generation to generation get their (the granddaughters') respective shares in the order of succession, and the other moiety shall be received by my daughter-in-law, *Srimutti Kali Soondari Debia*, and if she adopt a son by that adopted son, and by his children from generation to generation in the order of succession. But the same shall remain in the possession of my daughter-in-law, *Kali Soondari Debia*, till the said adopted son shall have attained his majority; and in case there shall be a misunderstanding between him and my daughter-in-law after he shall have attained his majority, the said adopted son and my daughter-in-law, *Srimutti Kali Soondari Debia*, shall receive equal shares" (of the property). "But, after the death of *Kali Soondari Debia*, her adopted son, or any surviving lineal heir of her adopted son, shall obtain the same" (her share of the property).

Upon the death of *Kassiswari*, the now Appellant, *Hurrish Chunder*, who was the son of *Sumbhoo Chunder*, took possession of this property; whereupon an action was brought to obtain possession of it by *Chundermoni* and by *Kali Soondari*, who were then widows. *Kali Soondari* having adopted a son, *Chundermoni* not having made an adoption. The plaint in that action claims possession. It recites the sunnud from *Sumbhoo Chunder*; the will and the death of the testatrix; and proceeds:—"In virtue of this will, I, Plaintiff No. 1,"—*i. e.*, *Chundermoni*,—"and I, Plaintiff No 2,"—*Soondari*—"on behalf of the minor, have, since her death, become entitled to hold and enjoy all the aforesaid moveable and immoveable properties." The plaint goes on to state that the Defendant had unjustly intruded himself into this land. The Defendant denied most of the allegations in the plaint, among them the adoption of a son by *Kali Soondari*.

The Plaintiffs obtained a judgment and a decree from the Court of first instance; and it is necessary now to determine, as far as possible, what was the precise

effect of that judgment. The issues raised were, "1st, Can *Kali Soonduri* prefer this suit jointly with *Chandermoni?* 2nd, Had *Kassiswari Debia*, authority to make a will, and did she make one? 3rd, If so, is the will valid, and can the Plaintiffs, jointly or individually, prefer the present action for the recovery of the talook with wasilat? 4th, Is it necessary to consider the question of adoption of a son or otherwise in the present action?"

The Judge, after disposing of the first two issues in favour of the Plaintiffs, proceeds thus:—"Touching the third issue, it is true the original will is not forthcoming, but an attested copy has been filed. I would accept the copy as evidence, as it was attested by the registration authorities, who have the original in their safe custody. The opposite party, I may remark, does not distinctly and emphatically deny the existence of the original will, the execution of which has been substantiated by witnesses." He finds in favour of the will. He proceeds:—"But even supposing there was no will executed, yet *Chandermoni Debia*, as the successor and child of *Kassiswari Debia*, can sue for the entire talook; and she herself has no objection to have *Kali Soonderi* as a co-plaintiff; therefore, the Plaintiffs can sue in the manner they have." It may be observed that there is no allegation of or issue upon *Chandermoni's* heirship to *Kassiswari*, and the learned Judge's dictum on the subject is merely obiter. "For the aforesaid reasons it is not necessary to consider the question of adoption of *Sharat Chandra Lahiri*, the minor. To my mind the Plaintiffs can sue upon the will of *Kassiswari*, the existence and genuineness of which I do not doubt." Their Lordships regard this as, in effect, a suit for the purpose of establishing the will; and the only question to which the issues relate, and which really seems to have been tried, was whether it was valid, comprising the questions whether it was executed and whether the testatrix had the right to make it. The decree is in pursuance of this judgment, and goes on to affirm, "The Plaintiffs institute this suit against the Defendant, on the basis of the said will, for the recovery of possession after establishment of their shikmi right," and so on. And it concludes:—"That this case be decreed with costs in favour of the Plaintiffs, and that the Plaintiffs do recover from the Defendants possession of the disputed manzahs and the costs of Court, and *wasilat* from this day until realisation, with interest at the rate of 6 per cent. per annum." It is true that, if the plaint be read with technical strictness, the second Plaintiff sues only in right of her adopted son; but it does not seem to have been so understood by the Judge, who meant to give each of the ladies possession of half the property, and declined to try the question of adoption, because, whether the adoption were proved or disproved, *Kali Soonderi's* right to immediate possession remained. Their Lordships are not prepared to say that the Judge was wrong in taking this broader view of the question before him.

An appeal was preferred to the High Court against this judgment, and it was reversed by the High Court on the ground that the testatrix only took an estate for life, and therefore was incompetent to dispose of the property by will; but the High Court also treat the action as one brought for the purpose of establishing the validity of the will. The daughters of *Chandermoni* (she having died before the last-mentioned judgment) appealed to the Queen in Council, and by Order in Council the judgment of the High Court was reversed, and the judgment of the Subordinate Court was affirmed. With respect to the judgment of the Subordinate Judge, their Lordships observe:—"No dispute was raised as to the genuineness of the will of *Kassiswari* or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favour of the Plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be, that, in his opinion, *Chandermoni* took an absolute estate under the *sunnud* on the death of

her mother; but that, having elected to take under her mother's will and to admit the co-Plaintiff to a half share of the estate, both the Plaintiffs were entitled to maintain the action against the Defendant." Their Lordships also observe that their decision was not intended to conclude any question between the co-Plaintiffs.

The judgment of the Queen in Council was sent to *India* to be executed, but in the meantime the Defendant had acquired the interest of the Plaintiffs in *Chandermoni's* moiety, whereupon an application was made to Mr. Justice *Pontifex*, on behalf of *Kali Soonderi*, who claimed the other moiety, for an execution of the judgment of the Court of first instance as far as that moiety was concerned.

Mr. Justice *Pontifex* was the Judge appointed under the power, which had been previously conferred by statute upon the High Court, to execute a portion of their jurisdiction, *viz.*, that which related to enforcing the orders of the Privy Council and other questions having to do with the relations of the Privy Council to the Courts in *India*. That learned Judge refused to direct execution under sect. 610 of Act X of 1877, which regulates the procedure for enforcing the execution of any order of Her Majesty in Council. That section is to this effect: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal, and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty, by her said order, may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly in the manner and according to the rules applicable to the execution of its original decrees." Mr. Justice *Pontifex* in a short judgment observes, "This is an application for the execution of a Privy Council decree, in part, by one of two Plaintiffs. The original Court passed a decree in favour of both the Plaintiffs. On appeal to this Court that decree was overruled. One of the Plaintiffs only appealed to the Privy Council, and on appeal to the Privy Council the decree of the original Court was restored and that of this Court reversed. The Privy Council, in their judgment, expressly said they would not decide the rights of the Plaintiffs *inter se*. Subsequently the Defendant, who is in possession of the property, bought the interest of the appealing Plaintiff. The party who did not appeal, having applied to execute decree, has been met with two objections, the first under sect. 610 of Act X of 1877, that that application could not be granted because it was not accompanied by a certified copy of the decree of Her Majesty in Council. But the Defendant himself has got that certified copy, and therfore I think the objection under sect. 610 cannot be sustained"

Their Lordships think it well, before proceeding further, to say that they entirely agree with the learned Judge in this view, which was adopted by the Appellate Court. The practice with respect to the decrees of Her Majesty in Council seems to be this:—The original decree is given to the successful party, or to one of the successful parties, to the appeal. That is taken to *India*, and it is the duty of the person to whom it is given, as he is informed by a written circular, a copy of which has been read, to file that original decree in the High Court of *Calcutta*. That being done, the proper officer of the Court in *Calcutta* would be able to give a certified copy, or indeed the Registrar of this Board would be able to do the same. It seems that in this case the Defendant got, through *Chandermoni*, whose interest, as before stated, he had taken, the original order. He neglected to file it, as he ought to have done, in the Court, and it was under those circumstances that Mr. Justice *Pontifex* held that a copy

of that order, though perhaps not a certified copy, might be properly admitted, and their Lordships think he was right. The provisions of sect. 610 cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in *India*. Mr. Justice *Pontifex* proceeds.—"The other objection to the execution of the decree of the Privy Council was that the decree of the original Court, upheld by the Privy Council, could only be executed as a whole, and not partly by one of the two Plaintiffs. Mr. *Phillips* relies on sect. 231 of Act X. of 1877. Now the two Plaintiffs claim under a will which is not free from difficulty. The Privy Council declined to construe the will as between the two Plaintiffs claiming under it. I think, therefore, I must refuse this application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property."

From this order or judgment of Mr. Justice *Pontifex* an appeal was preferred to the High Court. All three of the learned Judges of the High Court, the Chief Justice and the two puisne Judges, were of opinion that Mr. Justice *Pontifex* had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two puisne Judges were of opinion that an appeal would lie under sect. 15 of the Royal Charter of 1865, which is in these terms:—"We further ordain that an appeal shall lie to the said High Court of Judicature, at *Fort William* in *Bengal*, from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to sect. 13 of the said recited Act"—the said recited Act, with regard to this matter, having enabled the Court to confer upon a Judge, or a division of the Court, the power of the Court itself. These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under sect. 610 would or would not be a merely ministerial proceeding, Mr. Justice *Pontifex* had in fact exercised a judicial discretion and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of *Kali Soonderi* to an execution in this suit. They held, therefore, that it was a judgment within the meaning of sect. 15.

The Chief Justice was of opinion that it was not a judgment: and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice *Pontifex* had no jurisdiction to inquire at all whether or not *Kali Soonderi* had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the Lower Court for execution; that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr. Justice *Pontifex* can be properly treated as having usurped jurisdiction; but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

It only remains to observe that their Lordships do not think that sect. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.

The remaining question is whether Mr. Justice *Pontifex* was right in refusing to make the order in question; and their Lordships are of opinion that the learned Judge was wrong. They are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the Plaintiffs—a doctrine which, as pointed out by the

High Court, would lead to the consequence that a Defendant could prevent the execution of a decree by buying the interest of one of the Plaintiffs. The effect of the judgment which had to be enforced was, in their Lordships' view, as has been already expressed, that the second Plaintiff, *Kali Soonderi*, was entitled to possession of half of the estate in question. The Defendant had obtained the share of *Chandermoni's* representatives. As far, therefore, as that share was concerned, he was in no better position to dispute any right the Plaintiff might have to execution than *Chandermoni* herself would have had; and it appears to their Lordships that *Chandermoni* would have had no right in this suit to dispute the title of the Plaintiff to present possession of a moiety of the land. As a Defendant he had no better rights. As against the Plaintiff he was a wrongdoer; and as against him she had an immediate right to possession. But it has been asserted that he had a right to have the question of the adoption by *Kali Soonderi* determined, and that this question could not be determined in an execution proceeding, to which latter proposition their Lordships assent. But if the adoption were set aside, still *Kali Soonderi* would have a life interest in the property, and could maintain the action in respect of that interest. With this view, as already pointed out, the Judge of first instance found in her favour, declining to try the question of adoption, and it is his judgment which has now to be executed. Any possible hardship which the Defendant might complain of in the present judgment operating as an estoppel against him, or otherwise unfavourably to his trial of this question, should it ever arise, will be obviated by a declaration that the decree is to be executed in respect only of the share to the possession of which *Kali Soonderi* is entitled under and by virtue of the will, and that nothing in this judgment shall affect any right which the Defendant may at any time have to question the validity of the adoption.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Coturt, coupled with this declaration, and to dismiss this appeal with costs.

Solicitors for the Defendant: *Watkins & Lattey.*

Solicitors for the Respondent: *Barrow & Rogers.*

17th November, and 9th December 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SRIMUTI JANOKI DEBI (Plaintiff) ... } *Appellant,*

and

SRI GOPAL ACHARJIA & others (Defendants) } *Respondents.*

Hindu Law—Endowment—Succession to the management of a religious endowment, as sebait—Usage of the institution.

On a claim to succeed to the management, as *sebait*, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the *sebait* led a family life.

Held, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

Appeal from a decree of the High Court (29th January 1877), upholding a decree of the Subordinate Judge of *Manbhoom* (31st August 1874), whereby Appellant's suit was dismissed.

Mr. *Cowell* appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondents.

* 10 Cowell's Ind. Ap. p. 32; I. L. R. 9 Cal. 766.

9th December, 1882.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Appellant in this case brought a suit to recover possession of certain properties which she alleged in the plaint to be partly *brahmottar* and partly *debatter*, the latter being dedicated to certain deities of the names of *Keshab Rai* and others, and also for the possession of the deities themselves from the hand of the first Defendant, *Sri Gopal Acharjia Goswami*. Although the Plaintiff described part of the properties claimed as her own *Brahmottar*, which had devolved upon her by right of inheritance, it appeared on the hearing before the first Court, and was admitted by both parties, that the whole of the properties claimed belonged to the deities.

The Plaintiff's case was that the properties were in the possession of *Lakhun Acharjia Goswami* as sebait of the idols; that he having no son of his body, took the Plaintiff's husband *Bejoy Lakhun Acharjia*, in adoption, and died in October or November, 1859; that *Bejoy Lakhun* being then a minor, his mother took possession of the properties on his behalf, the right of sebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance; that the idols were established by a remote ancestor of her husband, and the right had devolved from one person to another, following the rule which governs the succession of an ordinary heritable property.

The Plaintiff further alleged that the mother remained in possession, on behalf of her minor son, up to 1863, when he died, and the right of sebaitship devolved upon the Plaintiff, as his widow, but she being then a minor her mother-in-law managed the *deb-seba* for her up to the time of her death, which occurred in March, 1864; that upon the death of her mother-in-law, the first Defendant *Gopal Acharjia*, one of the Respondents in this appeal, who was the natural father of *Bejoy Lakhun*, attempted to take possession of the properties along with the *deb-seba*, and was opposed on her behalf by her father and maternal uncle, the second and third Defendants and also Respondents, and that a compromise was effected between them, which the Plaintiff sought to set aside as collusive. As the father and uncle do not appear to have had any legal authority to act as the Plaintiff's guardians, and the compromise has not been relied upon, it is unnecessary to notice it further.

The defence of *Gopal Acharjia* was, that the suit was barred by the law of limitation; that the adoption of the Plaintiff's husband was not valid according to Hindu law; that the Plaintiff, being a female, was not competent to perform the duties which ordinarily devolve upon a sebait, and to fill the office; and that, according to the usage of the family, and the rules regulating the appointment of *mohunts* to the *guddi*, he was entitled to succeed to the *deb-seba* estate on the death of *Bejoy Lakhan*, and the Plaintiff had no right whatever; that originally the *deb-seba* was founded by an ancestor of the present Rajah of *Panchkote*, and the title of sebait was not complete unless he was confirmed in his appointment by the Rajah of *Panchkote* for the time being, and that Rajah *Nilmoni Singh Deo*, the present Rajah, had made the confirmation in his favour. Rajah *Nilmoni Singh Deo* was added as a Defendant, and put in a written statement to the same effect as the last allegation.

The first Court decided the question of limitation in the Plaintiff's favour, and the Defendants did not appeal from that decision. It then found that the Plaintiff's husband *Bejoy* was duly adopted by *Lukhun Acharjia*, and the customary ceremonies of adoption were performed, but that, he being the eldest son of *Gopal Acharjia*, his adoption by *Lakhun* was invalid.

The suit was dismissed, and the Plaintiff appealed to the High Court, which held that the Lower Court was wrong in holding that the adoption of the Plaintiff's husband was invalid by reason of

his having been the eldest son of his natural father; but upon the question whether the Plaintiff was entitled upon the death of her husband to succeed as sebait, the Court held that although there was no satisfactory evidence that the appointments of sebait had been made by the Rajah of *Panchkote*, the evidence did not establish the Plaintiff's right to succeed under the Hindu law of inheritance. The appeal was therefore dismissed.

The Plaintiff has appealed to Her Majesty in Council, and it has been contended on her behalf that, in the absence of prescribed rules or usage, the ordinary law of inheritance applies.

It appears to follow from the judgments of their Lordships in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1), *Rameswarem Pagoda* (2), and *Rajah Vurmah Valia* v. *Rajah Vurmah Mutha* (3), that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage.

The greater part of the villages in dispute were dedicated to the idols more than a century ago by the then Rajah of *Panchkote* or *Pachete*, and from time to time other villages have been added to the endowment. The first sebait was *Rungraj Goswami*, who left an only daughter, *Auchuma*, who married, and had issue an only daughter, *Bencooma*; she married, and her only issue was a daughter, *Lukhipria*, and according to the Plaintiff's case *Lukhipria* had an only daughter, *Kedro Bibi*, who married *Lukhun Acharjia*, and had a son, *Srinibash*, the grandfather of the Plaintiff's husband. The Plaintiff asserted that the four daughters succeeded each other as sebaits; the Defendant *Gopal* on the contrary asserted that their husbands were the sebaits. It appeared, however, that *Lukhipria* held the "guddi" for nearly sixty years, her husband having died first, which is inconsistent with the latter contention. Now, whether the four daughters succeeded each other or their husbands were the sebaits, the succession was not according to Hindu law, as a daughter's daughter is not an heir except in certain cases of *stridhun*, and a son-in-law has no right of succession. There is, no doubt, considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage has not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the Plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the Respondent *Gopal*, who has been in possession many years, with the consent if not by the appointment of the Rajah. The Plaintiff being out of possession must recover upon the strength of her own title, and not on the weakness of that of the Defendant. Their Lordships have, therfore, only to consider whether the Appellant has made out her title, and they are of opinion that the High Court was right in holding that she had not. They will humbly advise her Majesty to confirm the judgment of the High Court and to dismiss the appeal. The costs will be paid by the Appellant.

Solicitors for Appellant: *Barrow & Rogers*.

Solicitor for Respondent: *T. L. Wilson*.

(1) 11 Moore's Ind. Ap. Ca 428.
(2) Law Rep. 1 Ind. Ap. 209.
(3) Law Rep. 4 Ind. Ap. 76, see p. 83.

23rd November, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE MAHARAJAH OF BURDWAN (Defendant) } *Appellant,*

and

SRIMATI TARA SOONDARI DEBIA and others (Plaintiffs) ... } *Respondents.**

Sale for arrears of rent—Regulation VIII of 1819, s. 8, cl. 2—Proof of publication of notice before sale of patni talook for arrears of rent.

The due publication of the notices prescribed by Regulation VIII of 1819 s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni talook for non-payment of rent is exercised by the zemindar, who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted.

Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebee* v. *Lalchand Chowdhry* (1); yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zeminder—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee.

Appeal from a decree of the High Court (22nd March 1880) reversing a decree of the Judge of the District of *East Burdwan* (2nd May 1878).

Mr. *T. H Cowie*, Q. C, and Mr. *C. W. Arathoon* appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD FITZGERALD:—

This case comes before us *ex parte*. The suit was to set aside a sale of a patni talook which took place by auction for non-payment of rent, the allegation of the Appellant, who was the Plaintiff in the suit, being that the sale was illegal in consequence of non-observance of Regulation VIII. of 1819. By that regulation it is provided with reference to cases where sales are to take place in certain districts and under certain circumstances for non-payment of rent, that "on the first day of Bysakh of the following year from that of which the rent is due the zemindar shall present a petition to the civil court of the district, and a similar one to the collector, containing a specification of any balances that may be due to him on account of the expired year from all or any talookdars or other holders of an interest of the nature described in the preceding clause of this section." Having presented this petition both to the civil court and to the collector, "the same shall then be stuck up in some conspicuous part of the *kucheree*, with a notice that, if the amounts claimed be not paid before the 1st of Jyte following, the tenures of the defaulters will on that day be sold by public sale in liquidation." Then it provide that "A similar notice shall be stuck up at the sudder *kucheree* of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the *kucheree*, or at the principal town or village upon the land of the defaulter." It is admitted that there was a compliance with the two earlier provisions, but the question arises whether a copy or extract of the notice applying to the individual case was sent by the zemindar to be published "at the *kucheree*, or at the principal town or village upon the land of the defaulter." The regulation goes on:—"The zemindar shall be exclusively answerable for the observation of the

10 Cowell's Ind. App. 19; I. L. R. 9 Cal. 619.

(1) 9 W. R., 242.

forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same; or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the 15th of the month of Bysakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the *kucheree* of the nearest moonsiff, or, if there should be no moonsiff, to the nearest thanna, and there make voluntary oath of the same having been duly published—certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." That is a very important regulation, and no doubt it was enacted for a certain and defined policy, and ought as a rule to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar who institutes the proceeding exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir *Barnes Peacock*, when he filled the office of Chief Justice of the High Court of *Bengal*, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest moonsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved and the fact is not left to be matter of controversy afterwards.

The issue in this case is as to whether the provisions of Regulation VIII. of 1819 have been complied with. The case before us differs from that before the Chief Justice of *Bengal*, and equally from that case which was before this tribunal, in this, that the fact of service here is matter of controversy. We should be obliged to assume, in order to arrive at a conclusion one way or the other, either that there was a conspiracy to cheat and deceive upon the part of the Plaintiff *Charoo* and the two chowkidars who are represented to have assisted in the fraud, or that there was a conspiracy on the part of the peon sent to effect this publication, who, having, it is said, neglected his duty, conspired afterwards

with a confederate to make a false statement and forge a receipt.

The Judge in the Primary Court delivered his judgment in favour of the Appellant. He had the advantage of seeing and hearing the witnesses, and he has expressed his decision in vigorous language. But there was an appeal on the question of fact, and upon that question of fact two Judges of the High Court have concurred in thinking that the Judge of the Court below was wrong, and have come to the conclusion that the Plaintiff and his witnesses have told the truth. It shows that not alone is the fact of publication in controversy, but that the matter is so involved that it is difficult to come to a safe conclusion upon it. Their Lordships do not propose to say upon this controverted question of publication on which side the weight of evidence lies.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and upon this ground: The doubt or difficulty in the case is one that would not have existed save by the neglect of those representing the Maharajah. There is no evidence save the statement of the peon *Khetu* that the notice was ever entrusted to him; but supposing it was entrusted to him for publication, his duty, and that of the officers of the Maharajah, would have been clear and plain. He should have ascertained when he went to make the service that the person whom he represents to be *Charoo*, to whom he says he delivered the notice, was the defaulter, or the agent of the defaulter. He should then have obtained his receipt, a receipt proper in form. If he could not obtain it he should have followed the course prescribed by the Regulation, and should at once have returned the documents to the proper officer of the Maharajah. It would then have been the duty of that officer to examine the receipt and see that it was in all respects complete and regular as part of the foundation of the title afterwards to be given by sale. Their Lordships have before them a copy of the supposed receipt, which appears to be enveloped in mystery from the time it was alleged to have been signed. The peon gives no history of it. What did he do with it? To whom did he give it? Where has it been? All that is left in obscurity, and no confirmatory proof is produced from amongst the servants of the Maharajah that the peon, having effected what he alleged to be service, brought in this receipt with him, and filed it in the collectorate or with the proper officer of the district. What is the document itself when we come to look at it? The professed signatures are at the top. The first is that of *Brojo Mohun Banerjee*. That purports to be the name, not quite the correct name, of the registered proprietor of the talook, who has been dead many years, and if this had been brought to and examined by the servants of the Maharajah they must have seen that the dead man could not have signed it; there is no doubt that they knew that this registered proprietor was not alive. The next signature is that of *Redoznath Banerjee*, who is put down as the *karpurdaz*, meaning the *karpurdaz* of the dead man, *Brojo Mohun Banerjee*. This turns out to be a non existing individual; there is no such person. Then we come to the attesting witnesses at the foot, and they are *Goburdhun Chowkidar* and *Gopal Chowkidar*, residents of *Salmula*. The inference from that would be that they were the chowkidars of *Salmula*. If there are such persons in existence, there are no such chowkidars at *Salmula*, and neither of the chowkidars of *Salmula* have been produced on either one side or the other. This document or receipt so produced by the peon is by no means a compliance with the provision of Regulation VIII. Their Lordships think that the absence of that care and attention which ought to have been shewn with reference to this document, and the absence of any contemporaneous inquiry whether there had or had not been a publication of this notice, as required by the Regulation, have created the very difficulty which the Regulation was intended to prevent; and as the Regulation makes the zemindar exclusively answerable for the observance of its provisions, their Lordships are of opinion that the

issue as to the Regulation ought to be found in favour of the Respondents; and will threfore humbly report to Her Majesty, as their opinion, that the decree of the High Court of Judicature ought to be affirmed and this appeal dismissed.

Solicitor for Appellant: *T. L Wilson.*

23rd and 24th November, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

R. OLPHERTS and E MACNAGHTEN (DECREE-HOLDERS;) ... } *Appellants*,

and

MAHABIR PERSHAD SINGH and another (Judgment debtors.) } *Respondents.**

Sale in execution of decree—Civil Procedure Code (Act X of 1877), s. 311—Irregularity in publication of intended sale.

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of the first instance, which found that proclamation had been made.

Held, that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s. 311 of Act X of 1877.

Held, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.

Appeal from a decree (22nd April 1881) of the High Court reversing a decree (25th September 1880) of the Officiating Subordinate Judge of Zillah *Tirhoot.*

Mr. *Macnaghten*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This was an application to set aside a sale of certain property in execution of a decree in consequence of irregularity. The application was made under section 311 of the Civil Procedure Code of 1877, chap. 10. By that section it is enacted that "The decree-holder or any person whose immovable property has been sold under this chapter may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." Irregularity, therefore, alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. It has also been held that inadequate price of itself is not a sufficient ground for setting aside a sale, unless there is irregularity. The question, therefore, in this case is whether an irregularity did occur, and, if so, whether that irregularity caused injury to the applicant; the injury complained of being the inadequacy of the price which was realised at the sale. The principal irregularity complained of was that no notification of the sale was properly published. Section 286 of the same Code provides that "Sales in execution of decrees shall be conducted by an officer of the Court or by any other person whom the Court may appoint, and, except as provided in section 296, shall be made by public auction in manner hereinafter men-

* 10 Cowell's Ind. Ap. p 25; I. L. R. 9 Cal 656

tioned." Then section 287 says—"When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible the property to be sold; the revenue assessed upon the estate, or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to the Government;" and certain other things.

In addition to the irregularity as regards the notification of the sale, another alleged irregularity was complained of, viz., that the attachment was not properly notified. Whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale, it is not necessary to inquire, inasmuch as that point was given up by the applicant on the trial before the Judge. The question then is solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published. The parties went down to trial upon that point, evidence was given, and the learned Judge of the First Court held that the proclamation had been published, and the High Court affirmed the decision of the first Judge in that respect. There are, therefore, two concurrent findings of the Courts that a proclamation was published.

The Judge consequently refused to set aside the sale. The parties appealed to the High Court. They never took any objection in their grounds of appeal to the form of the proclamation, or stated that there was an irregularity in not having stated all that was required by the Act, and, amongst other things, the revenue which was assessed upon the estate. When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated, and the High Court at that time considered that all the proclamations were alike, and that in each of the proclamations with regard to the twenty mouzahs which were sold the amount of revenue had not been stated. It may be inferred from the grounds of review that the Court themselves first took the point; but whether it was taken by the Court or by the applicant is immaterial, because their Lordships are of opinion that the objection could not be taken for the first time in the Court of Appeal. Even if the objection could have been properly taken at that stage of the proceedings, if no question was raised before the Lower Court as to whether any injury had been sustained by the applicant by reason of the proclamation not stating the amount of revenue, that question was never tried in the Lower Court and no evidence had been given with reference to it.

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity—it would have been necessary to go on and shew that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject before the Lower Court, though by sect. 311 the onus lay upon the applicant to prove to the satisfaction of the Court that he had sustained substantial damage in consequence of the irregularity; nor was there any finding of the Lower Court upon it, because the question was never raised.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say:—"But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price." There was no evidence

at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

The High Court, however, upon the ground that there was an irregularity, and that it had caused substantial injury to the applicant, reversed the decision of the Lower Court. Upon that a review was applied for, and then it was discovered that the objection as to the non-statement of the revenue did not apply to six of the mouzahs and six of the sales; and the High Court, having found that the proclamation in respect of those six did contain the amount of the revenue, set aside their former decision as to them, and upheld it as to the other fourteen. But when they upheld the sale as to the six they never adverted to the fact that, as they had fallen into a mistake as to them, they might equally have fallen into a mistake as to the other fourteen. They found that the inadequacy of price as regards the six did not arise from the non-statement of the amount of revenue. They might, therefore, have reasonably supposed that their former supposition, that the inadequacy of price as to the fourteen was occasioned by the non-statement in the notice of sale of the amount of revenue, was as much without foundation as it was as to the six; but instead of that they upheld their decision as to the fourteen, and set it aside as regarded the six. The question now is whether the judgment of the High Court as regards the fourteen is correct in holding that there was an irregularity in the non-statement of the amount of revenue in the proclamation which could be relied on upon appeal, and that the Appellant had sustained substantial injury by reason of that irregularity.

Their Lordships think that it was too late for the applicant to make the objection; and even if it were not too late for him to make the objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was an inadequacy of price occasioned by the non-statement of the revenue in the sale proclamation.

Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to affirm the decision of the First Judge. They think that the Respondent must pay the costs of this appeal and the costs in the High Court.

Solicitors for Appellants: *Lawford, Waterhouse, & Lawford.*

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28 November, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

OMRAO BEGUM and another (Plaintiffs) } *Appellants,*

and

THE GOVERNMENT OF INDIA and others (Defendants) ... } *Respondents.**

Jurisdiction of Commissioners appointed under the Nawab Nazim's Debts' Act (XVII of 1873.)

The Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873, (1) having ascertained and certified that a certain zemindari was nizamut property, (*i.e.*, held by the Government for the purpose of up-holding the dignity of the Nawab Nazim for the time being), the fact that this property had, before the passing of the Act, been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of s. 12 of the Act is not controlled by any words in the preamble.

A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed.

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* 10 Cowell's Ind. Ap. p. 39; I. L. R. 9 Cal 704.

(1) An Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process.

Appeal from a decree of the High Court, dated 26th April 1880, affirming a decree of the Judge of the *Moorshedabad* District dated 29th May 1878.

Mr. *R. V. Doyne* appeared for the Appellants.

Mr. *Graham*, Q. C., and Mr. *J. D. Mayne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This was an action brought by *Omrao* Begum and *Yohura* Begum, daughters of the late *Syed Mehdi Ali Khan*, against the Government of *India* and the second Defendant, who is called for shortness *Amir Saheb*, for the recovery of certain arrears of an allowance, or, in lieu thereof, possession of certain immovable property. There is also a claim that the allowance may be charged upon this property, and that if it be not paid the property be sold for the purpose of payment.

The facts necessary to the decision of this case may be shortly stated. *Mehdi Ali Khan* was a half-brother of *Amirunnissa*, who was the widow of the grand-uncl and predecessor of the present Nawab Nazim of *Bengal*. A certain estate of *Gopinathpore* had been purchased by her, benami in the name of *Mehdi Ali*, but really for herself. Upon her death the Nawab Nazim claimed, by a custom of the family, all her property. *Mehdi Ali*, the father of the Plaintiffs, raised some question upon this subject, and made some claim to the property himself. But he withdrew his claim upon an agreement which is to be found in a perwannah, not before their Lorpships, to the effect that he was to receive Rs. 600 per month, and in consideration thereof to forego any claim he might have, and not to molest the Nawab Nazim for the future. It seems that, notwithstanding the agreement, he took possession of the property, whereupon the Nawab Nazim was put to a suit which finally came before this Board, and in which this Board decided that he was entitled to recover possession of the property in dispute, mainly upon the strength of the agreement, which agreement prevented the Defendant from disputing his title. In the Courts of *India* a suit was brought by the Appellants against the Nawab Nazim, to recover, amongst other things, the arrears of the allowance granted to *Mehdi Ali Khan*; and a judgment for some Rs. 18,000 was obtained in December, 1873, about a month after the passing of the Act called the *Nawab Nazim's Debts Act*, on which the question in the present case turns.

The Government of *India* plead, among other things, that the suit could not proceed because the Nawab Nazim was not made a party to it. Whether they are right or wrong in that contention depends upon the construction of the Act which has been referred to—an Act to provide for the liquidation of the debts of the Nawab Nazim of *Bengal*, and for his protection against legal process. The object of this Act was, as stated in the preamble, to put a stop to various suits, to ascertain what property with respect to which there had been some disputes was or was not held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim, and for the purpose of exempting him for the future from being sued in the Courts. This Act appointed certain Commissioners for the purpose of determining what claims or debts were enforceable against the Nawab Nazim, and how much it was equitable to pay in respect of them, and gave them this jurisdiction without their being bound by any previous agreement or judicial proceeding; and then it proceeded, by sect. 12, to enact thus:—"The Commissioners shall ascertain what jewels and immovable property are held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property; and their finding thereon shall be binding and conclusive on all persons whomsoever."

The contention on the part of the Appellants has been that, the Nawab Nazim having, as it is admitted, executed a conveyance of this property of *Gopinathpore* to the second Defendant, his son, in the year 1850, it was not what may be

called Nizamut property, and that the Commissioners had no jurisdiction to deal with it or to declare it to be Nizamut property. But it has been very properly admitted on the part of Mr. *Doyne* that if they had such jurisdiction, and if they rightly declared it to be Nizamut property, then the suit cannot proceed.

Their Lordships are of opinion that the power of the Commissioners under sect. 12 is by no means controlled, as it has been contended, by any words in the preamble, but must be construed according to the plain meaning of the language; and that language is that the Commissioners are to ascertain "what jewels and immovable property are held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim." Whether this property had been conveyed to the son; whether the conveyance was valid; whether it was voluntary; whether it was collusive; or whether it was revocable—all these were questions which would come under the jurisdiction of the Commissioners to decide; and they have held that this property was immovable property held by the Government for the purpose of upholding the dignity of the Nawab. Their Lordships have no doubt that was within the jurisdiction of the Commissioners; and if so, as has been very properly admitted, the suit cannot proceed, and the judgment of the High Court was right.

Under these circumstances, their Lordships will humbly advise Her Majesty to affirm that judgment; and this appeal will be dismissed with costs.

Solicitors for Appellants: *Wrentmore & Swinhoe.*

Solicitor for Respondents, the Government of *India*: *H. Treasure.*

1st December, 1882.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RADHA PERSHAD SINGH (Plaintiff) ... } *Appellant,*

and

RAM PURMESWAR SINGH and others (Defendants) ... } *Respondents.*

Costs—Set-off of cost ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal.

It is not the usual pratice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later.

Although an Appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs

Appeal from a decree of a Divisional Bench of the High Court (24th February 1879), reversing a decree of the Judge of the *Shahabad* District (3rd August 1878.)

Mr. *J. F. Leith, Q. C.*, and Mr. *R. V. Doyne*, appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

* 10 Cowell's Ind. Ap. p. 113; I. L. R 9 Cal. 797

In this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the Appellant and Respondents as if there was no change. So speaking of them, the Appellant has been ordered to pay to the Respondents the costs of a litigation with them. He now seeks to set off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the Appellant was the Plaintiff, and the Respondents were the Defendants. The suit was for the recovery of certain lands; and the Respondents set up a defence of the law of limitation. That issue was decided in their favour by the Subordinate Judge on the 31st of July, 1868, and in consequence the Appellant's suit was dismissed. An appeal was presented to the High Court, who delivered judgment thereon on the 26th of April, 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the Respondents should pay to the Appellant the sum of Rs.2,499. 13*a*. 5*p*., being the amount of costs incurred by him in the High Court with interest; and further ordered that the Respondents should pay to the Appellant the costs incurred by him in the Lower Court with interest. With that order the suit was remanded. The litigation was then fought with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the Respondents. That decree was pronounced upon the 10th of June, 1874, when the Appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it are not in any way altered by that affirmation.

The Respondents applied to the Subordinate Court for execution for their costs, and the Appellant then claimed to set off against the costs claimed by the Respondents the costs which were due under the decree of the 26th of April, 1869. It may be well to mention that an application had been made by the Appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the Appellant were, first, the sum found by the High Court itself on the 26th of April, 1869, to be due for expenses in that Court; and secondly, an amount of Rs. 5,806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the Subordinate Judge on the 31st of July, 1868. Mr. *Brett*, the Judge of *Shahabad*, allowed those amounts to be set off by the Appellant against the claim of the Respondents, and he made an order to that effect on the 3rd of August, 1878. The Respondents presented an appeal to the High Court, and on the 24th of February, 1879, the High Court reversed the order of the Subordinate Judge and disallowed the claim of the Appellant to set off the costs awarded to him in the decree of the 26th of April, 1869; and they gave to the Respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th of June, 1874, giving the whole costs of the suit, overrode the decree of the 26th of April, 1869, which gives the costs of a portion of the suit in which the Respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of April, 1869, was not before the Court in 1874; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any

mistake in the prior order it ought to have been the subject of some review or rehearing in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th of June, 1874, to interfere with the costs awarded by the order of the 26th of April, 1869.

It has been mentioned that there were two amounts claimed by the Appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships consider that the Appellant is entitled to set those off against costs now claimable by the Respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs.3,245, which is the Court fee. The Court fee applies not only to the hearing in 1869, but to the whole of the litigation; and inasmuch as the general costs of the suit are awarded to the Respondents, it would be improper that they should have to pay the Court fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs.2490 for pleader's fee; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be: To discharge the order of the 24th of February, 1879; to declare that the Appellant is entitled to the costs properly recoverable under the decree of April, 1869; to declare that those costs consist of the sum of Rs.2,499. 13*a*. 5*p*., mentioned in the decree of April, 1869, and also such costs in the Court below as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing thereon, and of the decree of the 31st of July, 1868; that it be referred to the Court of the Subordinate Judge of *Shahabad* to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs.2,499. 13*a*.5*p*., are to be set off against the costs found due to the Respondents. Interest should be charged as ordered by the decree of the 26th of April, 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the Appellant does not wholly succeed; but having regard to the fact that the whole of the Appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They therefore think it right that the Appellant should have the costs of this appeal, and also the costs in the High Court.

Slicitors for Appellant: *Burton, Yeates, Hart, & Burton.*

Solicitors for Respondents: *Henderson & Co.*

16th, 17th February; and 15th March, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MOHESH LAL (Plaintiff) ... ... } *Appellant,*

and

MOHUNT BAWAN DAS (Defendant) ... } *Respondent.**

Mortgage, Payment of—Extinction of charge—Intention of Parties—Presumption.

Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other.

A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee.

Held, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mrotgage, there being no intermediate incumbrance. It being, also, presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished.

Appeal from a decree of a Divisional Bench of the High Court (22nd August 1879), reversing a decree of the Subordinate Judge of *Bhagulpore* (30th June 1877).

Mr *J. T. Woodroffe* appeared for the Appellant.

Mr. *R. V. Doyne* for the Respondent.

15th March, 1883.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a judgment and decree of the High Court of Judicature at *Fort William*, in *Bengal*, upon appeal in a suit brought by the Appellant against the Respondent and *Mungal Das*, in the Court of the Subordinate Judge of *Bhagulpore*.

In that suit the Appellant sought to recover with interest the sum of Rs.33,989. 12*a*. 6*p*., of which Rs.18,421 7*a*.6*p*., were alleged to be due upon a mortgage bond, dated the 12th of May, 1872, and the balance upon a running account from that date to the 13th of August, 1875.

The Plaintiff, Appellant, is a banker, who for many years carried on business at *Bhagulpore*, not personally, but by means of gomashtas. The Respondent, *Bawan Das*, the Defendant No. 1, was the mohunt of the ashul, at *Jankinuggur*, in zillah *Purneah*. He is described in the plaint as *Chela*, or disciple of Mohunt *Gorib Das*, deceased, and heir of Mohunt *Balgovind Das*, deceased.

The Plaintiff claimed to recover the whole amount from the two Defendants, and an order for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property hypothecated by the bond consisted of one-third of mouzah *Pourani*, the whole of mouzah *Kankerghat*, the whole of mouzah *Bishenpore Kantahi*, and the whole of mouzah *Ghuneshyampore Pathurgat*, of which the last three mouzahs at the date of the bond were the property of the asthul of *Jankinuggar*, or of the Respondent the mohunt thereof.

The case was tried in the first instance by the Subordinate Judge of *Bhagulpore*,

* 10 Cowell's Ind. Ap. p. 62; I. L. R. 9 Cal. 961.

who decreed, amongst other things, in favour of the Plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount covered by the bond, as well as that portion of the money included in the running account, amounting to Rs. 3,166. 11*a*. 6*p*., expended in payment of the Government revenue, dak contribution, and road cess be realised from the mortgaged property, and the remaining amount recovered from *Mungal Das*, the Defendant No. 2, alone, who was also declared to be bound to pay the entire amount of the decree.

Mungal Das did not appeal from the decree of the Subordinate Judge, but the Respondent Mohunt *Bawan Das* appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the Plaintiff's suit against him be dismissed; and, further, that the three mouzahs, *Kankerghat*, *Bishenpore Kantahi*, and *Ghuneshyampore Pathurghat* were not liable for any portion of the Plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present Respondent against *Mungal Das*, that mouzah *Pooraini Khalan* was not the property of the Appellant, or of the asthul of *Jankinuggur*, the decree of the High Court was silent as to that mouzah.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three mouzahs, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May, 1872.

A question was raised before their Lordships whether the property of the asthul was inalienable, except for the benefit of the asthul in cases of necessity; but in the view which their Lordships take of the case it is unnecessary to determine that question. They will therefore do as the High Court did, consider the question, assuming, without deciding, that the three mouzahs were not inalienable. In that view of the case the mortgage bond of the 12th of May, 1872, which was executed by *Mungal Das*, and not by the Respondent, did not bind the property, unless *Mungal Das* had authority, as agent of the Respondent, or of the asthul, to execute the bond, or the Plaintiff was induced by some act or neglect of the Respondent or of the asthul, to believe that *Mungal* had such authority, or that he was the actual owner of the property, and acting under the belief so caused, dealt with *Mungal* as such agent or owner.

As regards the agency, it seems clear from the evidence, and from the findings of both the Lower Courts, that *Mungal Das* acted as and was the duly authorized agent of the asthul, and of the mohunts thereof, and had the management and control of their property from the time of *Jairam* up to the time of mohunt *Balgovind's* death, in or about the month of October or November, 1869.

It was stated correctly by the High Court that an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to shew that *Gorib Das*, who succeeded *Balgovind*, or the Respondent who succeeded *Gorib*, ever reappointed *Mungal Das* as agent, or led the Defendant to believe that *Mungal's* agency continued.

The Subordinate Judge says, "It appears that, after the death of *Balgovind*, a dispute arose as to who was to be his successor. Both *Mungal Das* and *Gorib Das* were claimants to the succession, but *Mungal* failed to establish his claim, and *Gorib Das* obtained certificate of heirship of *Balgovind*. *Mungal* then declared himself to be absolute owner of the properties."

The finding of the High Court is to the same effect. They say that *Balgovind* died in October, 1869, and that the certificate case was decided in favour of *Gorib Das* on the 26th of November, 1870

The Subordinate Judge considered that *Gorib Das* was bound to give notice to the Plaintiff that *Mungal's*

authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of *Balgobind's* death, and of the termination of *Mungal's* authority. But whether the Plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with *Mungal* as agent. This the Plaintiff did not do, for throughout, after the death of *Balgovind*, he dealt with *Mungal* as the proprietor of the estates. and as a principal and not as an agent.

It was held by the Subordinate Judge, and contended at the bar, that the Defendant was estopped from shewing that the property mortgaged to the Plaintiff in 1872 was not then the property of *Mungal*.

It appears that after *Balgovind* became mohunt, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th of August, 1860, purporting to have been executed by *Balgovind*, in favour of *Mungal Das*, of the three mouzahs which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the mouzahs which were revenue paying estates, the third, *Pathurghat Guneshyampore*, being lakheraj, there was contemporaneously with the deed of sale, a mutation of names, and the name of *Mungal Das* was substituted in the Collector's register for that of the mohunt of *Jankinuggur*. In the Plaintiff's kothi also the accounts, which had been previously kept in the name of *Balgovind*. were, in September, 1861, opened and from that time kept in the name of *Mungal Das*.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says,

"It is most true, as alleged by the Defendant, that *Mungal Das* was believed by the Plaintiff and his agents to be the absolute owner of the whole properties which belonged to the asthul. But how were they led to believe so, and who made them to believe the same? It was the Defendant's ancestor, *Balgovind Das*, who put *Mungal Das* into the position of being the true owner of the asthul properties, and allowed him to deal with the Plaintiff's firm as such owner. All the properties belonging to the asthul were in his name, he had absolute control over them, and no sort of objection was raised by any member of the asthul to his power; how, then, could an outsider believe him to be otherwise than a true owner of the asthul properties? Under such state of things, I cannot think the Defendant can take any advantage of such belief of the Plaintiff to deprive him of the money lent to *Mungal Das* on security of the asthul properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered by the High Court. They say,

"Although there is no evidence to shew that the bill of sale of the 15th of August, 1860, was really executed by *Balgovind*, yet from the fact that, shortly after that date, the name of *Balgovind* was removed from the Collector's register, and that of *Mungal Das* placed in its stead, and that the accounts in the Plaintiff's kothi were transferred from one name to the other, it may be reasonably deduced that *Balgovind* was fully cognizant of the contrivance of putting the mortgaged property in the benami of *Mungal Das*, to protect it against the claims of a certain decree holder against himself. But the Plaintiff was not misled by this fraudulent device. The witness, *Mohun Misser*, who was the managing gomashta of the Plaintiff's kothi at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by *Balgovind*, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the Appellant are liable are not tenable."

Nor can it be disputed with success, in

the face of the evidence of *Baijnath Sahai* and of *Mohur Misser*, both gomashtas of the Plaintiff, that although the dealings in the time of *Balgovind* were with *Mungal Das* as principal and not as agent, they were merely nominally so, and that the credit was in reality given to the asthul in the name of *Mungal Das* as trustee, and furzi for the purpose of concealing the names of the real parties to the transaction.

Mungal was not the real proprietor, and he was not the agent of the Defendant No. 1. These facts must have been known to the Plaintiff or to his agents after the certificate case when *Mungal* repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in holding that the bond of the 12th of May, 1872, was not binding upon the asthul or upon the Defendant.

It was further contended on the part of the Plaintiff that, even if the bond of the 12th of May, 1872, was not binding upon the Defendant No. 1, the Plaintiff was entitled to fall back upon the mortgage bond of the 2nd of July, 1869, in favour of *Luchmi Narain*, which was binding upon the asthul and the mohunts thereof, inasmuch as it was executed at the time when *Mungal* was merely the apparent owner for the protection of *Balgovind* from his creditors, and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extinguished when *Luchmi Narain* was paid, or was intended to be kept alive for the benefit of the Plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shewn that, at the time of the execution of the mortgage of the 12th of May, 1872, the relationship of principal and agent which had existed between *Mungal* and the asthul in *Balgovind's* time had terminated, and that after *Balgovind's* death *Mungal Das* claimed to be the mohunt of the asthul in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of mouzah *Pouraini*, &c., and after a recital, amongst other things, that he has taken a loan from *Mohesh Lall* of Rs 20,000 on interest at 1 per cent. per month, of which the sum of Rs.8,266. 8*a*. was for the payment of the balance of the debt due on *Luchmi Narain's* mortgage of 1869, he declares that he will pay in cash, in one lump, the principal with the interest in the month of Jeyt 1280 Fusli, &c., and further, that until the payment of that money he has mortgaged the estates to *Mohesh Lall*, &c.

There is nothing in the bond or in the evidence, or even in the surrounding circumstances, to shew that *Mungal* intended to keep *Luchmi Narain's* mortgage alive, or that he or the Plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May, 1872, the sum of Rs. 8,382, the balance due to the estate of *Luchmi Narain* on his mortgage was paid *through* the Plaintiff, and on the deed a receipt for that amount was indorsed in the following words:—"Received in full Rs. 8,382 up to the 15th of May, 1872, through *Mohur Misser*, gomashta of *Baboo Mohesh Lall Mahajun*, and returned the bond." The bond was then delivered to the gomashta, and was retained by the Plaintiff.

It should be remarked that the mortgage to *Luchmi Narain* carried interest at the rate of Rs.1. 8*a*. per month, whereas the mortgage to the Plaintiff was at the rate of Rs.1 per month. It therefore seems to have been the intention of *Mungal* to borrow money at 1 per cent. per month, partly to pay off and extinguish the mortgage debt at Rs. 1. 8*a*. per month which was a charge upon the estate which he claimed in his own right. There was no intermediate mortgage between *Luchmi Narain's* mortgage and the mortgage to the Plaintiff of 1872. *Mungal*, if the proprietor of the estate, as he then claimed, and was stated in the recitals, to be, had no interest in keeping alive *Luchmi Narain's* mortgage; on the

contrary, it was his interest, and he must therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Rs. 1. 8*a*. a month should be paid off and extinguished. Nor upon the hypothesis that *Mungal* was himself the proprietor of the estates had the Plaintiff any interest in keeping *Luchmi Narain's* mortgage alive, inasmuch as under the mortgage of 1872 he had the security of all the estates included in *Luchmi Narain's* mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the Plaintiff could have derived from taking an assignment of *Luchmi Narain's* mortgage of 1869 was that he might have the benefit of that security if it should turn out that *Mungal* was not the proprietor of the estates, as he represented himself to be, and therefore could not legally charge them. But such an event could not have been contemplated by the Plaintiff. It is not probable that *Mungal* would have admitted his inability to bind the property by the deed of 1872, or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs.20,000 as was in excess of the amount secured by *Luchmi Narain's* mortgage. Even if he would have consented, it is not probable that the Plaintiff would have advanced the full amount of Rs 20,000 upon the security of the estates if he had had any doubt as to *Mungal's* title or right to charge them.

In *Adams* v. *Angell* (1) it was held that the question whether a mortgage paid off was kept alive or extinguished depended upon the intention of the parties. The master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can by expressly declaring his intention either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will in the absence of any declaration of intention destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." Applying that rule to the present case, it must be presumed in the absence of any expression of intention to the contrary that *Mungal*, who, when he borrowed the money to pay off *Luchmi Narain's* mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the Plaintiff's gomashta to *Luchmi Narain's* estate, it was paid with money borrowed from the Plaintiff by *Mungal*, and for which *Mungal* was liable to him. The mortgage was therefore paid off by *Mungal*, and not by the Plaintiff.

It must be presumed that when the Plaintiff lent the money to *Mungal* to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it. If an equitable transfer of *Luchmi Narain's* mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs.20,000, and thus the mortgage at Rs. 1. 8*a*. per mensem interest, though intended to be paid off, would be a security for Rs. 20,000 at

(1) 5 Ch. D. 634.

1 per cent. a month, contrary to the expressed intention of *Mungal* to pay it off.

It was contended on the part of the Plaintiff that it must have been intended to keep alive *Luchmi Narain's* mortgage for the benefit of the Plaintiff, because, when he paid the money to *Luchmi Narain's* representative, he took possession of and subsequently kept that mortgage deed. *Luchmi Narain's* representative was paid by the Plaintiff as the banker of *Mungal*. It was paid, not by the Plaintiff as the payer, but through him as the agent of *Mungal* the payer, and with money lent to *Mungal* upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be indorsed on the bond, and that besides the payments so indorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the Plaintiff as *Mungal's* banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an indorsement on the bond. Having taken that receipt, it was the ordinary course of business for the Plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take or keep the receipt without taking and keeping the bond on which it was indorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. *Woodroffe*, after the close of his argument, referred to several cases, but none of them show that a mortgage when paid off and intended by the parties to be extinguished is presumed to have been intended to be kept alive.

Another question is whether the Plaintiff is entitled to recover the Rs.5,849 applied out of the moneys raised by *Luchmi Narain's* mortgage in purchasing four small properties, which may be called 8, 9, 10, and 11, and which, by the High Court and by her Majesty in Council, in a suit brought by the present Defendant against *Mungal Das*, were held to be the property of the asthul, because they were purchased with money raised by the mortgage to *Luchmi Narain*. Those four properties were not included in the mortgage of 1872, nor are they included in the suit now under appeal. It is difficult to conceive how, if *Luchmi Narain's* mortgage was not kept alive and transferred to the Plaintiff as a security for his loan of 1872, the right of *Mungal*, if he had any, against the asthul in consequence of the application of Rs. 5,849 raised by that mortgage in the purchase of property now held to be that of the asthul, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date The asthul may be liable to *Mungal*, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June, 1877, in their reasons for the advice given to her Majesty in Council in the appeal of *Mungal Das* and the present Respondent. *Mungal Das* claiming to be the proprietor of the estates included in the mortgage of 1872, retained possession and received the profits of those estates, as well as of the four small properties purchased with the Rs. 5,849. *Mungal* must render his accounts before he can be held to be entitled to any portion of the Rs.5,849. Unless *Mungal's* claim against the asthul was included in the mortgage of 1872, and can be held to have been assigned to the Plaintiff as a security for the loan, there is no privity between the Plaintiff and the Defendant No. 1 in respect of the Rs. 5,849.

At all events the Plaintiff cannot be entitled to any greater or other rights than those of *Mungal* in respect of the Rs. 5,849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the Plaintiff to

recover on *Luchmi Narain's* mortgage, or to recover the Rs.5,849 expended by *Mungal* in the purchase of the lots above referred to as 8, 9, 10, and 11. This is not a mere technical objection, for if the claim had been made, or an issue raised relating to it, the Defendant No. 1, Respondent, might have called witnesses to prove that there was no intention to keep alive *Luchmi Narain's* mortgage, or to include it or *Mungal's* right to the Rs.5,849 claimed on account of the purchase of lots 8, 9, 10, and 11, in the security to the Plaintiff for the loan of Rs.20,000.

As to the sum of Rs.3,166. 11*a*. 6*p*. awarded by the first Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue road cesses, &c., on account of the estates, the credit was given to *Mungal* and not to the Plaintiff and there is no privity between the Plaintiff and the Defendant No 1 in respect of it. *Mungal* may possibly be entitled to it, but that must depend upon the state of accounts between him and the asthul, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The Appellant must pay the costs of this appeal.

Solicitors for Appellant: *Barrow & Rogers.*

Solicitor for Respondent: *T. L Wilson.*

21st, 22nd, and 23rd February, and 15th March 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Allahabad.

A. B. MILLER, Official Assignee, High Court, Calcutta (Plaintiff) ... } *Appellant,*

and

SHEO PERSHAD (Defendant) ... } *Respondent.**

Stat. 11 and 12, Vic., Cap. 21, s. 24—Insolvency—Voluntary transfer by insolvent.

A firm, trading in *Calcutta*, having been there adjudicated insolvent, the transfer of a debt, transferred by one of its Branches, located in *Lucknow*, was held upon the evidence to have been a voluntary assignment, void under s. 24 of the Statute 11 and 12, Vic, Cap. 21, as against the official assignee.

A draft, dated of the day on which, at night, the insolvent firm stopped payment in *Calcutta*, adjudication having followed on the 2nd day after, purported to have been drawn by a debtor owing money to the *Lucknow* Branch under its assignment in favor of the defendant to the amount of such debt. The latter received the money. *Held* that under all the circumstances it was not necessary to decide whether the transfer was made on the date which the draft purported to bear, the conclusion, upon all the facts, being that the debt had been transferred "voluntarily" within the meaning of s 24.

Appeal from a decree of the High Court (17th November, 1879) (1), reversing a decree of the Subordinate Judge of *Cawnpore* (25th September, 1878).

Mr. *Graham*, Q. C., and Mr. *Woodroffe* appeared for the Appellant,

Mr. *Leith*, Q. C., and Mr. *Doyne* for the Respondent.

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* 10 Cowell's Ind. Ap p. 98; I. L. R. 6 All. 84.

(1) See report of this case on appeal to the High Court, I. L R., 2 All., 474.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This is an appeal in a suit brought in the Court of the Subordinate Judge of *Cawnpore* by Mr. *A. B. Miller*, the official assignee of the High Court at *Calcutta*, as the assignee of the estate and effects of *Lala Baijnath* deceased, *Bansidhar*, and *Ghasi Ram*, insolvents. *Baijnath* and *Bansidhar* were brothers, and *Ghasi Ram* is the son of a deceased brother, *Sitaram*, and they carried on business in partnership at *Calcutta*, *Lucknow*, and *Cawnpore*, as bankers and piece-goods merchants. The firm at *Calcutta* was *Nanu Mal*, at *Cawnpore*, *Bansidhar*, *Ghasi Ram*, and at *Lucknow* the banking business was carried on under the style of *Chote Lal Sitaram*, and the piece-goods business of *Bansidhar Ghasi Ram*. The business at *Calcutta* was managed by *Bansidhar*, that at *Lucknow* by *Baijnath*, and that at *Cawnpore* by one *Sheo Dial* as munib (agent). The *Calcutta* firm stopped payment at midnight on the 20th of December, 1875, and were adjudicated insolvents on the petition of two of their *Calcutta* creditors, on the 22nd of December. The Defendant carried on business at *Lucknow* under the style of *Sheo Parshad Khazanchi*. His business was managed by his brother-in-law, *Paras Ram*, who was himself a partner in a firm at *Cawnpore* styled *Paras Ram Beni Madho*.

The official assignee in his suit alleged that one *Munshi Ram Parshad*, a resident of *Lucknow*, owed Rs.9,436 to the banking firm of *Chote Lal Sitaram* at *Lucknow*, and that *Baijnath*, who died in 1876, colluded with the Defendant *Sheo Parshad*, and fraudulently transferred this debt to him, and in the account book wrongly entered the date the 21st of December, 1875, and that the Defendant had recovered the debt from *Ram Parshad*, and the official assignee demanded the amount of it, with interest.

The Defendant in his written statement said that there were dealings between his firm and the firm of *Chote Lal Sitaram* at *Lucknow*; and with reference to the money dealings from the 13th July to the 14th of December, 1875, Rs. 9,452 were found due by *Baijnath*, and on the 20th of December, 1875, *Ram Parshad* drew, under the assignment of *Baijnath*, a rukka for Rs.9,452, through *Paras Ram*, on account of the money due to the Defendant upon one *Kanhaia Lal*, deceased, a banker resident at *Lucknow*; that *Kanhaia Lal*, according to the rukka, dated the 20th of December, 1875, made entries in his own firm, according to banking usage, against the Defendant's name, in respect of the item of Rs.9,452, and the said item is shewn in *Kanhaia Lal's* account books to the Defendant's credit.

On the 16th of April, 1878, the Subordinate Judge recorded as the issues in the case:—

1. When did the transfer of the principal sum in suit take place? Is the transfer unlawful, and was it fraudulently made or not?
2. Is the Plaintiff entitled to interest?

On the 11th of September, 1878, before he proceeded to take evidence, he questioned the pleaders of both parties, and recorded that the Plaintiff's pleader stated that the Plaintiff claimed to have the transfer declared invalid, on the grounds,—

1. That it was really made after the 22nd of December, 1875, and was made fraudulently.
2. Even granting that the transfer took place before the 22nd of December, it was voluntarily made, and was invalid under sect. 24 of the *Indian Insolvency Act*.

The Subordinate Judge does not appear to have made any alteration in the issues which he had recorded, but their Lordships think this was not necessary, and that the question whether the transfer was voluntary and fraudulent and void as against the assignee was sufficiently raised.

The Subordinate Judge made a decree for the Plaintiff for Rs.9,436. 12*a*. and Rs.2,264. 13*a*. interest thereon, for reasons which will be afterwards mentioned, and this was reversed by the High Court, which dismissed the suit, with costs.

Their Lordships have come to the conclusion that the transfer was voluntary, within the meaning of sect. 24 of the *Indian Insolvency Act*, 11 & 12 Vict. c. 21. That section is:—

"And be it enacted that if any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over, any estate real or presonal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor, or to any other person in trust for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed and is hereby declared to be fraudulent and void as against the assignees of such insolvent."

The Plaintiff having proved, by a deposition taken at *Calcutta* that the order of abjudication was made on the 22nd of December, examined as a witness *Sheo Dial*, who was the agent of the insolvent firm at *Cawnpore*, and became the servant of the official assignee. He said the account books of the firm of *Chote Lal Sitaram* at *Lucknow* were stolen on the 11th of March, 1878, and in December, 1877, he examined the account of the Defendant in those books He produced a memorandum, from which he stated that on the 21st of December, 1875, Rs.9,636. 12*a*., were entered on the credit side, and Rs.9,436. 12*a*. on the debit side, in the cash book of *Chote Lal Sitaram*, after adjustment, and by both these items the account of *Sheo Parshad* was closed in this way, that there was a balance of Rs.200 due by *Sheo Parshad*,—that the firm at *Cawnpore* was under his management) and at 4 A.M. on the 21st of December he learnt from *Bani Madho* (not the brother of *Paras Ram*) that the firm of *Baijnath* had failed. The items entered in the account books were in *Baijnath's* handwriting.

The principal witness for the Defendant was *Paras Ram*, who said:—

"I was manager (muhtamin) of the firm of *Lala Sheo Parshad*, situate at *Lucknow*, and used to do all the work of the firm of *Lala Sheo Parshad*. Rs.8,500 were due by the firm of *Baijnath*, styled the firm of *Chote Lal* and *Sita Ram*, up to the 20th of December, 1875, in this way, that there were three hundis drawn by *Baijnath*, aggregating to Rs.7,500, and a currency note for Rs 1,000 was lent to *Baijnath*—that up to the 20th of December, 1875, the term of none of the three hundis had expired. Before the 20th of December, 1875, I had pressed the demand for Rs.8,500 on *Baijnath*, and the reason for my making the demand before the expiry of the term of the hundis was that *Baijnath* having drawn a hundi for Rs.5,000. had gone to the *Bank of Bengal* for borrowing money, and the agent to the *Bank of Bengal* at *Lucknow* refused to give money, saying that he had been prohibited to receive his (*Baijnath's*) hundis by the *Calcutta* (bank), and consequently he would not take his hundi. This happened two or three days previous to the 20th of December, 1875, consequently I made the demand on *Baijnath* on the 20th of December, 1875. and he then caused Rs.8,500 to be paid by *Munshi Ram Parshad*. I have told *Baijnath* to give me Rs.8,500 in cash. *Baijnath* then said, 'I have no money in cash; money is due to me from *Munshi Ram Parshad*. Accompany me, and I will make him pay money to you' I immediately proceeded with *Baijnath* to *Munshi Ram Parshad's* house, and *Baijnath* said to *Munshi Ram Parshad*, '*Lala Sheo Parshad* is pressing his demand hard on me; give whatever money is due to me by you.' *Munshi Ram Parshad* then, having adjusted the account, stuck a balance of Rs. 9,452

against himself, and he drew a ruqqa on *Kanhaia Lal*, banker, resident of *Lucknow*, to the effect, 'Pay Rs. 9,452 to *Lala Paras Ram*,' and *Kanhaia Lal*, on seeing the ruqqa, debited Rs. 9,452 to *Munshi Ram Parshad* in his account books, and credited the same to my account. Some of those persons who have monetary dealings with the firm of *Lala Sheo Parshad* at *Lucknow* sometimes make debit and credit entries in my name in their account books, but the monetary dealings are carried on for the firm of *Lala Sheo Parshad*. *Baijnath* caused Rs. 9,452 to be paid to me by *Munshi Ram Parshad*, for this reason, that Rs. 8,500 were paid in the account of *Lala Sheo Parshad*, and Rs. 525 were given, it being due to *Kanhaia Lal*, on whom the ruqqa was drawn, and Rs. 427, due to the firm of *Paras Ram* and *Beni Madho* in *Cawnpore*, was caused to be paid. At the time when *Munshi Ram Parshad* wrote the ruqqa on *Kanhaia Lal* for Rs. 9,452, *Lachman Parshad Daroga*, *Maulvi Faqir-ul-ah*, *Lala Baijnath*, and I were present, and *Munshi Ram Parshad*, having written the ruqqa, had given it to me before *Baijnath*, and took back a ruqqa of his from *Baijnath*. I sent for ruqqa written by *Munshi Ram Parshad* to *Kanhaia Lal* through *Becha*, peon employed in the bank, and *Kanhaia Lal*, on seeing the same, accepted it At the time when the sum of Rs. 427 was caused by *Baijnath* to be paid to the firm of *Paras Ram—Bani Madho*, the whole amount due to *Paras Ram—Bani Madho* had not been paid in full. The debit and credit entries in the books of the firm of *Lala Sheo Parshad* were made on the 31st of March, 1876, in respect of Rs. 9,452. The debit and credit entries, regarding the ruqqa of the 20th of December, 1875, were delayed and made on the 31st of March, 1876, because when the accounts of *Kanhaia Lal* were compared then this item was debited and credited; this item was not an item of cash, and consequently it was not debited and credited immediately."

The Judge, on the 26th of August, 1878, ordered a commission to be issued to three experts to examine the Defendant's account books, and on the 11th of September, 1878, they reported as follows:—

"The item of Rs 9,452, entered in rokar-bahi (cash-book), page 218, as credited to *Chote Lal Sitaram*, on account of assignment made against *Munshi Ram Parshad*, has been credited on 6th Sudi Chait, Sambat 1933, corresponding to the 31st of March, 1876, and in its detail the following words are written, '8th Badi Pus, debited to *Kanhaia Lal*, caused to be paid by *Munshi Ram Parshad*.' The items comprising this item appear to be entered on the debit side as follows:—

	R.	A.	P.
"Page 181. 3rd Badi Pus, Sambat 1932, corresponding to the 15th of December, 1875, one note, No. 88,969 L-53, through *Umrao Ali* ...	1,000	0	0
"Page 26 of the naql (bahi). 2nd Badi Pus, Sambat 1932, one hundi, drawn by *Chotey Lal Sitaram* at *Cawnpore*, upon *Bansidhar Ghasi Ram*, payable sixty-one days after 2nd Badi Mangsar, credited to *Surat Chand Mal*, and money paid on 13th Badi Pus	2,500	0	0
"Page 218 of rokar-bahi. 6th Sudi Chait, Sambat 1933, corresponding to the 31st of March, 1876,—			
"One hundi drawn on *Calcutta* by *Chotey Lal Sitaram*, upon *Nannhu Mal*, in my (*i. e.*, *Sheo Parshad's*) favour, payable fifty-one days after 5th Sudi Mangsar, credited to *Ajindhia Parshad* ..	2,500	0	0
"One hundi drawn at *Cawnpore* by *Chotey Lal Sitaram*, upon *Bansidhar Ghasi Ram*, in favour of *Paras Ram*, payable sixty-one days after 5th Badi Bangsar, credited to *Gur Parshad Shukal*	2,500	0	0
"On Pus Badi 8th, Sambat 1932, credited to *Kanhaia Lal*	525	0	0
	5525	0	0

	R.	A.	P.
"Page 264 of rokar bahi 6th Sudi Bhadon, Sambat 1933, corresponding to the 25th of August, 1876, credited to *Lala Paras Ram*, and debited to *Chotey Lal Sitaram* ...	427	0	0

"All these items amount to Rs 9,452, mentioned above."

Except the entry in the cash book, the only evidence of the loan of Rs. 1,000 is the vague statement of *Paras Ram* that a currency note for Rs 1,000 was lent to *Baijnath*, but their Lordships will take it as a fact that this sum was lent on the 15th of December. The next three sums of Rs. 2,500 each are the amounts of three hundis drawn by one of the insolvents' firms upon another of them. These hundis were drawn in favour of *Paras Ram*, as the Defendant's agent, and had been discounted by him, and were on the 20th of December in the hands of third persons. They were subsequently taken up by the Defendant, or debited to him by the holders. There was thus a contingent liability on the part of the Defendant on these hundis, and on the 21st of December the parties must have had full knowledge that they would be dishonoured. Their Lordships are not prepared to say that the transfer, so far as it provided the Defendant with funds to meet the hundis, would, as a matter of law, be voluntary within the meaning of the *Insolvent Act*, but the transaction was out of the ordinary course of business, and there was no satisfactory explanation of the delay in making the entry of it in the Defendant's books.

Looking at this part of the transaction alone, there is strong *primâ facie* ground for thinking that it was done with the view of preferring the Defendant. But the hundis are mixed up with the other items, and the whole formed one transaction. The next item is the Rs. 525 said to be credited to *Kanhaia Lal* on the Hindu date corresponding to the 20th of December But it is taken from page 218 of the cash book, and was not entered in it till the 31st of March, 1876. As to this sum there is only *Paras Ram's* statement that it was due, and the evidence of *Bhondu Mal*, who said, "*Baijnath Lal* had given permission to *Kanhaia Lal* to make a deduction of Rs 525 from the amount of the ruqqa. This permission was received two days before the execution of the ruqqa, and for two days I had been demanding money from *Baijnath*." The remaining item of Rs 427 was not credited to *Paras Ram* and debited to the insolvents' firm until the 25th of August, 1876, and is clearly a voluntary payment

Turning now to the books of *Kanhaia Lal*, their Lordships find fresh cause for suspicion. They were produced by *Bhondu Mal*, his grandson, he having died on the 30th of November, 1876. As to these books, the report of the experts, to whom they were referred for examination, is as follows:—

"In obedience to your order, we have inspected and examined the said account books, and it appeared to us that the accounts of *Paras Ram* are entered at leaf fifty-six of these account books. In it, on the credit side, an item of Rs. 9,452 is entered, with reference to the day-book, leaf 127, in this way—'Credited to *Paras Ram* on Pus Badi 8th Sambat 1932, Anglice 20th of December, 1875, (and) debited to *Munshi Ram Parshad*.' In the same day-book, at leaf 127, Rs. 9,452 are debited to *Munshi Ram Parshad*, and in its detail the following words occur:—'Pus Badi 8th, Sambat 1932, Anglice 20th of December, 1875, credited to *Paras Ram* the amount of a ruqqa.' In this day-book the first three leaves have not been paged, and then the fourth leaf has been paged, and the account commences to be written on the back of the leaf marked four, and the pages have been regularly numbered up to leaf 116. The next leaf should have been numbered 117, but in this day-book leaf 127 is in place of 117; from leaf 117 up to 126, ten leaves are wanting in the account book. In this day-book, at leaf 127, an item of Rs. 13. 2*a*. 3*p*. is debited to *Kanhaia Lal*, and in the account of *Kanhaia Lal* the said item of Rs. 13. 2*a*. 3*p*. which is entered on the debit side, has been posted from the day-book, and leaf 117 is mentioned. The cash balance, which has been

struck in the day-book, is in regular order."

This view was adopted by the Subordinate Judge, and it is unnecessary to state what he said.

Another suspicious fact is, that the ruqqa, which was drawn by *Ram Parshad*, says, "Rs. 10,352 were due to *Lala Baijnath Khazanchi* by me under a ruqqa, dated the 17th of May, 1875, bearing my signature. Now I draw this ruqqa in your favour, to the effect that, under his assignment, I am causing Rs 9,452 to be paid to *Lala Paras Ram*, on account of his debt," and there is no evidence that any part of the Rs. 10.352 had been paid by *Ram Parshad*. For aught that appears, the balance of Rs.900 may have been given up to *Ram Parshad*.

These are the material facts in the case, and upon consideration of all the circumstances, their Lordships have come to the conclusion that the transfer was voluntary within the meaning of the *Insolvent Act*, and fraudulent and void as against the assignee.

It is therefore necessary to decide whether the transfer was made on the 20th of December. The Subordinate Judge put the burden of proof of this upon the Defendant, and found that it was not; and inferring from this and the entries in the Defendant's books, and the abstraction of the leaves from *Kanhaia Lal's* books, that it was made after the 22nd of December, he made a decree for the Plaintiff. Their Lordships are not prepared to say that he was right as to the burden of proof, or whether his conclusion as to the time of the transfer was a right or a wrong one; but they consider that justice to him requires them to say that, so far from thinking, as the Chief Justice in his judgment on the appeal says, that "the Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case," they are of opinion that he had before him a case upon which he might come to the conclusion to which he came. Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, with costs. The Respondents will pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey*.

Solicitors for Respondent: *W. & A. Ranken Ford*.

27th February 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Allahabad.

BALWANT RAO BISHWANT CHANDRA CHOR (Plaintiff); ... } *Appellant*,

and

PURUN MAL CHAUBE (Defendant) ... } *Respondent*.*

Act IX of 1871 (Limitation Act), ss. 10, and Nos. 118, 123, and 145—Limitation of suit relating to property held in trust.

A suit in order to fall within Act IX of 1871, s. 10, excepting suits against trustees from limitation, must be brought for the purpose of recovering the trust property for the benefit of the trust; that section meaning that when trust property is used for some purpose other than that of the trust, it may be recovered, without any bar of time, from the hands of those in whom it has been vested in trust.

Where the plaintiff sued to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property was being applied to such purposes by the manager in possession, the above section was *held* inapplicable.

The possession of the defendant having been adverse for more than 12 years, *held* that the suit might fall within art. 123 or 145 of the 2nd

* 10 Cowell's Ind. Ap. p. 90; I. L R. 6 All. 1.

schedule of Act IX of 1871, in force when the suit was brought. Had it fallen within neither of the above, it would be barred under art. 118.

Appeal from a decree of a Divisional Bench of the High Court, (10th February, 1879.) reversing a decree of the subordinate Judge of *Agra* (30th March 1878).

Mr. *T. H. Cowie*, Q. C., and Mr. *W. A. Raikes*, appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

In this case the Plaintiff, who is also the Appellant, filed his plaint on the 12th September, 1877, and in it he claimed to remove the Defendant, who is the Respondent, from the management of the worship and service performed at the temple of the god *Ganeshji* in *Muttra*; to remove the power and control of the Defendant from the properties belonging to the temple; and to be declared authorized to appoint a second manager for the purpose of carrying out the object of the endowment. The plaint then states shortly the history of the temple; that it was founded by the Plaintiff's ancestor, who dedicated property to it, especially the village or mouzah *Mandesi*. Then it states that "he"—that is, the Plaintiff's ancestor—"entrusted the management of the service and worship to *Mangu Chaube*, the grandfather of the Defendant; and he during his lifetime, and after him his son *Titri Chaube*, have been, according to the intention of the founder of the temple, taking care of it and superintending its affairs. When, in 1865, the Plaintiff came to *Muttra* on pilgrimage, and asked the Defendant's mother how the income of the village used to be spent, she refused to render an account of it. The Plaintiff's complaint was rejected by the Collector on the 13th of September, 1865, on the ground of his having no jurisdiction. The Plaintiff then sued in the Settlement Department, but the Defendant himself denied the Plaintiff's right, and therefore he could not obtain redress from that department. The claim for entry of name was disallowed on the 14th of May, 1877, and that is the date of the cause of action."

The precise tenor of the plaint cannot be understood without reference to the dates of the transactions and to some of the documents referred to in it. It appears that the foundation by the Plaintiff's ancestor was prior to the commencement of the present century, so that for eighty years or upwards the management has been in the family of the Defendant. The Appellant became the heir, or one of the heirs, of the founder in the year 1847. The Defendant's title or possession as manager accrued on the death of his father *Titri Chaube* in the year 1863, when the Defendant himself was a child, and under the guardianship of his mother. In the year 1865, the Plaintiff presented the petition referred to in the plaint, which was for the purpose of having the trusts of the endowment carried into effect by the Collector's Court under Regulation XIX. of 1810, which in fact had been repealed some two and a half years previously. But the petition makes a case which, if it were proved, would entitle the Plaintiff to have the proper management provided for by a Court having jurisdiction, for it shews that the funds were applied improperly, and it prays that inquiries may be made from the zemindars and respectable residents of the city of *Muttra*, and that the expenses of the Thakurji may be entrusted to the management of experienced hands and learned divines, as provided by the regulation. The fate of that petition may be divined from the circumstance that the regulation had been repealed. It was dismissed for want of jurisdiction.

The Plaintiff did not then institute any suit in the Civil Court. He took no proceeding until nearly twelve years subsequent to the petition, when he again sought a remedy in the Revenue Department. An order was made by the settlement officer on the 14th of May, by which it appears that the Plaintiff applied to expunge the name of the Defendant, who was registered as muafidar of the village *Mandesi*, and for the entry of the

Plaintiff's name in lieu of that of the Defendant. It was ordered that the Plaintiff's claim be dismissed.

That dismissal appears to have led to the present plaint, which has been already stated. It appears then that in 1865 the Plaintiff conceived that he had a case of malversation of the property of the endowment against the then manager, who was the Defendant's mother, and that he prayed relief on that ground; that having carried his complaint to the wrong Court, and having failed there, he did not pursue the claim any further, but that nearly twelve years afterwards he simply claimed to be entered himself as munfidar instead of the Defendant; and then he brings the present claim which is for the purpose of either himself removing or getting the Court to remove the Defendant from his position as manager, and for the Plaintiff to be allowed to appoint another manager.

Now in the defence the Defendant does not dispute but that the property is an endowment appertaining to the god *Ganeshji*. He says that the income of it has all along been spent for the purposes of the temple, and the business of the temple is carried on as before. He then pleads the law of limitation as a bar to the suit. In the Plaintiff's written statement, a sort of replication, he states this: "The Defendant has only since a short time begun to misappropriate the income of the endowed property, contrary to the object of endowment and in contravention of his duty; and he, in the Settlement Department, declared himself, as against the Plaintiff, to be the proprietor and munfidar." That seems to be in answer to the plea of limitation; namely, that it was only a short time ago that the misappropriation had begun.

The Subordinate Judge finds that the Defendant's father in his lifetime repudiated the Plaintiff's right to manage the institution, and that the Defendant has followed his father's conduct. "This," he says, "was done in bad faith, and with the hope of escaping the control of a superior over his proceedings, so that he might independently deal with the endowment. This is calculated gradually to ruin the property, to divest the donor of his power, and disturb the management proposed by him." On those grounds he holds that the Defendant deserves to be dispossessed.

The Subordinate Judge does not find that there has been any malversation or misappropriation of the property on the part of the Defendant. All that he finds is that he opposes the right of the Plaintiff. He says in the earlier part of his judgement that the plaint specifies the Defendant's misconduct and improper acts on the ground of which he is said to have rendered himself liable to be removed, but on reading the plaint it is clear that the plaint does not specify any misconduct or improper act, unless it be the resistance to the Plaintiff's claim. Neither does the written statement carry the case any further, because, although it uses the expression "misappropriate the income," it does not specify any mode in which the income was misappropriated.

The Subordinate Judge deals with the question of limitation by saying that the Defendant has distinctly admitted that the property is an endowment, and that he holds it as manager of an endowment; consequently, he says, his possession cannot, with reference to its very nature, be regarded as adverse. He thinks, therefore, that if the property is affected by trusts, as both the Plaintiff and Defendant allege, any question is open that may arise between the Plaintiff and the Defendant respecting the right to manage the trusts. The Plaintiff gets his decree upon those grounds, and the Defendant appeals to the High Court. The High Court hold that in so far as the suit is for a declaration that the Plaintiff is, by right of inheritance, chief manager of the temple services and properties, it falls within article 123 of the *Limitation Act*—the Act applicable to this suit in Act IX. of 1871—and, in so far as it seeks recovery of possession of the temple property, it falls within article 145 of the same Act. Therefore they reverse the decree of the Subordinate Judge, and dismiss the suit

with costs. The appeal is now presented from that decree, and the question is whether the suit is barred by the *Limitation Act* of 1871.

The reasons now given for avoiding the bar of limitation are, first, that the suit is to be treated as one for the administration of the trusts of the endowment, and that it is open to the Court to dismiss the Defendant for misbehaviour in his office and on this point the Plaintiff seeks to incorporate in the present plaint the allegations in his petition of 1865. What other difficulties there may be in the way of such a suit, such as the omission to get the leave of the Courts under Act XX. of 1863, their Lordships desire not to discuss on the present occasion, because there is a complete answer to the Appellant's argument in the fact that no evidence whatever of misbehaviour on the part of the Defendant has been adduced. There is, as has been stated, no direct or sufficient allegation of misconduct in the pleadings. There was no issue framed upon that point, neither has anything been found on that subject by the Subordinate Judge. That ground therefore entirely fails

The next ground is that the case must be taken as following within sect. 10 of Act IX of 1871, which deals with trust property. That section is as follows:—"No suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives for the purpose of following in his or their hands such property, shall be barred by any length of time." Their Lordships are of opinion that the expression used by the Legislature, "for the purpose of following in his or their hands such property," means for the purpose of recovering the property for the trusts in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section. But here there is no question of recovering the property for the trusts of the endowment, because the Defendant admits that he is a trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the Plaintiff were to succeed in his suit than it is at this moment. The Plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within sect. 10 of the *Limitation Act*. If it does not, then it must be within one of the articles of the schedule. Their Lordships do not see any reason to differ from the High Court in thinking that it may fall within article 123 or article 145, but they desire to express no opinion upon that point, and there is some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the Plaintiff's title is stated in the plaint. But if it does not fall within either of those sections then the case is caught by the general article 118, which provides for every case that is not previously provided for in the Act. Therefore either the suit is barred in six years or in twelve years—it matters not which, for the cause of action arose at all events before the year 1865.

The consequence is that the appeal must be dismissed; and as the Respondent does not appear, nothing will be said about costs. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

Solicitors for the Appellant: *Oehme & Summerhays.*

1st, 2nd and 17th March, 1883.

PRESENT:

Members of the *Judicial Committee* :— The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Arthur Hobhouse.

And Cross Appeal.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KUMAR TARAKESWAR ROY (Plaintiff) ... } *Appellant,*

and

KUMAR SHOSHI SHIKHARESWAR ROY (Defendant) ... } *Respondent.**

Hindu law—Will, Construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.

A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favor of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows: "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

Appeal and cross appeal from a decree of the High Court, (9th September 1880) (1) modifying a decree of the first Subordinate Judge of the *Rajshahye* district (2nd May 1878.)

Mr. *R V. Doyne* and Mr. *C. W. Arathoon* appeared for *Tarakeswar Roy*

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe* for *Shoshi Shikhureswar Roy.*

17th March 1883.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

The question in these appeals arises upon the construction of a clause in a Hindu will, which is in these terms :—

"My brother's sons, *Kumar Jagadiswar Roy Kumar Tarakeswar Roy*, and *Kumar Sibeswar Roy*, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit, my one-half share in purgunnahs *Chowgaon* and *Khord Chowgaon*, recorded as No. 278 in the Collectorate of Zillah *Rajshahye*, in Dehi *Dalil*, and others, appertaining to tuppa Byas, and recorded as No. 456, and in mouzah Dehi *Gobindpore* in pergunnah *Santosh*, recorded as No. 96 in the touzi or rent-roll of the Collectorate of Zillah *Dinajpore*. The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

* 10 Cowell's Ind. Ap. p. 51; I. L R 9 Cal. 952

(1) See *Shoshi Shikhareswar Roy* v. *Tarkeswar Roy*, I. L R., 6 Calc, 421.

The facts necessary to be stated are, that the three nephews of the testator were living at his death; that two of them died before the institution of the present suit, one unmarried, the other leaving a widow but no issue; that the suit was instituted by *Kumar Tarakeswar Roy*, the survivor, against the infant son of the testator, represented by *Hurgobind Bose*, appointed manager of the estate by the Court of Wards, to obtain a declaration of title to and possession of half of pergunnahs *Chowgaon* and *Khord Chowgaon*. No question arises as to *Gobindpore* in this suit.

The plaintiff based his claim on the clause of the will above set out, contending that by its terms an absolute estate was given in undivided shares to the three nephews; that upon the death of his brothers their shares devolved on him, and he was thus entitled to the whole.

The Defendant denied the execution and validity of the will, both of which issues have been disposed of by concurrent judgments of the Courts against him. He further contended that upon the true construction of the will, which is narrowed to that of the clause in question, the Plaintiff was entitled only to a life estate in one-third of the property devised.

The Court of first instance gave the Plaintiff a decree for his whole claim.

This decree was altered by the High Court, which gave him a life interest only in the whole of the property.

From the judgment of the High Court there are cross appeals. The first by the plaintiff, on the ground that he was entitled to an absolute estate in the whole. The second by the Defendant, on the ground that the plaintiff was entitled to a life estate in one-third only. It will be convenient to deal firstly with the first appeal

The grounds of the judgment of the High Court that the Plaintiff was entitled to a life estate only may be thus shortly stated.

They held on the authority of *Jottendromohun Tagore* v. *Ganendromohun Tagore* (1) commonly called "the *Tagore* case," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindu law, that estate of inheritance was void, and that the will operated only to confer on the Plaintiff an estate for life.

The *Tagore* case is so well known, and has been so often referred to by this Board, that it is so necessary to cite it at length, and it is enough for the present purpose to refer to the following passage: –

"If the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage, or as in the *Tagore case*, where the attempt was to establish what would be called an estate in tail male according to English law. But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law, "excluding," in the terms of the judgment quoted, "the legal course of inheritance."

It has been contended on the part of

(1) L. R. Ind. Ap. Sup. Vol 47.

the Appellant, that the present case is distinguishable from the *Tagore case*, on the ground that, in that case, the first estate given was in terms an estate for life; that in the present case, if the words relating to succession, *viz*, "that their sons, grandsons, and other decendants in the male line shall enjoy the same, and shall perform acts of piety, as they respectively shall think fit, for the spiritual welfare of our ancestors," were struck out, the gift would be of an estate of inheritance; and that the intention of the testator to confer an estate of inheritance may be effectuated by striking out so much of the clause above quoted as excludes females from the succession.

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an absolute estate. They are further of opinion that to alter the words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object, expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females.

The case of *Bhoobun Mohini Debia* v. *Hurish Chunder Chowdhry* (1) has been cited on behalf of the Appellant, in which the following words of a grant,—"You are my sister; I accordingly grant you a taluk for your support ..... being in possession of the lands and paying rent according to the tahut jamma, do you and the generations born of your womb successively (Santán sreni kramé) enjoy the same, no other heir of yours shall have right or interest,"—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as "children and grandchildren," and indicating an estate of inheritance, while the only words which created a difficulty, "no other heir of yours shall have right or interest", were held to be satisfied by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

For these reasons they are of opinion that the first appeal should be dismissed.

The second appeal arises on the construction of the concluding paragraph of the clause:—

"If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts. "Any of them" means any of the three nephews, not any of their descendants; on the death of any of three nephews his share shall go to the surviving nephews or nephew, not to the descendants of a dead nephew; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend, as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. *Mayne*—based on the hypothesis that upon the death of the second nephew his share would go to his surviving brother, and to the "male descendants" of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would therefore, by a well known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive, and capable of taken on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according

(1) Law Rep. 5 Ind. Ap. 168.

to the authority of *Sreemutty Soorjeemonee Dossee* v. *Denobundhoo Mullick* (1), as explained in the *Tagore case*. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, *viz.*, whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only, and not the accruing shares, will go over. This rule was stated by Lord *Hardwicke* in *Pain* v. *Benson* (2), and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called "an aggregate fund" which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship) (3), when, in addition to the word "share," the word "interest" is used, (4), or where the words are his "or her share or *shares*" (5), so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited but by express words or necessary implication, has no application to the wills of Hindus. It may be observed that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindu wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, *viz.*, that on the death of the first brother his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and that both appeals be dismissed.

Solicitor for Appellant: *T. L. Wilson.*
Solicitor for Respondent: *H. Treasure.*

(1) 9 Moore, Ind. Ap. Ca. 135.
(2) 3 Atk. 80.
(3) *Worlidge* v. *Churchill*, 3 B. C. C. 465; *The Crawhall Trusts*, 8 D. M. & G. 480
(4) *Douglas* v. *Andrews*, 14 Beav. 347
(5) *Wilmot* v *Flewitt*, 11 Jur. (N.S.) 820.

16th March, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Commissioner of Fyzabad Division, Oudh.

AHMUD HOSSEIN KHAN (Defendant) ... } *Appellant,*

and

NIHALUDDIN KHAN (Plaintiff) } *Respondent.**

Res judicata—Suit for Maintenance—Limitation Act (XV of 1877,) Sch. 2, Art. 132.

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the

* 10 Cowell's Ind. Ap. p. 45; I. L. R. 9 Cal. 945

possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time, founded on an *ekrarnama*, did not afford a defence under s. 3 of the Code of Civil Procedure.

Held, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late; the Defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877.

Appeal from a decree (30th January 1879) of the Commissioner of the *Fyzabad* division, confirming a decree (1st June 1878) of the Deputy Commissioner of the *Lucknow* district.

Mr. *J. H. W. Arathoon* appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This is a suit between two brothers, the sons of *Mahomed Hossein Khan*, who died in November, 1863. The Plaintiff in the suit, the Respondent before their Lordships, was the second son of *Mahomed Hossein Khan*, and the Defendant, the Appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that the Defendant, the Appellant, was declared to be entitled to the estate. After that the Respondent brought a suit against his brother in which he claimed to recover Rs.19,600 for arrears of maintenance for eleven years and eight months, viz., from the 1st of July, 1866, to the end of February, 1878, at Rs.140 a month, and a declaration of his right to maintenance in perpetuity, and to have it judicially declared that the maintenance was a debt due from the estate of *Kalispur*, situated in the *Lucknow* district, as also from *Mamni* and *Motka*, being the estates which the Defendant had recovered by means of the litigation. He appears to have fixed the 1st of July, 1866, for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the Defendant got possession of it. His case was that he was legally entitled to maintenance at the rate of Rs. 140 a month from the estate of his deceased father; and in his plaint he founded his claim upon an order of the Deputy Commissioner of *Lucknow* in a suit between the father and *Mussumat Bebi Fatima*, his grandmother, and the present Defendant, who was the Plaintiff in that suit. He also said that he was dispossessed of the property under an order dated the 29th of June, 1865, which was upheld by Her Majesty in Council. The Defendant, by his written statement, set up various answers to the claim. The material defences were that the Plaintiff was not entitled to any maintenance as the son of *Mahomed Hossein*; that the claim was barred by limitation, as the Plaintiff himself said that he had not received maintenance since September, 1863, and that the Defendant was not bound by the document which was filed by *Bibi Fatima*, being a document alluded to in the plaint, nor by any document filed by *Mahomed Hossein*; and lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were; 1, Is the suit barred by *res judicata*? 2, Is the suit barred by limitation? and 3 and 4, which may be taken together: Was the Plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the Lower Courts have made decrees in favour of the Plaintiff, and the Defendant has appealed to Her Majesty in Council from the decree of the Commissioner which affirmed the decree of the First Court.

With regard to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the Defendant appears to be an order made in a suit brought by the Plaintiff against *Mahomed Hossein*, the father in which he claimed to be entitled to a monthly allowance for maintenance founded on some *ikrarnama*, which would appear to have been executed by the grandmother, who had the management of the property in consequence of *Mahomed Hossein* being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the Plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the Lower Courts were wrong in deciding against the Defendant upon that issue.

Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the Plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the Defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the Defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the Plaintiff is entitled to receive the maintenance.

The lower Courts have come to this conclusion upon that question: As to his being entitled to receive the maintenance. The officiating Deputy Commissioner says:—"Moreover it appears to me that the Defendant, as maafidar, merely takes that estate in trust, subject to the rent-charges, and that he is bound to pay the stipends with which the estate is charged. Sanad or act of Government does not absolve him from this charge. As regards Plaintiff's right to the allowance claimed, there is, in my opinion, no doubt; the documentary evidence referred to and filed fully establishes this fact, that the cadets of the family were assigned certain specified allowances, payable to them from the estate by the eldest male member managing the estate." The Commissioner says, "Regarding the payment of the allowance, I consider the evidence in the file of the lower Court amply sufficient. It clearly establishes that the cadets of the family were assigned certain allowances payable to them from the estate by the eldest uncle in possession." There is this finding of both the Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December, 1869, the parties came to an agreement. The Defendant's part of agreement states, "That *Mohammad Nihaluddin Khan*"—that is, the Plaintiff—"has waived his claim in succession of the estate, and, having filed a registered deed of compromise (*razinama*) in Court, has caused the suit to be withdrawn. That for his personal expenses I have fixed an allowance of Rs.75 per mensem for a term of one year, and then for the next six years Rs.100 a month; and as at present I am very much in debt, owing to the law expenses incurred, so much so that many of my maafi (revenue-free) villages are mortgaged and hypothecated, and the estate yields very little profits, I cannot afford at present to pay the old allowance of Rs.140 per mensem to *Mohammad Nihaluddin Khan*.

But after the expiration of the aforesaid term of seven years I shall continue to disburse the old pay of Rs.140 a month in perpetuity. If at any time I may offer any objection or hesitate in paying up each of three descriptions of monthly allowances, *Mohammad Nihaluddin Khan* will be at liberty to realize the same by a suit in Court. If for my own necessity I may mortgage or hypothecate the maafi villages, so that the property left may be insufficient to meet the monthly allowance fixed, I will in that case pay the said allowance out of the estate *Khalispur Amelika*." And there is a corresponding agreement, of the same date, by the Plaintiff, which recognises this agreement. This document was put in by the Plaintiff, and formed a very important part of the evidence in support of his case. Besides that, there was evidence of some previous proceedings with reference to this estate and the allowances for maintenance, in which there was a report of the Extra Assistant Commissioner of *Lucknow* made under the order of the Deputy Commissioner, stating that, in the opinion of the Extra Assistant Commissioner, it was proved that the parties mentioned received the allowances shewn opposite to their names. There is mentioned the name of "*Nihaluddin Khan*, Rs. 140," which would seem to be the allowance that was at one time paid. Their Lordships think that the Lower Courts, with this evidence before them, were quite justified in finding that the Plaintiff was entitled to allowance for his maintenance as a charge upon the property which had come from the father, *Mahomed Hossein Khan*. If that is the case, the plea of the law of limitation is answered, because it is shewn that the maintenance was a charge upon the property, and twelve years is the term which is applicable to the suit. The Plaintiff only seeks to recover arrears from the 1st of July, 1866, which is within the twelve years. Therefore the issue raised as to the law of limitation was properly found against the Defendant.

But there remains this question: although it would appear that at one time Rs. 140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read, in consequence apparently of the state of the property, the Plaintiff was willing to receive less than the Rs. 140 for a part of the time. It was then arranged that Rs. 75 should be paid from the date of that agreement for the year 1870; that Rs. 100 should be paid up to the 14th of December, 1876, and after that time that the Rs 140 should be paid. Now the Plaintiff's case was mainly supported by this agreement, exhibit A:. it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the Plaintiff's favour by the lower Courts should be altered by giving to the Plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the lower Courts upon the sum which they awarded. The decrees of the lower Courts as to the costs will stand, and with regard to the costs of this appeal the Respondent has really substantially succeeded in it. The objections of law which were taken by the Appellant, and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the Appellant ought to pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitor for Respondent: *H. Earle.*

16th, and 20th March, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

LALLA SHEOPARSHAD (Plaintiff) ... } *Appellant,*

and

JUGGERNATH (Defendant) ... } *Respondent.**

Practice—onus probandi—verval evidence when other evidence available.

A Judgment is not safely rested on verbal admissions, when there are other means of proving the case, like accounts.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

This is a suit instituted on the 30th of May, 1879, by *Lalla Sheoparshad*, a banker of *Lucknow*, who carries on business through his brother-in law, *Paras Ram*. The Defendant is one *Juggernath Parshad*, described as "the son and representative of the late *Deendial*," also of *Lucknow*. The plaint sets forth that there were commercial transactions between *Deendial* and *Sheoparshad*, and that *Deendial* died on the 23rd of November, 1878. Then it states that on the 22nd or 23rd of December, 1878, the Defendant *Juggernath*, then his father's administrator, called upon the Plaintiff and received a copy of the account contained in the Plaintiff's books, shewing Rs.16,378 to be due to the Plaintiff from the late *Deendial*. The gist of the suit is set forth in paragraph 4 of the plaint, and is as follows:—"That on the 31st of January last"—that is, 1879—"the Defendant, accompanied by *Budree Dass* and *Kulloo Mull*, came to the Plaintiff's house at *Lucknow*, and in the presence of"—a number of persons named—"admitted the said balance of Rs.16,378 to be due from his father, but begged that Plaintiff would forego Rs.1,378; and in consideration the Defendant offered to execute a bond for Rs.15,000, charging all his immoveable property with the payment of Rs.15,000, bearing interest at 6 per cent. per annum, payable by annual instalments of Rs 3,000; to which proposals the Plaintiff agreed, and the Defendant promised to execute and register the said bond within two days from that date." The breach alleged is that the Defendant has not executed nor delivered the promised bond. The prayer of the plaint is for the sum of Rs.15,000, with interest thereon, at 12 per cent., from the 31st of January, 1878, to date, and future interest to the date of liquidation. Now, that is a plaint in a very peculiar form,—it alleges an agreement and the breach of an agreement; it does not pray specific performance of the agreement; it does not fall back upon the state of things prior to the breach of the agreement, viz., the current account between the Plaintiff and *Deendial* and the debt due from *Deendial* on the footing of that account; but it takes a portion of the alleged agreement, namely, an admission that Rs.15,000 is due, and, alleging that the Defendant has not given the promised security for that Rs.15,000, prays for immediate payment of it, with the usual amount of interest.

On the part of the Defendant there was no written statement, but there was the usual hearing of pleaders before issues were settled, and the pleader of the Defendant puts in this defence: First, he says that *Deendial's* books show that he was the creditor upon the account current in a sum of somewhat upwards of Rs 9,000. Then he denies the allegations in paragraph 4 of the plaint, which is the one that has just been read. He says: "No such admission was made by Defendant. Defendant did not go to Plaintiff's house in *Lucknow*. No offer to execute bond for Rs 15,000 was made, nor any compromise. What took place was that on comparing

* 10 Cowell's Ind. Ap p. 74.

the respective accounts the differences were found to be so great that no settlement was made."

Now there being that positive denial of the agreement or the admission on which the Plaintiff relied it might have been expected that the Plaintiff would have fallen back, at least as an alternative, upon the foundation of the case, viz, that on the account current between himself and *Deendial*, *Deendial* was indebted to him. But he does not do that. Instead of doing that he adduces evidence to prove the admission of the debt which is set forth in the plaint. The evidence for the Plaintiff consists of his own evidence, that is, the evidence of *Paras Ram*, who throughout acts as the person substantially interested, and of five other persons. No attempt is made throughout the whole of the evidence to prove that any debt was due from *Deendial* to the Plaintiff; the whole gist of the evidence is to shew that there were negotiations between the Plaintiff and the Defendant after *Deendial's* death, and that those negotiations culminated in a meeting of the parties on the 31st of January, 1879, at which the alleged admission and the alleged agreement were made. The principal and most important witness for the Plaintiff is one *Gurdial*, who is a vakil of the Court, and who states that he was called in by a friend or colleague of the Defendant, named *Badridas* to settle the matter; not that he had any authority to settle the matter, dut he was asked to attend a meeting, and he did attend the meeting of the 31st of January, at which the alleged things were done. Now to all that there is a positive denial on the part of the Defendant. *Badridas* says that he had nothing whatever to do with the settlement of accounts between the Plaintiff and the Defendant; that he never went with *Gurdial* and others to the meeting, and to the best of his knowledge the Defendant never promised to pay Rs.15,000 to the Plaintiff. Another witness, *Kullumull*, who is alleged to have been persent at the meeting when the agreement was made, states that "no accounts between Plaintiff and Defendant took place before me in Plaintiff's house. On the 31st of January, 1879, *Gurdial* did not bring me and *Badridas* and *Juggernath* there." Then he says, "*Deendial's* accounts were compared by me and *Ganeshi Lal*," who appears to have been some connection of the Defendant's. "Some Rs 25,000 difference were found. I and *Ganeshi Lal* went in December to *Sheoparshad's* house, to *Paras Ram*, during last Christmas holidays. We asked him to compare accounts, and they were compared a little; but even these few items differing, *Paras Ram* got angry, declaring his accounts to be correct, ours wrong. This quarrel about the accounts has never been settled."

Now it was to be expected, there being this difference between the witnesses who gave oral evidence, that something would appear in the books of the Plaintiff to shew what took place. He alleges a formal settlement of accounts, and a formal agreement for discharging the balance. It is almost inconceivable that a banker, or any man of business, should have made no contemporaneous entry of such a very important transaction. But the books of *Paras Ram* are produced, and no entry can be found excepting entries which were made on the 26th of May, 1879, for the purpose of settling the plaint in this suit. When *Paras Ram* is asked for an explanation of that circumstance all he can say is this: "The entry was not till May, although the balance was settled to be due in January, because I was waiting to get the bond to enable me to close the account, namely, in the name of *Ram Ratten Deendial*, and open a new one in that of *Juggernath*. I could have commenced a new account with *Juggernath* on getting the bond, even if I had entered the balance on the 31st of January. I did make a mistake in not getting *Juggernath* to sign an entry made on the 31st of January. I can give no reason for the omission. Have brought *Sheoparshad's* books. There is no entry in the day book of the 31st of January, 1879." Neither in the day book nor in the ledger is there to be found any entry until we come to the 26th of May, 1879. Then

in cross-examination he is asked whether it is not the practice to enter the date of the transaction in the day book. He says, "When the entry is not made on actual date of the transaction it is the rule to enter that date in the body of the entry." But in the body of the entry made on the 26th of May no date appears.

The only other explanation given is that by *Gurdial*, who says: "It was urged,"—he does not say by whom, but —"it was urged that the balance of Rs.15,000 should be entered in books and signed. I pointed out that, if no instalments were entered by which balance should be defrayed, one anna stamp would suffice; but if instalments were entered, stamp of bond would be necessary. *Kunhi Lal*," who was acting for the Plaintiff, "then said, 'We can enter the balance in our books, and *Juggernath* can give us his bond.' Then *Juggernath* promised his bond in three days. Meeting then broke up."

Now that is the whole explation why there was no contemporaneous entry made. It is obviously no explanation at all. The plain course of acknowledging in writing the settlement of the account said to be settled could not possibly interfere with the opening of a new account with *Juggernath*, or affect the stamp duty ultimately payable on the bond to be given. The omission to make an entry at the proper time is a circumstance bearing very strongly against the Plaintiff's contention, and leading to the inference that the Defendant's witnesses, who say there was a quarrel over the settlement of the accounts, and that the quarrel still remained open, are much nearer the truth than those witnesses who say that a definite settlement was made at that moment of time.

In that state of the evidence the suit came to a hearing; and the District Judge of *Lucknow*, Mr. *Harington*, feels the difficulty arising from the state of the books. He says: "The Plaintiff's books, kept by one *Paras Ram*, his brother-in-law, are against him, insomuch as they contain no entry of the sum of Rs.15,000 said to have been admitted as due on the 31st of January, 1879, until the 26th of May last, the very date on which the plaint was drawn up. Such carelessness on the part of so well known a firm may appear unaccountable, and the explanation given by *Paras Ram* was an unsatisfactory one." He then weighs the evidence, and comes to the conclusion that, having regard to the position and high character of the witnesses of the Plaintiff, he is bound to believe them. Then comes the question what decree he shall give to the Plaintiff. He winds up his judgment thus: "Plaintiff falls back on the admission as the basis of his claim for the sum admitted to be due, and for interest. Strictly speaking, he is entitled, to this; but looking to the very slipshod nature of the contract, and to the room for reasonable doubts as to the details of what took place on the 31st of January, 1879, I am of opinion that Plaintiff should in his decree be restricted to the conditions of the agreement then made." The Judge therefore seems to have thought that some resonable doubts were to be entertained as to what actually did take place, and in effect he gives the Plaintiff a decree for specific performance of the agreement made; that is to say, the payment of Rs.15,000 by instalments, the first instalment falling due on the 31st of January, 1880.

Both parties appealed from that decree to the Judicial Commissioner; and the Judicial Commissioner, after laying down the very sound principle that the Plaintiff was bound to prove his case, enters into a careful examination of the evidence, and comes to the conclusion that the Plaintiff has not proved his case.

Their Lordships agree with the view taken by the Judicial Commissioner. They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, without very clear evidence, especially when there are other means of proving the case, if a true one. Now in this case, if it be true that *Deendial* was indebted to the Plaintiff in the sum alleged, or in any sum, the Plaintiff's proper course was to bring the accounts into Court and to prove that debt. If the

Plaintiff shrinks from doing that, and chooses to rely upon verbal admissions made at a meeting at his house, he should give the most clear and cogent proof of such admissions, and he should bring into Court a case that is not open to reasonable doubt. Their Lordships think that the evidence adduced in this case is very far from that clear and cogent proof which the nature of the case requires.

The result is that in their Lordships' judgment the appeal should be dismissed with costs; and they will humbly advise Her Majesty in accordance with that opinion.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitor for Respondent: *T L. Wilson.*

4th April, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH NILMONI SINGH DEO BAHADOOR (Petitioner) ... *Appellant,*

and

UMANATH MOOKERJEE and Others (Defendants) ... *Respondents,*

and

RAJAH NILMONI SINGH DEO BAHADOOR (Defendant) ... *Appellant,*

and

BHOYHARINI DEBIA (Plaintiff) ... *Respondent.**

* 10 Cowell's Ind. Ap p. 80; I. L. R. 10 Cal. 19.

CONSOLIDATED APPEALS.

Probate—Application for order revoking probate—Succession Act (X of 1865), s. 243—Locus standi of attaching creditor of next-of-kin to apply for revocation.

A will, on the evidence, was held duly proved. An application for revocation of probate was made by a judgment-creditor who had attached his debtor's right, title, and interest in family estate, whereof a one-fourth share would, but for this will, which made other dispositions, have been inherited by such debtor. Whether such an attaching creditor can oppose the grant of probate, or apply to have it revoked, is a matter of grave doubt; at least, in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. *Baijnath Sahai* v. *Desputty Singh* (1), referred to, and *Komollochun Dutt* v *Nilruttun Mundle* (2), distinguished.

Appeals consolidated and heard as one from two decrees of the High Court (10th September 1880), founded on one judgment reversing decrees of the Judge of the *Nuddea* district (24th March 1879).

Mr *R. V Doyne* appeared for the Appellant, the Rajah *Nilmoni Singh Deo*, Bahadoor.

Mr. *Leith, Q. C.*, and Mr. *C. W. Arathoon*, for the Respondents, *Umanath Mookerjee, Bhoyharini Debia*, and others.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in these appeals relates to the execution of the will of *Bamundas Mookerjee*, a large landed proprietor in the district of *Nuddea*, in *Bengal*, who died on the 7th of January, 1875. He had at the time of his death three sons living, *Umanath*, *Taranath*, and *Srinath*, and three grandsons, *Girendronath*, *Horendronath*, and *Norendronath* (the sons of a deceased son named *Arundass*). The Respondent *Bhoyharini* is the wife of *Taranath*. The Appellant, the Rajah, had in the years of 1863 and 1864 obtained decrees against *Taranath* for over

(1) I. L. R., 2 Calc., 208; S. C., 25 Suth. W. R., 489.

(2) I. L. R., 4 Calc., 360.

Rs 60,000 in the district of *Manbhoom*, which had in 1872 been transferred into the distret of *Nuddea* for execution.

Immediately after the death of *Bamundas*, namely, on the 11th of January, 1875, *Umanath*, *Srinath*, the three grandsons, and *Bhoyharini* presented a petition to the District Court of *Nuddea*, stating that *Bamundas* had given the whole of his property to them, by a will dated 24th Pous 1281 (7th of January, 1875), and praying for a certificate for collecting the debts due to the deceased under Act XXVII. of 1860. A deposition of *Norendronath*, one of the witnesses to the will, proving its execution, was made on the 5th of February, and on the 20th of February the certificate was granted. On the 2nd of February, the Rajah, the Appellant, applied for the attachment of the right, title, and interest of *Taranath* in certain immoveable property of the deceased *Bamundas*, and the attachment was made a few days after. Thereupon *Umanath*, *Srinath*, the grandsons, and *Bhoyharini* presented a petition to the District Court of *Nuddea*, under sect. 246 of Act VIII. of 1859 (the then Procedure Code) claiming to be in possession under the will. On the 29th of June their claim was disallowed by the officiating Judge, but by an order of the High Court, dated the 7th of September, 1875, the order of disallowance was set aside, and the Court was instructed to take up the claim again, with special reference to the question of possession, the officiating Judge having called upon *Bhoyharini* to prove the execution of the will (which he ought not to have done), and tried the case as if the question was the validity of the will. The result of the hearing on the remand was that, on the 11th of February, 1876, three fourths of *Bamundas'* share and interest in the estates under attachment were released, and the attachment was held good as to the remaining one fourth. The sect. 246 provides that the order passed by the Court under that section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right within one year from the date of the order. Accordingly, on the 1st of April, 1876, *Bhoyharini* filed her plaint in the District Court of *Nuddea* for a declaration of her right under the will to a fourth share of the zemindaries, &c., mentioned in the schedule thereto, left by *Bamundas Mookerjee*, situated within the jurisdiction of the Court. The suit was brought against the Rajah, and against *Taranath* as a *pro forma* Defendant. The Rajah in his written statement, filed on the 7th of June, 1876, objected that, as no probate had been taken out under the will, as was required by law, the Plaintiff was not entitled to bring a suit for declaration of her right, and alleged that *Bamundas* did not execute the will, and that it was fabricated after his death by *Taranath* and his co-sharers in order to deprive him of the money due to him.

Before this *Umanath*, *Srinath*, *Bhoyharini*, and the grandsons had, on the 14th of March, 1876, presented a petition to the Judge of *Nuddea*, praying that probate of the will, or, if the Court thought they were not appointed executors under it, letters of administration with the will annexed might be granted to them. The 24th of March was fixed for the hearing, and notice was ordered to be issued. On that date an order was made for granting probate, but before it was given *Bhoyharini* was to put in her husband's consent to her taking probate. It was not until the 21st of December, 1876, that the Judge granted the certificate of probate, and what caused the delay in granting it did not appear. On the next day, the 22nd of December, the Rajah presented a petition to the Judge of *Nuddea*, under sect. 234 of Act X. of 1865, praying for an order setting aside the probate, on the ground that, as by the will the right of his debtor *Taranath* had, in a manner, been destroyed, and the will had been got up with a view to defraud him he ought to have had notice of the application for probate, and he had not had notice. *Bhoyharini*, in her petition in answer said that the will was genuine, and was duly executed by *Bamundas*, and that the Rajah could not become an objector in

the probate case, and, consequently, was not entitled to apply to have it set aside.

It may be well to mention here that by Act XXI. of 1870, the *Hindu Wills Act*, certain portions of Act X. of 1865, the *Indian Succession Act*, are made applicable to wills of Hindus in the territories subject to the Lieutenant Governor of *Bengal*, and these portions include the different sections of the Act of 1865, which have been referred to in the course of this litigation.

The petition of the Rajah for revocation of the probate and the suit by *Bhoyharini* were heard together, and issues were framed by the First Court on the 7th of June, 1876.

The principal, and now the only material one, is, was any will executed by *Bamundas* on the 7th of January, 1875? Evidence was given on both sides, and the Officiating Judge of *Nuddea*, on the 3rd of September, 1877, ordered the probate to be revoked and dismissed *Bhoyharini's* suit against the Rajah. *Bhoyharini* appealed to the High Court, which, on the 9th of July, 1878, set aside the order as irregular, on the ground that notice of the application to revoke the probate had not been given to all the members of the family who were interested under the will, the parties being at liberty to take fresh proceedings upon the original petition of the Rajah. The decree in the suit by *Bhoyharini* was also set aside, and the case remanded to the Lower Court to be reheard.

Fresh proceedings were taken and more witnesses were examined, and on the 24th of March, 1879, the Judge of *Nuddea* gave his judgment. He first considered the question whether the Rajah was entitled to be heard against the will, and held that holding a decree against *Taranath*, and having attached *Taranath's* supposed share of the paternal estate immediately after the death of the father, the Rajah did acquire such an interest in it as entitled him to oppose probate of the will, which he contended was not executed by his debtor's father, and which purported to disinherit the debtor. He then held that the will was not genuine, saying he concurred generally in the reasons for the conclusion that the will was not executed by *Bamundas* given by the officiating Judge in the judgment of the 3rd of September, 1877. He said, however, that the propounders of the will had succeeded in shewing, beyond a doubt, that *Bamundas* did certainly contemplate the execution of such a will, and that he caused a draft to be made. The probate granted on the 21st of December, 1866, was ordered to be cancelled, and the suit by *Bhoyharini* was dismissed with costs. The parties appealed to the High Court, which gave judgment on the 10th of September, 1880. The Court held that the Rajah had such an interest in the property of the deceased as entitled him to dispute the genuineness of a will which purported to divert the succession from *Taranath* to another, but that the will was duly executed by *Bamundas*, and made an order in the application for revocation of the probate, and a decree in the suit by *Bhoyharini* accordingly, from which order and decree the Rajah has appealed to Her Majesty in Council. The following passage from the judgment of Mr. Justice *Morris* states the reasons for the decision upon the former question :—

"The first question that arises is whether *Nilmoni Singh*, as creditor of *Taranath*, has any *locus standi*, whether he has such an interest in the estate of the deceased *Bamundas* as gives him a right to apply for revocation of the probate granted of his will. In support of the proposition that he cannot apply for revocation of probate, several authorities have been cited. In the matter of *Mee Tsee*, petitioner (1), Mr Justice *Norman*, delivering the judgment of the Court, says: 'We have no doubt of the soundness of the proposition that a person who is not next of kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the will. In *England* it has been held that even a creditor cannot controvert the validity of a will, because it is a matter of indifference whether he should receive his

(1) 15 Suth. W. R. 351.

debt from the executor or from an administrator.' Then the case of *Baijnath Sahai and Others* v. *Desputty Singh* (1) is quoted to shew that the learned Judges there considered that, in this country too, creditors of the next of kin to the deceased are not entitled to have citation served upon them under sect. 250, Act X. of 1865, calling upon them 'to come and see the proceedings before the grant of probate or letters of administration.' But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of *Komollochun Dutt and Others* v. *Nilruttun Mundle* (2), and Mr. Justice *Markby*, in giving the judgment, made the following observations: 'If we thought that the decision in *Baijnath Sahai* v. *Desputty Singh* went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a full Bench, because we should disagree from such a ruling.' We entirely concur in the opinion here expressed. and consider that it is applicable to, and meets the circumstances of the present case. There is no question that *Nilmoni Singh*, immediately after the death of *Bamundas*, and before probate of his alleged will had been taken out, attached the property, which is the subject of the suit of *Bhoyharini*, as the property of his judgment debtor *Taranath*, to which he had succeeded on the death of his father owing to the devolution of the property of *Bamundas* by natural succession to *Taranath*."

The case of *Baijnath Sahai* v. *Desputty Singh* (3) was this: A Hindu testator died, leaving *B.*, alleged to be his adopted son, and *C.*, who would be his heir in default of adoption, and made a will of which *B.* applied for probate, and it was held under the *Succession Act* and *Hindu Wills Act* that creditors of *C.* were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision.

In *Komollochun Dutt* v. *Nilruttun Mundle* (4) the facts were that *Komollochun* and *Joynarain*, two brothers, originally held possession of certain joint properties in which they had a half share. On the 8th of January, 1872, *Joynarain* died childless, leaving a widow, who would, therefore, under the Hindu law, succeed to his estates. It did not appear that she ever got into possession of her husband's property, and on the 13th of November, 1875, *Komollochun* obtained probate of a will, executed by *Joynarain* shortly before his death. Before the grant of probate, namely, in June, 1875, the widow had sold her interest in her husband's estate to the Plaintiff, *Nilruttun*, who brought a suit to recover her share of the property upon the strength of his purchase, alleging the will to be a forgery. *Komollochun*, who was in possession, defended the suit, upon the ground that the will was genuine, and that by it the property was bequeathed to himself for certain purposes therein specified. The will having been found to be a forgery, the District Judge gave the Plaintiff a decree for the share of the property which had belonged to the deceased. The High Court held that the probate was conclusive, and that an application should have been made to revoke it, and they postponed the final decision until the Plaintiff had had an opportunity of making one. The whole passage, from which Mr. Justice *Morris* quotes a part, is as follows:—

"If this procedure be followed, we do not see what are the disastrous consequences of holding probate to be conclusive, to which the District Judge alludes. It was said that the Plaintiff in this case would be remediless, because, according to the decision in *Baijnath Sahai* v. *Desputty Singh* (5), he could not apply to revoke the probate. The point is not directly before us, but as at present ad-

(1) 25 Suth. W. R. 489.

(2) I. L. R. 4 Calc. Series, 360.

(3) I. L. R. 2 Calc. Series, 208.

(4) I. L. R. 4 Calc. Series, 360.

(5) I. L. R. 2 Calc. Series, 208.

vised, we think that the Plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no will he has a good title, at any rate, against *Komollochun*, as far as the will is concerned; whether the sale by the widow *Bogolamoye* would be good as against the reversioners does not appear to have been raised and tried, we do not therefore see why he should not apply to revoke the probate. The ground of the decision in *Baijnath Sahai* v. *Desputty Singh* was that the party there, a creditor of one of the next of kin, had no interest in the estate of the deceased. A purchaser from the next of kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser, or an attaching creditor, could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling."

The case in which this judgment was given was that of a purchaser from the heir, but no distinction is made between a purchaser and an attaching creditor. Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. But as, after hearing the Appellant's counsel upon the question of the execution of the will, their Lordships did not consider it necessary to hear the counsel for the Respondents, the question whether the Rajah could apply for the revocation of the probate has not been argued before them, and therefore they give no final opinion upon it.

They consider that the appeal should be decided in favour of the Respondents, on the ground that the High Court was right in holding that the will was duly executed by the testator. The effect of the will is to give the share of *Taranath* to his wife *Bhoyharini*, and it is expressly stated in it that it is the object of the testator to prevent *Taranath's* share falling into the hands of his creditors. Some time before his death the testator had had a draft will prepared, and sent it to be inspected by two members of his family, and a vakeel named *Parasaram Mustafi*. The latter drew up a revised draft will, and took it to *Bansbaria*, where *Bamundas* then resided. He approved of it, and directed *Chunderkant Surbogya* to take and shew it to his sons at *Birnuggur*, where the family residence was. This he did, and returned with it to *Bansbaria*. On the day of his return, and the next day *Bamundas* was unwell; but on the day after he asked him about the draft, and on *Chunderkant* saying that he had shewn it to his sons and grandsons, who had no objection to offer, he directed him to make a fair copy of it. The fair copy was made, and was read and approved by *Bamundas*, and then entrusted to his grandson *Norendronath* to keep. This was done a fortnight before his death, and the Respondents' case was that, on the evening on which he died he asked for the will and duly executed it. The Rajah's case was that he died without having executed it, being too unwell to do so, and that it was taken to *Birnuggur*, and his signature put to it there on the next day. The will was attested by *Norendronath* and *Chunderkant Mookerjee*, who was the gomashta at *Birnuggur*, and they deposed to its execution as required by the *Hindu Wills Act*. *Dinonath Sen*, the gomashta at *Bansbaria*, did not attest it, but he deposed to having seen it executed. It was argued that his not attesting shewed that the signature of *Bamundas* was forged, and that the signatures of the witnesses were put to the will at *Birnuggur* on the next day, when *Dinonath* was not there. Other circumstances of a similar character were relied upon as suspicious, and a case to prove that *Bamundas* died suddenly under entirely different circumstances from those described by the witnesses of the Respondents was at first set up by the Rajah, but it broke down, and was not pressed either in the first Court or in the High Court. After a full examination of the evidence and

the judgments of the first Court on the original hearing and the remand, the High Court came to the conclusion that there was no sufficient reason for disbelieving the testimony of the attesting witnesses and *Dinonath Sen*, and that it was impossible to discredit the direct and indirect evidence which was presented to prove the genuineness of the will. Their Lordships have come to the same conclusion. Looking at the facts, which are not disputed, it appears to them that, so far from there being ground for disbelieving the witnesses, it is more probable that *Bamundas* carried out his intention to make the will, and did execute it in the manner stated, than that he died so suddenly as to be unable to do so.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, the costs of which will be paid by the Appellant.

Solicitors for Appellant: *Lambert, Petch, & Shakespear.*

Solicitor for Respondents: *T. L. Wilson.*

7th, 8th, and 30th June, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MINA KONWARI (Plaintiff) ... ... } *Appellant,*

and

JUGGUT SETANI (Defendant) ... } *Respondent.**

Limitation Act (XIV of 1859), s. 22—Registration Act (XX of 1866), s. 53—"Decree" made upon a registered obligation—Summary decision—Petition to postpone sale in execution of decree—Estoppel—Evidence Act (I of 1872), s. 115.

A summary decision means a decision arrived at by a summary proceeding; and a "decree," made under s. 53 of Act XX of 1866, is a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees, or orders, made in a regular suit; and s. 22 of the same Act was intended to apply to all other decisions.

A decree made in 1867 under s. 53 of Act XX of 1866, *held* to be subject, as regards its execution, to the law of limitation provided in Act XIV of 1859, s. 22.

To petition for the postponement of a sale in execution of decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed and occasions no estoppel within the Indian Evidence Act, 1872, s. 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time.

Appeal from a decree (27th November 1880), of the High Court, reversing an order (15th July 1880) of the Subordinate Judge of the *Moorshedabad* district.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, appeared for the Appellant.

Mr. *J. T. Woodroffe* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in this appeal is whether the execution of a decree obtained in the Court of the Principal Sudder Ameen of *Moorshedabad*, by *Dhunput Singh* against *Gopal Chand*, is barred by the law of limitation. The Appellant is the holder of the decree by assignment from *Dhunput Singh*. The Respondent is the mother of *Gopal Chand*, and on the death of his minor son *Gopi Chand* succeeded as the heir of her grandson to the possession of the property which has been attached in execution. The decree was obtained on a mortgage bond, dated the 25th Cheyt 1273 (6th of April, 1867), for Rs.9,995, which sum was to be repaid with interest, at the rate of 2 per cent. per mensem, in the month of Jeyt, 1274.

* 10 Cowell's Ind. Ap. 119; I. L. R. 10 Cal. 196.

The bond contained an agreement that it should be specially registered under the provisions of sect. 53 of Act XX. of 1866. It was presented for registration on the 7th of June, 1867, and was registered and the agreement recorded on the 19th, the time fixed for payment having expired on the 13th of the same month.

Act XX of 1866 provides (sect. 52) that,—

"Whenever the obligor and obligee of an obligation shall agree that, in the event of the obligation not being duly satisfied, the amount secured thereby may be recorded in a summary way, and shall at the time of registering the said obligation apply to the registering officer to record the said agreement, the registering officer after making such inquiries as he may think proper shall record such agreement at the foot of the indorsement and certificate required by sects. 66 and 68 of the Act, and such record shall be signed by him and by the obligor, and shall be copied into the registered book, and shall be *prima facie* evidence of the agreement.

"Within one year (sect. 53) from the date on which the amount becomes payable, or where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act, No. XVI. of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

"On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decrees and a sum for costs to be fixed by the Court.

Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

On the 9th of July, 1867, *Dhunput Singh* obtained a decree under this Act in the following terms:—"That the suit be decreed, and the Plaintiff do recover the amount of the claim with interest during the pendency of the suit, and costs of the Court, together with interest up to the date of realization at the rate of one rupee per mensem from the property pledged and the Defendant." The latter part of this decree is not authorized by the Act, but it will not be material to consider this.

Gopal Chand died some time before May, 1870, but at what precise time does not appear in the proceedings. He left a minor son, *Gopi Chand*, and on the 10th of May, 1870, the first application was made for execution of the decree. This was made by *Dhunput Singh* to the Court of *Moorshedabad* against himself, described as guardian and *surbarakar* on behalf of *Set Gopi Chand*, minor, son and heir of *Set Gopal Chand*. It does not appear how he came to be guardian, except that in a petition of the Respondent to the Court of *Nuddea*, which will be afterwards referred to, it is said that he was, according to the arrangement made by *Gopal Chand*, appointed guardian of *Gopi Chand*. On the 11th of May it was ordered that the petition be registered, and the decree holder do deposit the cost of service of notice on the judgment debtor within seven days. This was merely a formal order, as *Dhunput Singh* was himself the person on whom the notice would be served.

It will be convenient now to consider what was the effect at this time of the law of limitation.

By Act XIV. of 1859, sect. 20, it is enacted—

"That no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for execution."

And by sect. 22,—

"No process of execution shall issue to enforce any summary decision or award of

any of the Civil Courts not established by Royal Charter, or of any revenue authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding application for such execution."

The Court of *Moorshedabad* was not established by Royal Charter. Their Lordships are of opinion that sect. 20 was intended to apply to decisions, whether they might be called judgments, decrees, or orders, made in a regular suit, and sect. 22 to all other decisions. Act XX. of 1866 does, indeed, say that the Petitioner shall be entitled to a decree, and that such decree may be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure; but sect. 52 says that the amount secured by the obligation may be recovered in a summary way. Summary decision means a decision arrived at by a summary proceeding, which this certainly is, and the decision being called a decree does not make any difference in this respect. It was held by the High Court at *Calcutta*, in *Ram Dhun Mundul* v. *Ramessur Bhuttacharjee* (1), that the words "summary decision or award" meant a decision of the Civil Courts not being a decree made in a regular suit or appeal. This construction appears to have been adopted by the Indian Legislature in the *Limitation Act*, No. IX. of 1871, in art. 166 of the second schedule, where one year is stated as the period of limitation for the execution of the decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or an appeal. Here the exception shews that the word "decision" is used as including a decree. Therefore the first application for the execution of this decree was barred by the law of limitation.

It remains to be seen whether in the subsequent proceedings the Respondent has become estopped from relying upon this. They may be briefly stated. On the 20th of July, 1870, *Dhunput Singh* applied to the *Moorshedabad* Court that the decree might be executed in the Court of the district of *Nuddea*. The Court, adverting to the fact that the decree holder was himself the guardian of the minor judgment debtor, on the 3rd of August, 1870, made an order that he "do recover the money due to him from the estate of the minor, with the permission of the Judge, or else by appointing another guardian on behalf of the minor, do take proper steps to carry on this execution proceeding in his presence within ten days." On the 29th of August, 1870, by an order reciting this order, and that no steps had been taken, it was ordered that the case be struck off for default. On the 23rd of July, 1873, *Dhunput Singh* and the Appellant presented petitions to the *Moorshedabad* Court stating that the decree, along with other decrees, had been sold by *Dhunput Singh* to the Appellant for Rs.1,000, and praying that she might be substituted for him, and the amount of the decree ordered to be paid to her. The Appellant is the wife of *Dhunput Singh*, but this was not stated in the petitions. The object seems to have been to avoid complying with the order of the 3rd of August, 1870. On the 28th of August the substitution was ordered. On the 12th of December, 1873, it was ordered "that for want of prosecution on the part of the decree holder this case be struck off for the present." The next step was an application on the 22nd of September, 1874, on the part of the Appellant for execution of the decree in the district of *Nuddea*, which was ordered on the 7th of December, 1874. On the 9th of April, 1875, this application was registered in the *Nuddea* Court, and, on the 4th of August, 1876, it was struck off in default. On the 25th of January, 1878, another application for execution was made to the *Nuddea* Court. *Gopi Chand*, the minor, died in November, 1878. The application to the Court, which became necessary on his death, either under sect. 210 of Act VIII. of 1859, or sect. 234 of Act X. of 1877, the new Civil Procedure Code, whichever might, according to sect. 3 of Act XII. of 1879, be applicable, was not made. Notwithstanding this omission the execution

(1) 11 Suth. W. R. 117; 2 Beng. L. R. 235.

proceedings appear to have been continued, for there is in the proceedings a petition, dated the 8th of December, 1879, of the Respondent by *Umanath Ghosal*, described as pleader for the Petitioner, stating that the decree holder had executed the decree against her, got her property attached, and that day had been fixed for the sale, and praying that two months' time might be sanctioned, and, the attachment subsisting, the 8th of February next might be fixed for the sale. This was assented to by the pleader for the Appellant, and an order was made accordingly. On the 9th of February, 1880, another petition of the Respondent was presented by *Nobin Chunder Sircar*, another pleader, stating that the decree holder had consented to allow time up to the 1st of March, and praying that that day might be fixed for the sale, which was ordered with the consent of the pleader for the decree holder. On the 8th of March part of the attached property was sold, and the petition of the Respondent to the *Nuddea* Court to set aside the execution having been rejected on the 6th of March, and an order made for a further sale on the 8th of May, the Respondent, on the 3rd of May, 1880, petitioned the *Moorshedabad* Court to stay the sale, and adjudicate upon the objections (among others which need not be mentioned) that the execution of the decree was barred by limitation, and the proceedings in execution had been without jurisdiction. And she denied that she knew of the proceedings. The Appellant, in his petition in answer, relied upon the petitions of the 8th of December and 9th of February. The Subordinate Judge of *Moorshedabad* rejected this petition, and there was an appeal to the High Court. That Court applied to the case the *Limitation Act*. No. IX. of 1871, art. 167 of which gives, in the decree or order of a Civil Court not established by Royal Charter, three years from the date of applying to enforce or keep it in force as the period of limitation, and held that the question was whether, within three years before the 23rd of July, 1873, anything had been done to enforce or keep in force the decree. They allowed the appeal, on the ground that no application for execution had been made within three years; but, it having since been decided by this committee, in *Mungal Pershad Dichit and Another* v. *Grija Kant Lahiri Chowdhry* (1), that, as regards suits instituted before the 1st of April, 1873, all applications in them are excluded from the operation of Act IX. of 1871, it is admitted that the decision cannot be sustained on that ground. It does not seem to have been considered whether art. 166 was not applicable. It has been held to be applicable to such a case by the High Court of *Bombay* (2).

Their Lordships observe that, although the Respondent denied any knowledge of the petitions presented in her name, and the Appellant relied upon them, no evidence was given that they were authorized by her, and further, that the proper steps consequent upon the death of *Gopi Chand* not having been taken in the *Moorshedabad* Court, the *Nuddea* Court had no authority to execute the decree against the Respondent. The petitions are of a very suspicious character, and their object appears to have been to have a sale without proclamation. The proceeding in the *Nuddea* Court against the Respondent was altogether irregular, if it was not without jurisdiction, and the petitions to postpone the sale cannot be treated as an estoppel. They contain no admission that the decree could be legally executed against the Respondent, and are not within the description of an estoppel given in the *Indian Evidence Act*, 1872, sect. 115, and following sections.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court by which the order of the Lower Court was set aside and the application for execution dismissed, should be affirmed, and this appeal be dismissed, and the costs will be paid by the Appellant.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Henderson & Co.*

(1) Law Rep. 8 Ind. Ap. 123.
(2) Ind. L. R. 5 Bom. S. 673.

20th and 30th June, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KALI KOMUL MOZOOMDAR and others (Defendants) ... ... } *Appellants,*

and

UMA SHUNKUR MOITRA (Plaintiff). ... } *Respondent.**

Hindu Law—Inheritance—Succession of adopted son on the mother's side.

An adopted son under the law prevailing in Bengal occupies, as regards inheritance, the same position in the family of the adopter as a natural born son (except in a few instances defined in the Dattaka Chandrika and Dattaka Mimansa,) succeeding collaterally, as well as lineally, his relations by adoption. *Pudma Kumari Debi Chowdrani* v. *The Court of Wards* (1), referred to and followed. Where a natural-born son, had there been one, would have been entitled to succeed a maternal uncle, as being brother's daughter's son to the latter, *held*, that an adopted son, who had been adopted by a widow under her deceased husband's authority, was entitled, in like manner, to inherit, at the death of the widow, from her father's brother.

Appeal from a decree (21st June 1880) of a Full Bench of the High Court (2), reversing a decree (31st May 1878) of the Officiating Additional Judge of the *Rajshahye* District, which affirmed a decree (20th December 1877) of the Second Subordinate Judge of *Rajshahye*.

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, appeared for the Appellants.

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This suit was brought by the Respondent against the Appellant to recover certain property which he claimed as an adopted son. The former full owner of the property was *Kristonath*, who died in 1815, leaving a widow, *Bhobani*, and a son, who died in the following year unmarried, and a daughter, *Hurrosoondury*, who was married to *Joy Shunkur Surma*, and died in April, 1872. *Bhobani* died on the 1st of December, 1873, and the Respondent claimed to be entitled to the property on her death, as having been adopted by *Hurrosoondury*, with the permission of her husband, who died in 1843. The Appellants are the sons of *Mothooranath*, the original Defendant, who died pending the suit. He was the nephew of *Kristonath*, and took possession of the property on the death of *Bhobani*.

It was satisfactorily proved that *Hurrosoondury* adopted the Respondent and performed the requisite ceremonies in 1854, having previously adopted a son, who died in October, 1853, and the questions in this appeal are:—

1. Whether *Hurrosoondury* had permission from her husband to adopt, which is required by the law of *Bengal*; and
2. Whether the Respondent, as an adopted son, can succeed to the property in suit.

The Subordinate Judge held that an authenticated copy of a written permission, purporting to be executed by *Joy Shunkar*, empowering *Hurrosoondury* to adopt three sons in succession, was admissible in evidence. The Appellate Court held that it was not admissible, as there was no evidence that a search was made for the original. It is not necessary to decide which is right, as their Lordships are of opinion that there is sufficient evidence of the permission without the copy. A hebanama, or deed of gift, executed by *Joy Shunkar* in favour of *Hurrosoondury* contains a statement that

* 10 Cowell's Ind. Ap. p. 138; I. L. R. 10 Calc. 232.

(1) I. L. R. 8 Calc. 302; S. C. L. R., 8 I. A. 229.

(2) I. L. R. 6 Calc. 256.

he had executed in her favour a deed of permission to adopt. In the deed by which the first adopted son was given in adoption by his mother to *Hurrosoondury* there is this passage :—"Your husband, *Joy Shunkar Moitra*, being without issue, gave you during his lifetime permission to adopt a son, and has since died." This deed is witnessed by *Mothooranath*. And in his deposition taken in the suit he admits that "the Respondent was treated and acted as a son to *Hurrosoondury*, calling her mother, and *Bhobani* grandmother, and *Mothooranath* himself 'mama' or maternal uncle, and he answered accordingly." There is, therefore, no ground for setting aside the findings of the Lower Courts that there was a valid adoption.

As to the second question, their Lordships have held in *Pudmacoomari Debia* v. *The Court of wards* (1), that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the Appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa. That this is the Hindu law is shewn by the careful examination of the authorities by the learned native Judge who delivered the judgment of the Full Bench of the High Court, which is the subject of this appeal. The Respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal uncle at the death of the widow, which he would be if he were a natural born son, and as an adopted son he is in the same position. This is clear from the Dattaka Mimansa, sect. 6, p. 50, where it is said : "The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grandsires (of adopted sons)." Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the Respondent is right, and they will humbly advise Her Majesty that it should be affirmed, and this appeal dismissed, and the Appellant will pay the costs of it.

Solicitors for Appellants : *Wrentmore & Swinhoe*.

Solicitor for Respondent : *T. L. Wilson*.

(1) Law Rep. 8 Ind App. 229 ; I. L. R. 8 Calc. 302.

20th and 21st June, and 11th July, 1883.

PRESENT :

Members of the *Judicial Committee* :—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ISRI DUT KOER and others (Plaintiffs) ... } *Appellants*,

and

MUSSUMUT HANSBUTTI KOERAIN and others (Defendants) ... ... } *Respondents*.*

Declaratory decree, Suit for—Civil Procedure Code (Act VIII of 1859), s. 15—Hindu widow's control over savings of the income of her limited estate.

A suit brought during the life of a Hindu widow by the presumptive heir, entitle on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s. 15, *viz.*, that, except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief.(1)

Held, that although to grant a declaratory decree under the above section, was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with

* 10 Cowell's Ind. Ap. 150 ; I. L. R. 10 Cal. 324.

(1) *Kattama Natchiar* v. *Dora Singah Tever*, L. R. 2 I. A. 169 ; S. C. 15 B. L. R. 83.

the widow's alienation, the grounds for the discretionary refusal of the decree should be strong. In this case, the difficulty of the question raised, and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons.

A widow's savings from the income of her limited estate are not her *stridhan*; and if she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. But it is not always possible to fix the line which separates accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. Where, however, both the family property, and property purchased by the widow out of savings from her income, were alienated by her, with the object of changing the succession, *held*, that accretion was clearly established, and that the after-purchases were inalienable by her for any purpose that would not justify alienation of the original estate.

A daughter, obtaining a transfer from her deceased father's widows of their interests in his estate, does not acquire thereby an estate valid against the title of the father's collateral heirs, expectant on the deaths of the widows.

Appeal from a decree (24th June 1879) of the High Court of *Bengal*, reversing a decree (17th September 1877) of the First Subordinate Judge of *Tirhoot*.

Mr. *C. W. Arathoon*, for the Appellants.

Mr. *J. H. W. Arathoon*, for the Respondents.

11th July, 1883.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

This is a litigation concerning the succession to the estate of one *Budnath Koer*, a Hindu who died towards the end of the year 1857. He left two widows *Hunsbutty* and *Chunderbutty* who are still living; and one child, the daughter of *Chunderbutty*, who was named *Dyji Ojhain*, and who has since died, leaving only a daughter. On the death of *Dyji* the collateral male relatives of *Budnath* became his presumptive heirs, subject to the interest of the widows. They are the Plaintiffs and the Appellants. The Defendants and Respondents are the two widows and *Bachni* the daughter of *Dyji*.

On the 21st of December, 1873, the widows executed a deed whereby, after stating that with the exception of *Dyji* there was no heir of their husband or of themselves, they made a gift to her of certain lands and villages, only retaining to themselves a life interest in part of them. Some of the property is described as mouzahs exclusively acquired by the widows out of their own fund, and the rest is described as having been left by their husband *Budnath*.

Dyji died in the year 1875, and in the course of the next year the Plaintiffs brought their suit. The material parts of the prayer are for a decision that the deed of December 1873 is null and void as regards the reversionary interests of the Plaintiffs, and for a declaration that the properties acquired by the widows are part and parcel of their husband's estate.

By their written statements, and by the mouth of their pleader, the three Defendants set up in substance the same defence. They say first, that the Plaintiffs having only a contingent interest cannot maintain the suit; secondly, that if a widow releases her interest to her husband's heir presumptive which *Dyji* was, the absolute interest becomes at once vested in such heir, and therefore the inheritance devolved on *Bachni*; thirdly, that at least the properties which were purchased by their own money, either received from their parents or given to them by *Budnath* during his lifetime, formed no part of *Budnath's* estate.

In the month of September, 1877, the case was heard and decided by the Subordinate Judge of *Tirhoot*. He found that the properties purchased by the widows were so purchased out of the profits of *Budnath's* estate, and were accretions to that estate. He held that the conveyance to *Dyji* did not vest the inheritance in her, because she was heir only to a woman's estate, and the prescribed course of inheritance would be changed if she took an estate transmissible to her own heirs. And he gave the Plaintiffs the decree they asked.

The Defendants appealed to the High Court, and in June, 1879, the case was heard by a Divisional Bench, consisting

of Justices *Ainslie* and *Broughton*, who reversed the decree below and dismissed the suit with costs. From that decree the Plaintiffs bring the present appeal.

The learned Judges think that the first part of the Plaintiff's prayer cannot be entertained, because it is clearly competent to the widows to convey their own interest; because as regards *Budnath's* original property it is not necessary to construe the deed of 1873 as doing more; and because as regards the after-purchases the widows only convey such legal interest as they believe themselves to hold. Their Lordships are unable to follow this reasoning, even when confined to *Budnath's* original estate. The Defendants have not met the Plaintiffs by saying that by the conveyance *Dyji* got nothing more than the widow's interest; they have contended that by coalition with *Dyji's* inheritance it gave her an estate transmissible to her own heirs. If then the true construction of this transaction be that it passes only the widow's interest, it materially concerns the Plaintiffs to have that construction established. In this part of their prayer they ask nothing more favourable to themselves, and as between themselves and the Defendants who allege an adverse construction, they are clearly entitled to as much, unless they are excluded by the rules relating to declaratory decrees.

The after-purchases fall under the same observations; and with respect to them two other substantial questions are raised, one of fact and one of law. First, the Defendants deny that they were made out of the proceeds of *Budnath's* property, and this issue has been decided against them in both Courts, and is no longer a matter of dispute. Secondly, they contend that such purchases are not to be treated as accretions to the property from the proceeds of which they were made, but belong to the widows who made them.

The learned judges below do not treat the latter question as unimportant to the Plaintiffs; but they consider it to be one of great difficulty, unsettled by authority, and requiring reference to a full bench. In their judgment therefore the case is not a proper one for a declaratory decree. Mr. Justice *Ainslie* states the principle of their decision as follows:—

"It seems to me that we ought not to allow this suit to be protracted and great additional expense to be incurred, when it is quite possible that the widows or one of them may survive the Plaintiffs, so that the estate may never vest in them and the decision arrived at may prove no bar to further litigation.'

"For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the Plaintiff) will not prejudice his rights in any way."

This suit was instituted before the passing of the *Specific Relief Act*, and its propriety must be tried by the law as it stood under sect. 15 of the Procedure Code of 1859. That section does not confer any right to declaratory relief in any given case, but merely enacts that no suit shall be liable to objection on the ground that a merely declaratory decree is sought, and that it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.

It is true that the apparently wide door here opened for declaratory suits is greatly narrowed by the decision that, as a general rule, the Court shall not make a declaration except in cases in which the Plaintiff could if he chose seek some consequential relief. That doctrine was clearly laid down in the case of *Kathama Natchiar* v. *Dorasingi Tever* (1), but it was there stated to be subject to exceptions. Their Lordships think, and here they agree with the learned Judges below, that such a suit as the present falls among the exceptions.

It is laid down, and in their Lordships' opinion correctly, in *Shama Churn*

(1) Law Rep. 2 Ind. App. 169.

Sircar's Vyavastha Darpana, that "if a widow, without consent of her husband's heirs, dispose of his property for purposes not sanctioned by law, they are entitled to interfere and prevent any such wrongful alienation by her." Yet it is clear that a widow may aliene her own interest. If then she executes a conveyance valid for her own interest but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief except a declartion that the conveyance is void *pro tanto.* He cannot set the deed aside, because it is partly valid; nor can it affect the possession, which the widow has a right to keep or to give up to another. Such suits as the present one would seem to be, at least in many cases, the only practical mode of enforcing the heirs' right to interfere with a widow's alienation. That they are known to the law is clear, for Act IX. of 1871 by art. 124 prescribes the time for bringing a "suit during the life of a Hindu widow by a Hindu entitled to the possession of land on her death, to have an alienation made by the widow declared to be void except for her life." That is precisely the first part of the Plaintiff's prayer in this suit. And the person "entitled" must mean the presumptive heir who would be entitled if the widow died at that moment.

It is true that the foregoing considerations do not settle the case, for there remains a discretion in the Court, which may find it, as the High Court has found it, inexpedient to grant the relief asked. But their Lordships think that a strong case of inexpediency should be shewn for refusing declaratory relief to classes of persons expressly recognised by the law as suitors for such relief. They do not say that there may not be such a case, but they cannot find it here.

The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of *Budnath*, as to which the Plaintiffs are clearly right and the Defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it.

Moreover, it is to be observed that objections resting on the difficulties of the dispute are of much more weight in a preliminary stage than in a Court of Appeal. If the Defendants had in the first instance objected to declaratory relief and had taken the opinion of the Subordinate Judge on that point, there would then have been more ground for refusing relief in order to save expence and litigation. But they did not do that. They disputed the whole case of the Plaintiff. An important issue of fact, and two important issues of law, were decided by the First Court in the Plaintiff's favour. After all this it comes very late for the Court above to reverse the action of the Court below on the ground of discretion and in order to save further litigation and expense.

For the above reasons their Lordships think that they are bound to decide the issues raised in this case.

So far as regards the contention of the Defendants that *Dyji* could by the conveyance take an absolute estate transmissible to her heirs, the High Court have not expressed any opinion adverse to that of the Subordinate Judge, and their Lordships need do no more than express agreement with him.

The difficult question of the after-purchases is very ably discussed by the learned Judges below, who would probably, if compelled to decide, have decided against the Plaintiffs. The difficulty is enhanced, if not created, by the later current of decision, which gives to the widow a more free and complete usufruct of her husband's property than is accorded to her by the

texts and earlier decisions; a modification of the law which is strongly illustrated by the conflicting opinions of Mr. Justice *Dwarkanath Mitter* and his colleagues in the case of *Kerry Kolitani* v. *Moneeram Kolita* (1).

The question was argued at the bar as though it were necessary to devide all the property of a widow into two classes; one being her *stridhan*, and the other her husband's estate over which she has the widow's right and no more. But the very question is, whether, having regard to the widow's freedom in enjoying her husband's property, and to her established right to alienate her own interest in it, she has not a kind of property the nature of which must remain undecided till her disposal of it or her death. It is impossible to read Mr. Justice *Ainslie's* forcible argument, without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get some income from them? And so on through all the steps of the *sorites*.

To decide this question it is necessary to examine the authorities, which are by no means in accord. But their Lordships do not treat as authorities on this question the numerous cases cited at the bar to shew that a widow's savings from her husband's estate are not her *stridhan*. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it. And the existing conflict of opinion upon it makes it desirable to pass the authorities briefly under review.

The earliest case which is relied on as an authority for the widow's power of alienation was decided by this Board in the year 1862: *Sreemutty Soorjemoney Dossee* v. *Denobundhoo Mullick* (2). The case however was of a different sort. A Hindu testator's estate was under administration, and there was dispute as to the interests taken by some of the parties. One of them died during the litigation, leaving a widow. He was ultimately declared to be entitled to an absolute interest in a share of the property, and the question then arose, how the income which had accrued from his share should be disposed of. The Supreme Court held that both the income which accrued during his life and that which accrued after his death should be held by his widow in that character. On appeal that decree was varied, and it was declared that, so far as regarded the accumulations after the death of the legatee, his widow was entitled to them absolutely in her own right. Here then the widow had not saved the income in question; she had never had the option of saving or spending it; and all that was done was to recognise her right to the full usufruct and control over it.

In the year 1866 the High Court of *Agra* expressly decided the point in question. A Hindu widow purchased property and afterwards alienated it. The Court first found that it was purchased with the proceeds of her husband's property, and then held that it was ancestral and the alienation invalid.

In the case of *Grose* v. *Amirtamayi Dasi* (3), decided by the *Calcutta* High Court in 1869, Mr. Justice *Macpherson* held, while saying that he had formerly thought the contrary, that accumulations ought to follow the *corpus*. In that case however the accumulations accrued before the widow recovered the estate, and the opinion expressed by Mr. Justice *Macpherson* seems to be at variance with the decision reported in 9th Moore.

In the case of *Bholanath* v. *Bhagabatti*

(1) 13 Beng L. R. 1.

(2) 9 Moore's Ind. Ap. 123.

(3) 4 Beng. L. R. O. J. 1.

(1), decided in 1871, the *Calcutta* High Court (*Jackson* and *Ainslie*, JJ.) held that a Hindu widow could not alienate property acquired by her out of the income of the husband's estate, but that she could make valid gifts to her daughter and granddaughter by buying property in their names.

This case came before the Privy Council in 1875, when it was held that the widow held the husband's estate not in her capacity of widow but as taker of a life interest after a settlement. But in their judgment the Board said, "If she took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate." *Mussumat Bhagbutti Daee* v. *Chowdhry Bholanath Thakoor and Another* (2).

In the year 1874, before the appeal in the last case was heard, another case in which the point was discussed had come before the Board: *Gonda Koer* v. *Koer Oodey Singh* (3). In that case there was no alienation by the widow, and the Board treated the point thus:—"It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself and to sever from the bulk of the estate such purchases as she had made with the view of conferring them on her adopted son." As the case stood, the widow's purchases accrued to her husband's estate.

In 1876 the point came again before the *Calcutta* High Court. The Division Bench, consisting of Judges *Jackson* and *Macdonell*, thought that their decision might be rested on other grounds, but expressed themselves as prepared to base their decision on the ground that a Hindu widow, having purchased land with the money derived from the income of her husband's estate, is competent afterwards to alienate her right and interest in whole or in part, to reconvert the land into money, and to spend it if she chooses (*Sreemutty Puddo Monee Dossee* v. *Dwarkanath Biswas* (4)).

This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow. They do not rest on what was said by them in *Bholanath's* case as decisive of this case, for the observation must be taken as applied to the then pending case, and it was, moreover, extra-judicial, and is fairly open to the qualifications with which Mr. Justice *Ainslie* read it. Nor do they think it possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it. As before said, they feel the force of Mr. Justice *Ainslie's* reasoning on this point.

In this case the properties in question consist of shares of lands, in which the husband was a shareholder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases. Parts of both are conveyed to *Dyji* immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purposes which would not justify alienation of that original estate.

The result is that, in their Lordships' opinion, the decree of the High Court should be reversed, and that of the

(1) 7 Beng. L. R. 93.
(2) Law Rep. 2 Ind. Ap. 260.
(3) 14 Beng. L. R. 159.
(4) 25 Suth. W. R. 340.

Subordinate Judge restored, and that the Respondents should pay the costs incurred in the High Court and the costs of this appeal. They will humbly advise Her majesty in accordance with this opinion.

Solicitor for Appellants: *T. L. Wilson.*

Solicitors for Respondents: *Henderson & Co.*

21st and 22nd June and 11th July, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAI BALKISHEN DASS ... *Petitioner,*

and

RAJAH RUN BAHADUR SINGH ... ... } *Objector.**

Decree—Construction of decree—Penalty—Higher rate of interest upon default in payment of instalment.

A decree, of which the terms had been arranged by *soleknama* between the parties, for payment of money by instalments with interest at six per cent., was construed to provide also for three contingencies, *viz.*, nonpayment at due date, *(a)* of the first instalment, two consecutive instalments being in arrear at the same time; *(b)* of instalments, other than the first; *(c)* of the first instalment, simply. Upon the occurrence of *(a)*, or of *(b)*, execution might issue for the whole decretal money with interest thereon at twelve per cent. Upon the occurrence of *(c)* execution might issue for that instalment, with interest at twelve per cent. from the date of the decree.

The decree-holder having accepted payment of the first instalment on the footing of *(c)*, *held* that he had not, by any admission or settlement, precluded himself from insisting on the above construction as to *(b)*. *Held*, also, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed.

Appeal from a decree (27th February 1880) of the High Court setting aside an order (16th July 1879) of the Subordinate Judge of *Gya* made in execution of decree and substituting another.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne* appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal by *Rai Balkishen Dass*, the representative of *Rai Narain Dass*, from an order of the High Court at *Calcutta*, dated the 27th February, 1880, by which an order of the Subordinate Judge of *Gya*, of the 16th July, 1879, was set aside, and the order appealed from was substituted for it.

The determination of the questions which arise in the appeal depends upon what is the proper construction to be put upon the 3rd clause of a decree of the Subordinate Judge of *Gya*, dated 29th March, 1873, in a suit in which *Rai Narain Dass* was Plaintiff, and the Respondent, *Rajah Run Bahadoor Singh*, was one of the Defendants.

That decree was obtained by *Rai Narain Dass* in pursuance of a *solehnamah* or compromise between the parties to the suit.

The amount decreed was Rs.2,38,000 principal, with interest, and by the 2nd article it was ordered, amongst other things, that,—

"The Plaintiff shall get interest on the decretal money at the rate of eight annas per cent. per mensem from Defendants. That the Defendants shall pay annually Rs 30,000 out of the principal and interest year after year by instalments to the Plaintiff; and the Plaintiff, after granting a receipt and filing a petition in the Court, shall take the said sum from Defendants. Out of the annual amount of Rs. 30,000, whatever may be found due on account of interest, the decree

* 10 Cowell's Ind. Ap 162; I. L. R 10 Cal. 305.

holder shall deduct the same on account of interest, and credit the balance to the principal. The first instalment shall be in one lump, on the 30th Bhadon 1281 Fusli. In future, year after year, each instalment shall be so paid in a lump sum on the last day of Bhadon of each year. The money covered by the instalment shall be sent to the decree holder at *Benares*, and Defendants shall pay the expenses incurred in sending the same."

The 3rd article, which is the important one, is as follows:—

"If the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid, then the Plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money, with interest at the rate of one rupee per cent. per mensem, from Defendants, and their properties. In case of default, the decree holder shall be entitle to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this *solehnamah*, to which your petitioners, Defendants, shall have no objection. If at any time within the term Defendants desire to pay any sum over and above Rs.30,000, the Plaintiff shall have no objection to receive the same."

The first instalment, which fell due on the 30th Bhadon 1281, corresponding with the 25th September, 1874, was not paid on that day. It was, however, paid on the 31st of August, 1875, before the second instalment became payable, and a receipt for the same, dated the 1st of September, 1875, was given by the decree holder acknowledging the payment, and stating that Rs.8,720 were appropriated to the payment of interest on Rs. 30,000 from the 29th of March, 1873, the date of the *solehnamah*, to the said 31st of August, 1875, the date of payment, at the rate of one rupee per cent. per mensem, which, by reason of the default of payment of the instalment on the due date, became payable under the terms of the *solehnamah* or compromise embodied in the decree, at the rate of one rupee instead of eight annas per cent. per month.

Subsequently, after two instalments had been paid, and a third instalment had become due, an application was made by the decree holder to the Subordinate Judge of *Gya* for execution of the full amount of the decree, with interest at the rate of one rupee per cent. per month, after deducting Rs.60,000 on account of the two instalments which had been paid. That application was made upon the ground that default had been made in payment of the first instalment on due date, and of two consecutive instalments. The Subordinate Judge held that two consecutive instalments were not unpaid within the meaning of the third clause of the decree. He therefore ordered that the petition for the execution of the decree by realization of the entire decretal money in one lump, with interest at the rate of one rupee per cent. per month, should be rejected, but that for the instalment then overdue the decree should be executed.

Upon appeal the High Court, on the 29th July 1878, affirmed the decision and no appeal to Her Majesty in Council from that judgment has been preferred. It therefore stands unreversed. The Judges of the High Court stated that, in their opinion, the view taken by the Subordinate Judge of the arrangement between the parties was correct, and that the intention evidently was that no two instalments should be outstanding at the same time, and that, provided the debtor pay up the first instalment after due date, but in sufficient time to guard against a second instalment becoming overdue whilst the first remained unpaid, he was to be allowed to do so on payment of a double rate of interest as a penalty, but that, if he went further, and allowed two instalments to be actually due and unpaid at one and the same time, the arrangement would fall to the ground, and the whole amount of the decree would be realizable in a lump sum.

Independently of the fact that no appeal was preferred against that decision,

their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The *solehnamah* was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others.

In a subsequent judgment, dated the 25th of February, 1880, to which advertence will be made presently, the High Court say:—

"It was one of the terms of the *solehnamah* that if at any time two instalments were due at the same time, the whole of the debt should be recoverable forthwith, and the interest, which otherwise was to be calculated at 6 per cent. per annum, should be calculated at 12 per cent.; and there was a further term in the *solehnamah* that if the first instalment was not paid in due time interest should be calculated at the rate of 12 per cent. instead of 6 per cent. from the date of default until realization.

"There is no specific mention in the *solehnamah* of any other instalment than the first, but this being a decree of Court, we think that the language of it is capable of a more liberal construction than if it had been simply a deed between the parties, and we are of opinion that the same conditions must be considered applicable to default on every instalment which are made applicable in default of the first instalment."

Their Lordships think it right in this place to refer to that part of the judgment, in order to point out that, in their opinion, the decree holder could not, under the first paragraph of the 3rd clause of the *solehnamah*, issue execution for the full amount of the judgment, with 12 per cent. interest, unless both the first instalment should not be paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments should be in default and unpaid at the same time. The High Court would read the words "first instalment" as if they had been "any instalment," and the words 'on the 30th Bhadon 1281 Fusli," as if they had been on the 30th Bhadon 1281 Fusli, or on the last day of Bhadon in any year, as the case may be." Their Lordships think that the words "first instalment" must be read in their strictly literal sense, and that the word "and" in that paragraph must be read in the conjunctive and not in the disjunctive, and consequently that the non-payment of the first instalment on the due date was a meterial part of the contingency contemplated by the first clause, and the allowing of two instalments to be in arrear at the same time the other portion of that contingency.

The only remaining question is whether, in default of payment of any instalment other than the first on the due date, interest from the date of such default until the realization of the instalment was to be paid upon the full amount of the principal remaining unpaid at the time, or only upon the amount of the instalment.

The Subordinate Judge, in his judgment of the 16th July, 1879, after giving his reasons, says, "Hence it clearly appears that the object aimed at by the *solehnamah* was that in case of breach of instalment the decree holder would get interest on the expired instalment at one rupee per cent. per month in the place of eight annas per cent., and he decreed accordingly." Both parties appealed to the High Court from that decision.

On the 25th of February, 1880, the High Court appear to have agreed with the Subordinate Judge in thinking that the increased rate of interest was to be paid on the amount of the instalment in default, and not upon the whole amount of the debt. Their judgment and decree are quite unintelligible. They order the decree of the Subordinate Judge to be set aside, and then they declare that the first instalment of Rs.30,000, which had been paid, is to be treated as not having been paid; afterwards they declare that in adjusting the account between the parties it must be taken that the said first instalment was duly paid on the 25th of September, 1874, and that all subsequent payments must be taken to have been properly made for the purposes of the sub-

sequent instalment, and that in dealing with those instalments interest will be calculated at 6 per cent. per annum on the whole debt, and the capital will be paid off by the residue of such instalments, after providing for interest at that rate. Then they order the judgment debtor within six months from the date of the decree to pay to the decree holder the said first instalment, with interest at 12 per cent., and that in default thereof the decree holder may apply, and the Court reserves the power of reconsidering, and if necessary of altering, the terms of the decree.

The reason given by the High Court for holding that in default of payment of a second or subsequent instalment on due date interest is to be calculated upon the amount of the instalment, and not upon the amount of the whole decretal money, is that in the receipt given for the first instalment a portion of it, viz., Rs.8,720, is appropriated to the payment of interest at 12 per cent. upon the amount of the first instalment, and not upon the whole debt It is said,—

"According to the strict construction of the *solehnamah*, I myself have doubts whether the Plaintiff would not be entitled to 12 per cent. interest upon the whole amount for the time being due between the due date of each instalment and the time it was actully paid, that is, from the date of default of payment until its realization; but inasmuch as the parties themselves, when the first instalment was paid, have put a construction upon this instrument, and have treated the interest as calculable on Rs.30,000 and not on the whole sum, and as the Judge of the Court below, as we understand his judgment, has decided in the same way, we think we ought not to interfere with that decision, because the effect of calculating interest only upon the instalment upon that first occasion may have misled the other side, and may very seriously prejudice them if any other construction is now put upon the instrument; for, if upon that occasion the Plaintiff had claimed to be entitled to 12 per cent. upon the whole amount of the debt, and not to 12 per cent. on the instalment only, it is not improbable that the Defendant might have been careful to pay up what was due, and not have continued in default, as he appears to have done."

Their Lordships are of opinion that according to article 3 of the decree of 1873 three contingencies were in the contemplation of the parties.

The first is, if the first instalment be not paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments be not paid. The second, "in case of default." The third, if the first instalment be not paid on the 30th Bhadon 1281 Fusli. The first has already been considered and dealt with. Upon the third the parties have put their own construction, and have voluntarily settled upon the basis of that construction, which their Lordships cannot say was wrong. The decree holder is bound by it, and cannot, in the settlement of accounts, recover interest at 12 per cent. in respect of the default in payment of the first instalment from the date of the *solehnamah* to the date of realization of that instalment except upon the amount of the instalment, interest upon the remaining portion of the debt during that period being calculated at 6 per cent. per annum.

In determining upon what amount interest at 12 per cent. per annum is to be allowed in consequence of a default in payment on the due date of the second or any subsequent instalment, the decree holder is not bound by the construction put by him upon the 3rd clause, nor by any admission or settlement in respect of the default made in payment of the first instalment. The wordings of the second and third contingencies respectively are very different. The second is clear and explicit. It declares that in case of default the decree holder shall be entitled to take out execution and realize interest on the entire decretal money from the date of such default to the date of realization, at the rate of one rupee per cent. per mensem. The third declares that if the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree holder shall have the power to realize the

principal, with interest at the rate of one rupee per cent. per mensem from the date of the *solehnamah*.

It was contended that the words "in case of default" were intended to refer to the default provided against by the first contingency. But in their Lordships' opinion it cannot be construed as having that meaning, for it was declared that upon the happening of the first contingency the entire decretal money, with interest at 12 per cent., might be realized, whereas in case of default it was declared merely that interest on the entire decretal money might be realized at the rate of one rupee per cent. per mensem.

The instalment itself would be of course realizable under the decree, and out of it, according to the 2nd article, interest at 6 per cent. upon the decretal money, except during the period for which interest at 12 per cent. was to be levied, would be payable.

If the words, "in default, &c.," referred to the default contemplated in the first contingency, the words "the decree holder shall be entitled to take out execution and realize, &c," were useless and inapplicable, for words to the same effect had been previously used with reference to principal and interest; whereas in the 2nd article they apply merely to the interest

The words "the principal" in the third contingency, viz., the non-payment of the first instalment on the due date, could not refer to the whole decretal money, otherwise the third contingency would be at variance with the first.

By the words, "in case of default," in the second contingency, their Lordships are of opinion that a default in payment on due date of any instalment, except the first, was provided for. They had no reference to the first contingency for the reasons already expressed. They did not refer to the non-payment of the first instalment, for that is specifically provided for, and to complete the first contingency it was necessary that in addition to the non-payment of the first instalment on the due date two consecutive instalments should also be unpaid at the same time.

The word "principal" in the third contingency, therefore, evidently referred to the principal of the first instalment, and not to the entire decretal money, as specified in the first and second contingencies. The parties, by putting that construction on the words of the third contingency, are clearly not bound to have the same construction put upon the clear words used with reference to the second contingency, viz., "to realize interest on the entire decretal money."

It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances.

Their Lordships are of opinion that the judgment and decree of the High Court of the 25th of February, 1880, ought to be reversed, and that it ought to be declared that in adjusting the accounts between the parties, for the purpose of the proceedings in execution of the decree of 1873, the Defendant is to be charged with the principal sum of Rs. 2,38,000 and interest at 8 annas per cent. per mensem from the date of the decree upon the said principal sum, or so much thereof as from time to time remains due after giving credit for all payments made on account, together with additional interest at the same rate on the first instalment from the date of the *solehnamah* to the payment of such instalment, and also additional interest at the same rate on the principal sum remaining unpaid for the period between the day on which the second or any subsequent instalment became due and the day on which it was paid or realized, and that each instalment or any payment on account thereof as paid is to be credited first in discharge of the interest then due and the balance towards reduction of the principal.

Their Lordships will humbly advise Her Majesty to the above effect.

The Respondents must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Watkins & Lattey.*

28th, and 29th June, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SITUL PERSHAD (Plaintiff) ... ... } *Appellant,*

and

LUCHMI PERSHAD SINGH and others, (Defendants). ... ... } *Respondents* *

CONSOLIDATED APPEALS

Mortgage—Sale of perpetual lease, with conditional agreement to sell back to vendor, not amounting to mortgage—Reservation of right to re-purchase—Right to redeem.

A purchaser of land, another person advancing the purchase-money for him, granted to the latter a mokurari pottah or perpetual lease, not as a security for the debt, but as an absolute acquittance of it. At the same time an ekrarnama was executed, whereby it was stipulated that when the grantor or his heirs should pay to the grantee or his heirs the amount of the above debt without interest, out of his or their own moneys without borrowing from any other person, then the pottah should be cancelled, the grantor having no claim to mesne profits during the possession of the mokuraridar.

Held that, with regard to the terms of the instruments, and the circumstances under which they were made, this transaction was not a contract of mortgage, but evidence of a sale and acquittance of a debt with power reserved to the vendor to re-purchase under certain conditions personal to him.

* 10 Cowell's Ind. Ap 129; I. L. R. 10 Cal. 30

130—31

Two appeals, consolidated and heard as one, from two decrees, (21st July 1880) of a Divisonal Bench of the High Court, affirming two decrees (2nd and 3rd July 1879) of the Subordinate Judge of *Bhagulpore.*

Mr. *J. F. Leith*, Q. C., Mr. *J. T. Woodroffe*, and *Baboo Otool Chunder Mullick* appeared for the Plaintiff.

Mr. *T. H. Cowie*, Q. C., Mr. *R. V. Doyne*, Mr. *J. D. Mayne*, and Mr. *H. Cowell* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRET COLLIER:—

The sole question to be decided in both these appeals is whether the Plaintiff, in the first appeal as assignee, in the second appeal as execution creditor, of one *Chucknarain Singh*, derived from *Chucknarain* a right to redeem certain villages which he alleged to have been mortgaged by *Chucknarain.* On the part of the Respondents it is not disputed that if he is correct in his interpretation of these deeds, and the villages were mortgaged, he has the right which he claims. But it is contended that the deeds in question did not create a mortgage, but were a sale of the property with a provision for its repurchase on certain conditions personal to the mortgagor

In order to determine this question it is necessary to consider the circumstances under which the two documents which are relied upon, namely a *pottah* and an *ikrarnamah* of the 15th of January, 1864, were executed, as well as to examine the documents themselves.

The circumstances were shortly these: *Ramchuran* was the eldest of three brothers, *Chucknarain* being a half-brother of the other two. *Ramchuran* purchased a 14 annas share of some fifty-two villages in a zemindary in the joint names of himself and his two brothers. It was intended that he should have 10 out of the 14 annas, and that each of his brothers should have two annas. He paid the greater part of the purchase-money; the brothers paid a comparatively small part of it, and they were indebted to

him. In order to recover that debt, amounting with interest to upwards of Rs.40,000, he brought an action, and obtained judgments against both of them for something more than Rs.20,000 These were the transactions between the brothers at the time of the deeds being entered into.

On the 15th of January, 1864, a *pottah* was entered into by *Chucknarain Singh*, in which he purports to grant in *mokurruri* on perpetual tenure, to his brother *Ramchurn*, his two annas share in the fifty-two villages, at an annual rental of Rs.497. The deed contains these recitals. It speaks of the sum of Rs.30,005 as the consideration or peshkas nuzurana money, "out of which," *Chucknarain* says, "I have taken Rs.10,000 in cash for payment of the debt due to *Baboo Ramchurn Lal Mahajun*"—that is another *Ramchurn* —"and the balance, Co.'s Rs.20,005, was paid on account of the decretal money, principal with interest, and costs incurred in the zillah Court and the Sudder Court, as contained in the decision of the Principal Sudder Ameen of zillah *Bhagulpore*, dated the 10th of September, 1861, which was confirmed by the decision of the High Court of *Calcutta*, dated the 10th of September, 1863, due to *Baboo Ramchurn Singh*, Plaintiff, decree holder, from me, the declarant, Defendant, judgment debtor, after deduction of Rs.1,023 remitted out of the decretal money due to the said decree holder, and of the amount of costs incurred in the zillah Court, and also after deduction of one half of the decretal money due from *Baboo Chundi Pershad Singh*, second Defendant; and whereas a deed of acquittance of this date, with a receipt stamp affixed thereto, has been obtained by me from the said decree holder, I, the declarant, have from the beginning of 1271 Fusli, executed this *pottah* of perpetual *mokurruri* lease," and so on. The *pottah*, therefore, recites that this *mokurruri* lease was given upon an absolute acquittance of the debt, and not as a security for its payment.

The *ikrarnamah* of the same date must now be taken to be in these terms (there has been a dispute about the terms, which it is not necessary now to refer to). It was stipulated between the contracting parties that when *Baboo Chucknarain Singh*, or his heirs, paid off the said nuzurana money of Rs.30,000, without interest, from their own pocket, without taking money from any other person, to *Baboo Ramchurn Singh* and his heirs, then *Baboo Ramchurn Singh*, or his heirs, would without demanding interest, return the said *pottah* or perpetual lease to the said *Baboo Chucknarain Singh*, and *Chucknarain Singh* should have no claim in respect of the mesne profits for the period of the *mokurridar's* possession.

Now the question is whether, as contended by the Appellants, these documents, though they purport on the face of them to be a sale with a power of repurchase, really amount to a mortgage, or whether, as contended by the Respondents, the real intention of the parties was that which appears upon the face of them; namely, that there should be a sale, that the debt should be acquitted, and that there should be a power of repurchase under certain conditions personal to *Chucknarain*.

Both Courts have found in favour of the contention of the Respondents. Such finding, in the first place, is entirely consistent with the terms of both documents. The opposite finding would not be consistent with the terms of either, certainly not with the terms of the *pottah*, which speaks of the debt having been acquitted and discharged. To hold that it was not acquitted and discharged, but that these documents were really a security for it, would be to contradict the terms of the instrument.

Then, again, looking at the surrounding circumstances, among other things, at the value of the property, which appears to have been fairly ascertained, and at the relation of the parties, their Lordships are of opinion that the Courts have come to the right conclusion, that this transaction is in fact what it purported to be, and there is no sufficient ground for holding it to be what it did not purport to be, namely, a mortgage.

Under these circumstances their Lordships will humbly advice Her Majesty that these appeals be dismissed and the judgment be affirmed. The Appellant must pay the costs of the appeals; but as they have been consolidated, there will be only one set of costs.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitors for Respondents: *Barrow & Rogers.*

10th July 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Sitapur, Oudh.

NAJBAN BIBI (Defendant.) ... ... } *Appellant.*

and

CHAND BIBI (Plaintiff.) *Respondent.* *

Grant—Construction of gift—Resumption—Tribal custom—Evidence of Intention.

In view of the circumstances under which an oral lease of villages at a favourable rate of rent, and of indefinite duration, was made by the proprietor, a talukdar, in favour of her daughter, it was *held* not to be a lease for life, but to be resumable at the lessor's pleasure.

The parties belonged to a tribe, (Ahban) appearing to be Mahomedan, but in regard to inheritance and maintenance, having customs of its own, which permitted the resumption.

There was no evidence of the lessor's intention contemporaneous with the making of the lease; but her will executed within two years after and made known to the Government to show the future succession to the taluk, contained a bequest of the same villages to the lessee, with express reservation of power to alter this disposition. *Held*, that this was evidence bearing on the question of intention.

Appeal from a decree (26th March 1879) of the Commissioner of the *Sitapur* Division of *Oudh*, confirming a decree (30th July 1878) of the Settlement Officer of *Kheri*.

Mr. *J. D. Mayne* and Mr. *Theodore Thomas*, for the Appellant.

Mr. *R. V. Doyne* for the Respondent was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The single question in this appeal is whether a lease or gift made orally, and for indefinite duration, by one of the parties to the other, is a lease for life, or a lease or gift resumable either at the pleasure of the lessor or upon notice.

With respect to any difference between resumption at will and resumption upon notice no question has been raised, and it would seem, from the state of the pleadings, that no question could be raised; because in the plaint it is stated that the Defendant, who is the lessee, was informed by the lessor of her intention to cancel the lease, and that she resisted the action, and no issue is taken upon that statement.

The parties stand in the relation of mother and daughter, and the circumstances under which the gift was made are these: The mother is the talookdar of a talook containing a number of villages. The daughter married, and became a widow. For some time she lived with her husband's family. She then quarrelled with them, and it would seem that they deprived her of her share of the husband's property, upon which she came to her mother in destitute circumstances, and her mother gave her the property in question by way of maintenance. The parties belong to the tribe of the Ahbans, who appear to be Mahommedans, but with several customs of their own; and it would seem that their law of inheritance and their law of maintenance are tribal laws.

Now, in the first place, it is to be observed that the mother, the Plaintiff below, is only seeking to resume that which is a portion of her talook. *Prima*

* 10 Cowell's Ind. Ap. 119; I. L. R. 10 Cal. 238.

facie she has a right to do that, and it is incumbent upon the person who is resisting the resumption to shew a good title against the talookdar. The question is, whether the Defendant, who sets up his gift or lease, has shewn such a title.

There was a great deal of evidence given in the Court below as to the customs of the Ahbans. The evidence principally related to the custom of inheritance, because the Defendant set up a title either by inheritance, or by the law of succession mixed up with the allegation of a will in her favour. Those issues have been found against her in the Courts below, and there is no dispute about them now. But besides the evidence of the customs which relate to inheritance or succession, several witnesses have said that where a gift is made by way of maintenance it is a gift resumable by the grantor. It appears to their Lordships that both Courts have found in favour of that evidence. There is none the other way. The only witness who speaks as to the non-resumability of such grants speaks of grants made to a daughter of the family by way of dowry and upon marriage. Both the Courts below, as their Lordships read the judgments, have found in favour of the power of resumption. The Settlement Officer says, speaking of the gift to the Defendant: "It is shewn to be now, and was so from the first, a lease to her for her maintenance, and therefore resumable at the pleasure of the proprietor of the estate." That is in accordance with the evidence; and their Lordships read that, not as a conclusion of law found by the Judge himself, but as his interpretation of the evidence. The Commissioner says this: First he finds that, according to the custom of the Ahbans, the Defendant would have no right to maintenance from her mother. He then adds: "Defendant has therefore no claim either by custom or by special necessity to the continuance of this grant, which it appears to me cannot be regarded as anything but a compassionate allowance for her maintenance, granted by her mother under peculiar circumstances, which now no longer exist." Then he goes on to say that if it had been made in money there could be no doubt that it could have been stopped, and it cannot make any difference that the mother had followed the common custom of giving a beneficial interest in land instead of an allowance in money. He further shews that the old native custom always recognised a right of resumption on the part of the talookdar even in cases of maintenance proper, though he says it was exercised with a great deal of discretion in a gradual and merciful way, so that the whole of the resumption did not fall upon a single generation. But, he argues, if the right of resumption existed in cases where there was a right to maintenance, much more would it exist in such a case as this, where there is no right to maintenance at all.

Therefore both Courts have found that by the tribal custom the right to resumption exists, and it appears to their Lordships that such is the fair effect of the evidence on the subject.

Then their is another piece of evidence which is not without bearing upon the Plaintiff's right to resume. In answer to the circular sent out by the Government to talookdars, desiring to know who were their successors, the Plaintiff followed the not uncommon course of making what was called a will by way of pointing out to the Government who the successor was. In that will she appoints as her general successor her grandson, *Raza Husain*; but she states that "those entitled to any rights will continue to enjoy those respective rights in accordance with the details recorded herein." Then she goes on to say, "Until I die I have the right of revoking and confirming, and of decreasing and increasing, and of altering." So that, although she states that certain persons have rights, she at the same moment asserts her own right of altering those dispositions if she pleases. Now among those rights are four villages to be held

by the Defendant, and it is stated again that "these four villages will remain with the Defendant with the Government jumma upon them," and so forth. There we have stated on the face of a formal document, put in for the purpose of informing the Government of the state of this talook that the talookdar then claimed the entire right of altering the disposition of these very four villages.

Such evidence is by no means conclusive, and under some circumstances it might be worthless, or even inadmissible. But in this case we have absolutely no evidence of the intention of the donor, which is contemporaneous with the gift. The will was made within two years, at the longest, after the gift, and many years before the events which led to its revocation. Under such circumstances a formal declaration by the donor as to the positions of herself and the donee with reference to the gift ought not to be disregarded.

In the year 1876 the Plaintiff made what is called a codicil to her will, and thereby revoked the gift to her daughter.

At that time the circumstances in which her daughter was had very much altered for the better, and the relations between the mother and the daughter had altered too, but for the worse. We have however no concern with the reasons given by the mother for altering her dispositions. The fact is that she claimed the full right of altering them, and she has chosen to do so. Having altered them she brought this action for possession, and it has been decided that she has the power of resumption. For the reasons above given their Lordships entirely agree with the decision of the Courts below.

Something has been said as to the effect of sect. 52 of Act XVII. of 1876, the *Oudh Revenue Act*, but it does not appear to have been the ground of the decision in the Courts below, nor to have been much discussed, and their Lordships express no opinion about it.

The result is that the appeal should be dismissed with costs; and their Lordships will humbly advise Her Majesty to that effect.

Solicitors for Appellant: *Barrow & Rogers.*

Solicitor for Respondent: *T. L. Wilson.*

13th, and 18th July, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SURENDRANATH BENERJEA ... ... } *Appellant*,

and

THE CHIEF JUSTICE AND JUDGES OF THE HIGH COURT OF BENGAL ... } *Respondents.**

In re SURENDRANATH BANERJEA.

Contempt of Court—Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—Defamation—Criminal Procedure Code (X of 1882,)s. 5—Power of Courts of Record under common Law—Jurisdiction of High Court to punish summarily.

The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in the superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency Towns.

The Indian Penal Code does not provide against a contempt of Court Committed by the publication of a libel out of Court, when the Court is not sitting, and neither in chapter XXI. "of Defamation," nor elsewhere provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under

* 10 Cowell's Ind. Ap. 171; I. L. R. 10 Cal. 109.

the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both.

The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character.

The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882.

By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.

This was a petition for special leave to appeal from an order of the High Court, dated the 5th May 1883, whereby the petitioner, who was the editor and proprietor of a weekly newspaper published in *Calcutta*, and called the *Bengalee*, was sentenced to a term of imprisonment for two months in the Presidency Jail, for a contempt of Court.

The alleged contempt of Court was contained in the following article, which appeared in the *Bengalee* on the 28th April 1883:—

"The Judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred and have often grievously failed in the performance of their duties; but their errors have hardly ever been due to impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongest us a Judge who, if he does not actually recall to mind the days of *Jeffreys* and *Scroggs*, has certainly done enough within the short time that he has filled the High Court Bench to show how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity, which are inseparable from the office of the Judge of the highest Court in the land. From time to time we have in these columns adverted to the proceedings of Mr. Justice *Norris*, but the climax has now been reached, and we venture to call attention to the facts, as they have been reported in the columns of a contemporary. The *Brahmo Public Opinion* is our authority, and the facts stated are as follows:—

"'Mr. Justice *Norris* is determined to set the *Hooghly* on fire. The last act of *zubburdusti* on his Lordship's part was the bringing of a *Salgram*, (a stone idol) into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of *Calcutta* regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honor of being dragged into Court. Our *Calcutta* Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice *Norris* is not only versed in law and medicine but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of *Calcutta* will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of Justice.'"

On the 3rd May the petitioner, (together with one *Ramcoomar Dey*, the printer and publisher of the *Bengalee*), was served with a rule calling upon him to show cause on May 4th why he should not be committed to prison, or otherwise dealt with according to law for contempt of Court, in his having published the above article, containing contemptuous and defamatory matters concerning Mr. Justice *Norris*. This rule was issued on affidavits, of which the petitioner obtained copies in the afternoon of the same day (May 3rd).

In reply to these affidavits, the affidavits of *Ramcoomar Dey* and *Surendra Nath Banerjee* were produced in the High Court. The affidavit of *Ramcoomar Dey* stated that he had no concern with any matter which appeared in the paper, nor any power to prevent any matter

appearing therein; that he was imperfectly acquainted with the Engish language, and though able to set up works in English, he did not readily understand the sense and meaning of what he composed and set up; that he had no knowledge that the article in question contained any contemptuous or defamatory matter; and so far as he had any hand in its publication, he expressed his regret that any such matter should have appeared in the paper of which he was printer and publisher, and submitted himself to the favorable consideration of the Court.

The affidavit of *Surendra Nath Benerjee* was as follows:—

"I, *Surendra Nath Benerjee*, of No. 33, Neogee Pookur East Lane in the Town of *Calcutta*, at present residing at *Monirampoor* in the district of the 24-Pergunnahs, inhabitant, solemnly affirm and say as follows:—

"1*st*.—That on Thursday, the 3rd day of May instant, I was served with a rule issued by this Honorable Court in this matter on the day previous, calling upon the abovenamed *Ramcoomar Dey*, as the printer and publisher, and myself as the editor of the periodical work, the *Bengalee*, to show cause before this Honorable Court on Friday, the 4th day of May instant, at the sitting of the Court, why we should not be committed, or otherwise dealt with according to law, for contempt of Court alleged to have been committed by us in having unlawfully published a certain article in the said periodical work, the *Bengalee* of the 28th day of April last, containing certain contemptuous and defamatory matters of and concerning the Hon'ble *John Freeman Norris*, one of the Judges of this Honorable Court.

"2*nd*.—That, upon being served with the said rule, I bespoke and thereafter obtained office copies of the grounds upon which the said rule is based, which grounds I have perused.

"3*rd*.—That I admit that, as is stated in the affidavit of Mr. *Henry Adam Adkin*, Officiating Solicitor to the Government of India, the abovenamed *Ramcoomar Dey* is the printer and publisher of the said periodical work, the *Bengalee*, and I am the proprietor and editor thereof.

"4*th*.—That the said periodical work is made up entirely under my superintendence, and that the said *Ramcoomar Dey*, who is but indifferently acquainted with the English language, has no authority over any editorial matter appearing in the said periodical work, and further he could not, if he wished so to do, prevent any article or paragragh appearing therein.

"5*th*.—That the issue of the said periodical work of the said 28th day of April 1883 was made up and published entirely on my responsibility, and to the best of my knowledge, information and belief, the said *Ramcoomar Dey* did not read anything contained therein in the editorial columns before the publication thereof.

"6*th*.—I further say that, except as an Honorable and learned Judge of this Honorable Court, I have no knowledge whatsoever of the said Hon'ble *Jhon Freeman Norris*, and that in writing and publishing what I did in connexion with his Lordship, I acted entirely *bonâ fide*, and, as I believed, in the interests of the public good.

"7*th*.—That there appeared in the said issue of the 28th day of April 1883 two paragraphs in connection with the said Hon'ble *John Freeman Norris*, one at page 194 under the heading of "News and Notes" of Tuesday, the 24th day of April 1883, and the other at page 199 amongst the editoral notes. The said two paragraphs are as follows. [Here followed the above paragraph, on which the rule was issued, and another paragraph, relating to different matter, but also reflecting upon the conduct of Mr. Justice *Norris*.]

"8*th*.—That the *Brahmo Public Opinion* referred to in the said paragraph is a periodical work published in *Calcutta* every Thursday, and is believed by the public, and I believe it, to be under the editorship of a gentleman practising as an attorney of this Honorable Court.

"*9th.*—That the matter of complaint made in the said first paragraph appeared in the said *Brahmo Public Opinion*, to the best of my knowledge, information and belief, in its issue of Thursday the 19th day of April 1883, and no contradiction thereof, nor any explanation thereof, appeared either in the said *Brahmo Public Opinion*, or, to the best of my knowledge, information and belief in any other newspaper.

"*10th.*—That the matter of complaint made in the said second paragraph appeared in the said *Brahmo Public Opinion* in its issue of the 26th day of April 1883, and no explanation or contradiction thereof appeared in that paper, or in any other newspaper, before the publication of the said issue of the said periodical work.

"*11th.*—That I honestly believed the statements in the said *Brahmo Public Opinion* to be true, and the paragraphs aforesaid which were both written by me, were so written under such belief and under a sense of public duty that conduct, such as was imputed to the said Hon'ble *John Freeman Norris*, should be brought to the notice of the public and censured.

"*12th.*—That from the affidavits of Mr. *William Robert Fink*, the Assistant Registrar, and the Officiating Chief Clerk of this Hon'ble Court, and of Baboo *Baneymadhub Mookerjee*, one of the Interpreters of this Hon'ble Court, the truth of which I entirely and unhesitatingly accept, I now find that the statements contained in the said *Brahmo Public Opinion* relating to the production of the said *Salgram* in Court were inaccurate and misleading, and that the said Hon'ble *John Freeman Norris*, instead of acting in a *zubburdusti* manner as alleged, acted under pressure from the parties, who are both Hindus, apparently against his own inclination.

"*13th.*—That I have received contradictory statements with regard to the statements contained in the said first paragraph, some asserting that they are inaccurate and misleading, others maintaining the contrary; and I have not been able to ascertain which of these contradictory statements represent the truth.

"*14th.*—I say most emphatically, that if I had known, or had any reason to believe, that the statements of the *Brahmo Public Opinion* aforesaid were in any respect inaccurate, I would not have made the observations I have, and I am truly sorry that I was misled into making them, and I withdraw them unreservedly; but I repeat that my observations were made prefectly *bonâ fide*, and without any motive of any description whatsoever other than the motive to promote public good.

"*15th.*—That the circumstances of British India are such, that this Hon'ble Court and the other High Courts in the other Presidencies are looked upon, and I believe justly looked upon, as the staunchest, the most upright and the most impartial upholders of the just rights and privileges of all sections of the community, and any action on the part of any Hon'ble and learned Judge of these Hon'ble Courts tending to show the least disregard of such rights and privileges is viewed with great alarm by the community, and I conceive that it is the duty of all journalists to maintain that no such disregard is shewn.

"*16th.*—That I express my deep regret at having unwittingly endeavoured to cast an undeserved slur upon the said Hon'ble *John Freeman Norris*, and I place myself unreservedly in the hands of this Hon'ble Court, being satisfied that the apology which is hereinfore contained is, under the circumstances, due from me to the said Hon'ble *John Freeman Norris* and this Hon'ble Court, and I further submit myself to the favorable and indulgent consideration of this Hon'ble Court.

"*17th.*—That I am advised, that this Hon'ble Court has no jurisdiction to issue the said rule, or to deal with me or the said *Ramcoomar Dey* summarily; but the question, I am also advised, is one of extreme difficulty, and I know it to be one of great public importance, and one which will require much time and attention to

be dealt with as, in my judgment, it should be dealt with.

"18*th*.—That the said rule was served upon me at half-past eleven o'clock, and I received the said grounds at about a quarter after 2 P.M., and though my attorney and I have made our best endeavours to secure the services of Counsel learned in the law to appear for me and argue the said question, I have not succeeded in getting one prepared to do so this morning, and I humbly pray that time may be granted to me sufficient to enable me to have the said qusetion argued; and I make this prayer entirely subject to the apology which I have made and without in any way detracting from or weakening the same in any particular whatever."

On the 4th May the rule came on for hearing before the Chief Justice and four Judges of the High Court (GARTH, C.J., MITTER, J., CUNNINGHAM, J., MCDONELL, J., and NORRIS, J.)

Mr. *Bonnerjee* appeared to show cause; and after reading the portion of the affidavits containing the apology for having inserted the article, stated that he was not prepared to support the prayer for an adjournment contained in the 18th paragraph of the affidavit of the petitioner; that even if that prayer were granted, he would not be in a position to argue the question of the jurisdiction of the Court; and that if he were in a position to agrue it, he would not do so.

The Court on the next day (May 5th) delivered the following judgments on the matter:—

GARTH, C.J. (CUNNINGHAM, MCDONELL and NORRIS, JJ., concurring).—Baboo *Surendra Nath Benerjee*, you have been guilty of a gross contempt of this Court in publishing in the *Bengalee* Newspaper, of which you are the editor, the article which is the subject of this rule.

We understand from your Counsel, Mr. *Bonnerjee*, that whatever your original intention may have been, you now admit that you have been guilty of such contempt; and you have submitted what professes to be an apology to the Court in the affidavit which was read yesterday by your Counsel.

You have certainly acted wisely in not attempting to justify an act which you must be well aware is wholly unjustifiable; and your Counsel has also exercised a wise discretion in not insisting upon a point which we observe is suggested in your affidavit, that this Court had no power to institute these proceedings.

It is impossible that any reasonable man who is acquainted with the real truth of the matter, can read the article in question which you admit to have been composed and published by yourself, without seeing that it is a most scandalous and wholly indefensible attack upon Mr. Justice *Norris*.

You begin the article by accusing that learned Judge of neglecting in the discharge of his judicial duties the commonest consideration of prudence and decency; you go on to compare him with two of the most notoriously unrighteous Judges that ever disgraced the English Bench; and you denounce him to the Indian public as utterly unworthy of his high office, and unfitted by nature to maintain those traditions of dignity, which are inseparable from the position of a High Court Judge. As a climax to these accusations, you quote the following passage from the *Brahmo Public Opinion*, reflecting upon the learned Judge's conduct in a particular cause, which was then, and is now, pending in this Court; "Mr. Justice *Norris* is determined to set the *Hooghly* on fire. The last act of *zubberdusti* on his Lordship's part was the bringing of a *Salgram* (a stone idol) into Court for identification. There have been very many cases both in the Supreme Court, and the present High Court of *Calcutta*, regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honor of being dragged into Court. Our *Calcutta* Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice *Norris* is not only versed in law and medicine, but is also a connoisseur of

Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of *Calcutta* will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of Justice."

Upon the basis of that statement in the *Brahmo Public Opinion*, without informing yourself whether it was true or false, and without ever making enquiry into the circumstances of the case, you proceed recklessly to comment upon the conduct of the Judge and to hold him up to public execration in the following language:—

"What are we to think of a Judge, who is so ignorant of the people, and so disrespectful to their most cherished convictions, as to drag into Court and then to inspect an object of worship, which only Brahmins are allowed to approach, after having purified themselves according to the forms of their religion? Will the Government of *India* take no notice of such a proceeding? The religious feelings of the people have always been an object of tender care with the Supreme Government. Here however, we have a Judge who, in the name of Justice, sets those feelings at defiance, and commits what amounts to an act of sacrilege in the estimation of pious Hindus. We venture to call the attention of the Government to the facts here stated, and we have no doubt due notice will be taken of the conduct of the Judge."

Now so far from there being the least foundation for this tissue of abuse, it appears from the affidavits upon which this rule was issued (which are now admitted by yourself to be perfectly, correct,) that the account given in the *Brahmo Public Opinion* and your own comments upon it, were wholly without foundation.

The truth of the matter was this. In a case which was tried before the learned Judge, a question arose as to the identity of a certain thakoor or idol. It was necessary for the purpose of determining that question to ascertain whether a particular thakoor, which was then in the custody of one *Bhuttock Nath Pundit* in the Burra Bazar, was the family thakoor of certain parties to the suit.

For the purpose of determining that question, it was suggested by the Counsel on both sides that the thakoor should be brought into Court for the purpose of identification.

Mr. Justice *Norris* hesitated to take that course, until he had enquired from the attorneys on either side, who were Hindus, whether there would be any objection to it. Their answer was that there would be none. His Lordship then further enquired from a person named *Gouree Kant Burmun* who was in Court, and who was an agent of the Plaintiff, whether he saw any objection, and his answer was, that the idol could not be brought into the Court itself, on account of the coir matting, with which the floor was covered, but that it might be brought without objection into the corridor.

The learned Judge then, in order to satisfy himself still further, sent for the Court Interpreter, Baboo *Banimadhub Mookerjee*, who is an officer of great experience and a high cast Brahmin, and made the same enquiry of him. He asked whether the thakoor was a *Salgram*, and finding that it was made the same answer as *Gouree Kant*, namely, that it could not be brought into Court on account of the matting, but that it might with perfect propriety be brought into the corridor.

Upon this his Lordship granted the application, and a *subpœna duces tecum* was issued to *Bhuttock Nath Pundit* to produce the thakoor the same day, and in order to ensure the orders of the Court being properly carried out, it was further ordered that the Interpreter himself should proceed with the officer to *Bhuttock Nath Pundit's* house, who was himself a Brahmin, and should see to the proper conveyance of the thakoor to the Court.

We have then the affidavit of *Banimadhub Mookerjee* himself, who, after confirming the above facts, informs us that in obedience to the order of the Court, the thakoor was duly conveyed into the corridor by himself and the Pundit, and the learned Judge, attended by Counsel on both sides, and the attorneys, left the Court and went into the corridor for the purpose of inspecting it.

It seems, therefore, impossible for any one, however strict his religious views on such subjects may be, to say that Mr. Justice *Norris* did not take the utmost pains, in the first place to ascertain whether the thakoor ought to be brought to the Court at all, and in the next place to provide that it should be brought there with all due respect and propriety.

It may be perfectly true that European Judges, and more especially Barrister Judges, are often imperfectly acquainted with the religious views and feelings of the Hindu community, and the utmost they can do, when occasion arises, is to consult those who are best informed upon the subject, and to be guided by their advice.

But we now understand from your own affidavit, as well as from your counsel, Mr. *Bonnerjee*, that you admit that the learned Judge did everything in his power to ascertain the truth of the matter, and to avoid giving the least offence to the religious feelings of your countrymen.

It therefore only remains for us to consider what punishment we ought to inflict upon you.

It is, indeed, a very lamentable thing, and I trust that your own countrymen will also be of that opinion, to find a gentleman of your position and attainments, who was once a member of the Covenanted Civil Service, and is now an Honorary Magistrate of this city, making use of his influence as a newspaper editor to vilify and bring into public contempt, without any justification whatever, a Judge of the High Court.

If the offence had been committed by any young inexperienced man of no education or knowledge of the world, or by a person in the position of *Ramcoomar Dey*, who stands beside you, we might ascribe it, in some degree at least, to ignorance or want of consideration. But you have had great educational advantages. You know, or should know as well as any one, the duties and responsibilities of gentlemen connected with the Press. You profess in your affidavit to justify your offence by putting forward as the basis of your false charges against Mr. Justice *Norris*, a statement in the *Brahmo Public Opinion* which you say you believed to be true, and upon which you considered yourself at liberty to enlarge and comment with extreme severity.

Moreover, whilst you profess to admit that your charges were totally false and unfounded, and made without any sort of enquiry on your part, you still maintain that you made them "in perfect good faith, and in the interests of the public good."

Furthermore, you have made mention in your affidavit of another article, extracted from the *Brahmo Public Opinion*, which is also apparently intended to reflect upon Mr. Justice *Norris*, and the subject of which has nothing to do with the present proceeding. Your counsel, though invited to do so, has wholly failed to explain to the satisfaction of the Court why that article was inserted. And you must have known prefectly well that the affidavits, upon which the rule was issued, were not directed to the subject of that article.

These matters in your affidavit, so far from extenuating your offence, appear to the Court to be an aggravation of it.

The Judges are at a loss to understand how a libel so gross could possibly have been inserted in your paper "*in good faith*;" and they find great difficulty in believing that a gentleman of your education, and a newspaper editor, could be so utterly ignorant of the law of libel as to suppose that you were at liberty to publish these attacks upon the conduct and character of a High Court Judge, merely because you found them, though

in a less virulent form, in another native newspaper.

The Court is quite willing to make some allowance for your affidavit having been drawn, as your counsel informed us was the case, in a hurry, and without consideration. But they cannot look upon it, for the reasons which I have just mentioned, as any extenuation of your offence.

We feel that it is absolutely necessary to vindicate and maintain the authority of the Court, and to guard against the repetition of the grave offence which you have committed, by imposing upon you, (not a fine, which in your case would be a mere nominal penalty), but such a substantial punishment as may serve as a wholesome warning to yourself and others.

The Court's order is, that you be imprisoned on the civil side of the Presidency Jail for the space of two months.

The majority of the Court regret, that in determining the award of punishment, my brother *Mitter's* views should not be in accordance with theirs. We are, of course, fully aware of the precedents to which that learned Judge refers; but in the first place, we think the facts of those cases are very different from the present, and in the next place, we find ample precedent in England in cases of gross libel, where a more severe punishment has been awarded.

We fail to see, why persons charged with contempt of Court for libel in a proceeding of this nature, should be subjected to a less severe punishment, than if the proceeding had been by criminal information, or by the more ordinary process at the criminal sessions

Had your affidavit disclosed a more honest and candid avowal of your guilt, without making mention of those matters, which the Court cannot find to have been introduced for any useful purpose, or from any proper motive, they might have considered it sufficient for the ends of justice to have visited you with a more lenient punishment.

Ramcoomar Dey, you have also been guilty of a contempt of this Court, for having been the means as the printer and publisher of the *Bengalee* newspaper, of circulating the article in question.

We are, of course, by no means prepared to say that as a rule the printer and publisher of a newspaper is not fully responsible, both civilly and criminally, for everything that is inserted in that paper. But we find in this instance, not only from your own affidavit, but from that of Baboo *Surendra Nath Banerjee*, who has very properly done his best to protect you, that you know the English language very imperfectly, and that you have evidently been the mere instrument of the editor, under whose orders you acted.

We, therefore, think that you may with propriety be discharged.

Mitter, J.—I concur in the finding that both *Ramcoomar Dey* and *Surendra Nath Banerjee* are guilty of contempt of Court. But after giving my best consideration to the question of the punishment that should be inflicted, I am unable to agree in the view of the majority of the Court. There have been in this Court two cases of a similar nature since its establishment. One is *In the matter of Piffard* (1). The other case is not reported in any authorized report, but is well known as *Tayler's case*. In both these cases at the first hearing the persons charged with contempt did not admit their guilt. The matter was discussed fully, and after the Court had pronounced its decision that they were guilty, suitable apologies were made.

In the case before us, the persons charged with contempt have at once admitted their guilt, and have expressed their deep regret at having unwittingly cast an undeserved slur upon a learned Judge of this Court.

In the first-mentioned case, Sir *Barnes Peacock*, C. J., in delivering the judgment said: "Although the majority of the Judges were of opinion that both these gentlemen," *i. e.*, the persons charged with contempt, "has acted in contempt of Court, they did not wish to visit

(1) 1 Hyde., 79.

the offence with any punishment. The Court would be content with an apology, nor need the apology be an abject one, but simply such as would convey the expression of their sorrow at having committed that which the Court considered to be contempt." In accordance with this expression of opinion a suitable apology was made, and no punishment was inflicted.

In the other case the sentence of the Court was that Mr. *Tayler* should stand committed for one month to the civil side of the Presidency Jail, and that he should pay a fine of Rs. 500, and that he should be further imprisoned till the fine was paid.

There Sir *Barnes Peacock*, C. J., referring to an apology which had been published by Mr. *Tayler* before this sentence was passed, said:

"If you think fit to add to the apology which you have already published, (and it is for you to decide whether you can conscientiously do so or not), the Court is willing to mitigate the sentence. If after what you have heard, you state that, upon reflection you find that the charges which you made against Mr. Justice *Dwarkanath Mitter* were unwarranted and wholly without foundation, and that you are sorry for having made them, you may do so, and you may add, if you wish it, either that you did not intend to cast any reflection upon any of the other Judges, or that the reflection cast was unfounded, and if you publish that apology in the *Englishman* you may apply on Monday, the 3rd of May next, for your discharge on payment of the fine."

This sentence was passed on Saturday, the 24th April 1869, and on the 27th April following Mr. *Tayler*, having made a suitable apology, was released, the remaining term of his imprisonment having been remitted.

I have gone into these details, because it seems to me that in determining the amount of punishment to be inflicted on *Surendra Nath Banerjee*, we should take these cases as our guide. The complexion of guilt in the case of Mr. *Tayler* is certainly not of a lighter character than that of *Surendra Nath Banerjee*.

On the question of punishment, therefore I should have been inclined to adopt the course which was adopted in these cases.

From this sentence *Surendra Nath Banerjee* preferred a petition to Her Majesty in Council for special leave to appeal.

The petition, after setting out the facts, and the articles complained of, and referring to the matters stated in his affidavit as above set out, continued:—

"That your petitioner immediately on learning from the affidavits the facts therein stated, determined to express fully and unreservedly his sincere regret at having through ignorance of the said facts written the article in the *Bengalee*, and in accordance with such determination, the affidavit filed by him in answer to the said rule, a copy whereof is appended to the memorial hereinafter referred to, and hereto annexed, after setting forth the facts and circumstances stated, and exonerating *Ramcoomar Dey* from all reponsibility for the article, which your petitioner admitted was composed by himself, and published on his own and sole responsibility, stated, that he found from the affidavits, the truth of which he entirely and unhesitatingly accepted, that the statements contained in the *Brahmo Public Opinion* were inaccurate and misleading, and that the said Mr. Justice *Norris*, instead of acting in a *zubberdusti* (violent) manner, as alleged, had acted under pressure from the parties to the said proceeding, who were both Hindus, and that had he known, or had he had any reason to believe that the statements of the *Brahmo Public Opinion* respecting the said Mr. Justice *Norris* were in any respect inaccurate, he would not have made or published the observations respecting that learned Judge which he did, and that he was truly sorry he had been misled into making them. The petition, after setting forth matters to show that there had been no waiver on his part of the point of jurisdiction, inasmuch as his advocate had said what

he did "not under your petitioner's instructions or by his authority" further stated that "your petitioner is advised that, even if there had been any waiver by his Counsel of your petitioner's right to question the jurisdiction of the High Court to proceed against him in a summary way, as for contempt of Court, by reason of his publication of the aforesaid article, such waiver does not, nor can affect your petitioner, or confer a jurisdiction upon the said Court, which it did not by law possess."

After setting forth the facts of the judgment and sentence upon him, and that he was advised that such sentence was passed without jurisdiction, he went on to state :—

"That your petitioner upon being so sentenced and imprisoned prepared and presented to His Excellency the Viceroy a memorial" (a copy of which was annexed to the petition) "praying His Excellency in Council to forward the same to your most Gracious Majesty in order that your Majesty might, if graciously pleased so to do, refer the said memorial to the Judicial Committee of your Majesty's Privy Council under the provisions of the 3 & 4 Will. IV., c. 41, s. 4 for hearing and consideration, and that your Majesty might also be graciously pleased to suspend the operation of the sentence passed upon your petitioner pending the hearing and consideration of the said memorial by their Lordships of the Judicial Committee, should your Majesty be pleased to refer the matter of the memorial to them."

This memorial had (the petition stated) been forwarded to the Secretary of State for India in Council.

On the hearing of this petition,

Mr. *T. H Cowie*, Q C., (with whom was Mr. *J. T. Woodroffe*), appeared for the petitioner.—The publication of this article did not tend directly to obstruct the course of justice in the determination of the then pending suit, nor was it a contempt committed in view of the Court. Although it affected the administration of justice generally, it was not aimed at interference with the decision in a suit, but was a libel on a Judge in his judicial capacity in reference to his conduct at a trial. The question of jurisdiction might be thus stated : (*a*), whether in an Indian Court, which was a Court of Record, summary proceedings for contempt were the authorized course in the case of a libel, out of Court, on a Judge in his judicial capacity in reference to his conduct at a trial ; (*b*), whether such proceedings were now authorized, regard being had to the terms of the Indian Codes, *viz.*, the Indian Penal Code and the Code of Criminal Procedure.

Whatever might have been the powers of the Supreme Court to punish for a contempt in or out of Court, the only legal mode in which the High Court could punish such an act as that of the petitioner was by enforcing an appropriate section of the Indian Penal Code, upon proceedings taken according to the Code of Criminal Procedure, 1882. Viewed as a contempt this act was of the class of criminal contempts which, as explained in *Wellesley's case* (1), and *In re Pollard* (2), were in the nature of offences. That there were provisions, in chapters X and XI of the Indian Penal Code, directed against contempts of the lawful authority of public servants, and against offences against public justice, affected the question whether the summary powers exercised at common law for the protection of Courts had remained in force ; although insults and interruptions to a public servant sitting in any stage of a judicial proceeding, provided for in s. 228, Indian Penal Code, were restricted to such acts done in Court. Other provisions of the Indian Penal Code, *viz.*, those of chapter XXI (of Defamation) would meet this case viewed as a libel. To these considerations must be added the apparent intention of the Code of Criminal Procedure, 1882.

The statute 13, Geo. III, c 63, which authorized the issue of the Letters Patent of 1774, in s. 13 empowered the Court of which it authorized the establishment,

(1) 2 R and M., 639.

(2) L. R. 2 P. C, 106

"to do all such things as shall be found necessary for the adminstration of justice, and the due execution of all or any of the powers which by the said Charter may be granted and committed to the said Court." The same section enacted that "the Court shall, at all times, be a Court of Record." The Letters Patent of 1774 declared, in s. 4, that "the Chief Justice and Puisne Justices of the Supreme Court should have such jurisdiction and authority as the Justice of the Court of King's Bench had, and might lawfully exercise in that part of Great Britain called England by the common law thereof." This conferred the ordinary jurisdiction, which alike on the Plea, Equity, and Crown sides as well as the Admiralty and Ecclesiastical jurisdictions, were separately conferred. But neither in the Statute, nor in the Charter, was there any general clause declaring the general powers of the English Courts to belong to the Supreme Court. [SIR R. Couch observed that the practice of issuing the writ of *habeas corpus* had been referred to this authority.] The exercise of that power was within the words to do all such things as might be necessary. And it might be noticed that Act X of 1882 provided for the issue of the *habeas corpus*. The summary process for contempt could hardly be put on the same ground after the legislation that had taken place.

The powers of the Supreme Court had not been quite co-extensive with those of the superior Courts in England. The learned Counsel referred to issue of the writ or *Mandamus* from the Queen's Bench: also to the judgment of *Cockburn*, L, C.J. in *The Queen* v. *Lefroy* (1), who said that the superior Courts at Westminster were originally all divisions of the *aula regia*. There had been no office in the Supreme Court directly corresponding to that of the Master of the Crown Office, and it had been doubted how far the *ex-officio* powers of the Advocate-General extended in obtaining leave to file criminal informations.

He did not allege, having regard to *Macdermott* v. *The Justices of British Guiana* (2), and other cases, that no Courts of Record other than the High Courts of Justice in England, could exercise powers to commit for contempt. But if these powers belonged to the Supreme Court, the question still remained whether they had been transmitted to the High Court. By s. 9 of the Charter of 1861, issued under the authority of the Statute 24 and 25 Vic. c. 104, the High Court was to exercise jurisdiction, and every power and authority, in any manner vested in the Courts then abolished, with the reservation, important to the argument, that "this was to be subject, and without prejudice, to the legislative powers of the Governor General in Council." The legislative power had been exercised. The Indian Penal Code had come into force as XLV of 1860, enacting in s. 2 that no person should be liable to punishment for any offence otherwise than under that Code or "under any special or local law." In both the Charters of 1862 and of 1865, (in s. 29 in the former and s. 30 of the latter), it was declared that all persons brought for trial before the High Court charged with any offence for which provision was made by the Indian Penal Code should be liable to punishment under such Code, and not otherwise. Reference was made to chapters X and XI of the Indian Penal Code; also to chapter XXI; and it was argued that the contemplation of law, as shown in the legislation referred to, was that all offences capable of being dealt with under the Indian Penal Code should be so dealt with.

The introduction of the Code of Criminal Procedure within the local limits of the Original Jurisdiction of the High Court had followed. By Act X of 1882, s. 1, it extended to all British India; although, in the absence of any specific provision to the contrary, nothing therein contained was to affect any "special or local law in force," or any "special jurisdiction," or "power conferred," by any other law in force.

These terms "special law" and "local

(1) L. R. 8 Q B, 134.

(2) 5 Moore's P. C. N. S., 466.

law," also used in the Indian Penal Code, to which, for their explanation, the last clause of s. 4 of Act X of 1882 referred, meant, the one, a law applicable to a particular subject, and the other, a law applicable to a particular part of British India. It was further enacted in s. 5, that all offences under the Indian Penal Code should be inquired into and tried according to the procedure enacted in this Code, and that all offences under any other law should be inquired into and tried according to the same provisions; but subject to any enactment, for the time being in force, regulating the manner, or place, of inquiring into or trying such offences. The conclusion was that the summary process for contempt was not a special or local law, within the meaning of the above, nor in force under any enactment regulating it. The Code of Criminal Procedure was, therefore, applicable to this offence, not being excluded by its own provisions.

To this might be added an argument derived from s. 480 of Act X of 1882, which enacted that, when certain offences within ss. 175, 178, 179, 180, or s. 228, of the Indian Penal Code had been committed in the view of a Court, it might cause the offender to be detained in custody and punished with fine, itself taking cognizance of the offence. Part of the reasoning of the judgment in *The Queen* v. *Lefroy* (1) was, that because special provision had made in the statute 9 and 10 Vic., c. 95, enabling County Courts to punish summarily contempts committed in their view, it was, therefore, not the intention of the Legislature that such Courts should possess the general powers exercised by the superior Courts to punish contempts committed out of their view. By analogy the giving express power in s. 480 to punish in a certain class of contempts, excluded the inference that the Legislature intended that other powers of a similar sort should remain.

The general result was, that the provisions in the Indian Penal Code and the Code of Criminal Procedure, 1882, effected this; that an act, such as that of the petitioner, in the nature of a libel on a judge in his judicial office, and in reference to his mode of conducting a trial, was remitted to the general head of defamation to be punished under chapter XXI of the Indian Penal Code.

[SIR B. PEACOCK referred to Lord *Hardwicke's* division of contempts in his judgment in *The Champion* (2).]

Mr. *Cowie*, Q. C, said that his contention was, that unless the libel had a direct tendency to interfere with the course of justice in a pending case, the proper mode of proceeding was not to deal with it as a contempt. What constituted contempt was fully explained in the judgment of the Irish M. R. in *Birch* v. *Walsh* (3). Reference was also made to *In re Pollard* (4); *In re Ramsay* (5); *R.* v. *Creevey* (6); *McDermott* v. *The Justices of British Guiana* (7); *Smith* v. *The Justices of Sierra Leone* (8); *Rainy* v. *The Justices of Sierra Leone* (9). Reference was made to the opinion expressed in *Morgan* v. *Leech* (10) in regard to the reservations contained in the Statute 3 and 4 William IV, c. 4 as covering a grant of leave to appeal in the case of matters not strictly an appealable grievance. Also to *In re Skinner* (11), in which it had been held that leave to appeal under the general powers of s. 4 of that statute might be granted, although the alleged grievance might not be appealable under the Letters Patent of the High Court. Also in connection with this, *In re Ramsay* (12) was referred to.

(1) L. R. 8 Q B, 134.

(2) Atkyn's Rep. 469.

(3) 10 Ir. Eq Rep (1847-48), 93.

(4) L. R., 2 P. C., 106.

(5) L R, 3 P. C., 427

(6) 1 M. and S. 273.

(7) 5 Moore's P. C. C., N. S., 466.

(8) 3 Moore's P C C., 361.

(9) 8 Moore's P. C. C, 47.

(10) 3 Moore's P. C. C., 368.

(11) L. R. 3 P. C. 451.

(12) L R, 3 P. C 427.

18th July, 1883.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The only question to be determined is whether the High Court had jurisdiction to commit the Petitioner for a contempt of Court in publishing the libel set out in the petition.

Their Lordships took time to consider, in order that they might carefully examine the provisions of the Code of Criminal Procedure, 1882, which came into force in January 1883. Having done so, they are clearly of opinion that, notwithstanding that Code, the High Court had jurisdiction.

The Penal Code for *British India* was referred to by the learned counsel for the Petitioner, and in particular chap. 11, sect. 228, and chap. 21 of "Defamation." But that Code merely defines the several offences thereby created, and provides the punishments to which offenders are to be liable. It does not at all affect the procedure by which offenders are to be brought to punishment. It is only by the Code of Criminal Procedure, read in conjunction with the Penal Code, that the jurisdiction of the High Court to commit for contempt was, if at all, affected.

Section 228 of the Penal Code, which was referred to in the argument, does not apply to the present case; it relates merely to insult or interruption to a public servant while sitting in a stage of a judicial proceedings. It does not provide against a contempt of Court committed by the publication of a libel out of Court when the Court is not sitting.

The chapter 21 "Of Defamation," does not define "contempt of Court" or make any provision for the punishment of a contempt of Court by the publication of a libel reflecting upon a Judge in his judicial capacity or in reference to his conduct in the discharge of his public duties. The offence, as a case of defamation, might doubtless have been punished under that chapter with simple imprisonment, not exceeding two years, or with fine, or with both. If the procedure of the Criminal Procedure Code had been adopted, and the Petitioner had been convicted of simple defamation under chap. 21 of the Penal Code, and, after his apology, had been sentenced by the Court to two months' imprisonment, there would have been no pretence for an application for special leave to appeal against the conviction.

But it is not because the publisher might have been punished for defamation that he could not be punished summarily as for a contempt of Court.

Lord *Hardwicke*, in the case of *The Champion* (1), says: "To be sure, Mr. Solicitor-General has put it on upon the right footing that, notwithstanding this should be a libel, yet, unless it is a contempt of Court, I have no cognisance of it; for whether it is a libel against public or private persons, the only method is to proceed at law."

The libel in the present case was clearly a contempt of Court It is contended, however, on the part of the Petitioner that, by reason of the Code of Criminal Procedure, 1882, the Court could not deal with it as a contempt of Court or punish the offender by commitment in a summary manner.

Several sections of that Code were referred to.

Section 198 enacts, amongst other things, that no Court shall take cognisance of an offence under chapter 21 of the Indian Penal Code, *i.e.*, the chapter "Of Defamation," except upon a complaint made by some person aggrieved by such offence.

"Complaint is defined in sect. 4 a to mean the allegation made orally or in writing to a magistrate with a view to his taking action," &c.

Section 195 enacts that no Court shall take cognisance of an offence under sect. 228 of the Indian Penal Code (*i.e.*, the offering insult to a public servant whilst sitting in any stage of a judicial proceeding) when such offence is committed in or in relation to any proceo-

(1) 2 Atk. 469.

ding in any Court, except with the previous sanction or on the complaint of such Court or of some other Court to which it is subordinate.

It is scarcely possible to suppose that the procedure above pointed out was intended to apply to the case of an insult to or a libel upon the High Court or a libel upon one of the Judges thereof, imputing corruption or misconduct or incapacity in the discharge of his public duties, or a libel such as that set out in the petition.

Section 480 and the two following Sections of the Code of Criminal Procedure were referred to in the argument in support of the petition, but they do not apply to a case of libel or defamation out of Court whilst the Court is not sitting, and have no direct bearing on the present case.

Section 5 was also referred to, and it was contended on the part of the Petitioner that, according to the provisions of that section, the procedure provided by the Code of 1882 was the only one which could be adopted.

That section is in the words following:—

"All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences."

Their Lordships are of opinion that a contempt of the High Court by a libel such as the present, published out of Court when the Court is not sitting, is not included in the words "offences under the Indian Penal Code," although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which by the common law of *England* is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of *England* was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for *British India* and the Code of Criminal Procedure, 1882, but by virtue of the common law of *England*: *McDermott* v. *Judges of British Guiana* (1).

The words "all offences under any other law" in sect. 5 cannot be intended to include a contempt like the present, for which no provision is made by the Code. It is unnecessary, therefore, to consider what is the true construction of the words "any special jurisdiction or power conferred by any other law now in force" in sect. 1.

There Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the Petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

In the case of *Rainy* v. *Justices of Sierra Leone* (2) upon an application for leave to appeal to enable the Petitioner to get rid of certain fines imposed upon him by the Court of *Sierra Leone* for contempts of Court, it was said,—"It is the opinion not only of the members of the Committee who heard the petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court." That case was referred to as an authority by the Judicial Committee in the case of *McDermott* v. *Justices of British Guiana* (3).

In the latter case an application was

(1) 5 Moore P. C. (N.S.) 497.

(2) 8 Moore's P. C. 54.

(3) 5 Moore's P. C. (N.S.) 466

made *ex parte* for leave to appeal from an order of the Supreme Court of Civil Justice in *British Guiana*, by which the Petitioner was, for a contempt of Court in publishing certain libels commenting on the administration of justice, and upon one of the Judges of the Court, committed to gaol for a period of six months or until further orders. See S. C., p. 490, and 4 Moore, P. C. (N.S.), 110, 120. Leave to appeal was granted without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal. The case came on for argument, and it was contended by the Solicitor-General that the leave to appeal ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. He stated, however, that he was prepared to support the order upon the merits, but he was not called upon to do so.

In delivering the opinion of the Judicial Committee, Lord *Chelmsford*, after stating that the leave to appeal was conditionally granted, said the Respondents might have come in to discharge the order upon the very ground which had been taken, namley, that there could be no appeal against an order of a Court of Record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the Appellant must shew either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something in the order committing the Appellant which rendered it improper, and therefore the subject of appeal. Then, after deciding that the Court at *Sierra Leone* was a Court of Record, his Lordship says (p. 498): "Not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." Again, after referring to the authorities, and amongst others to *Rainy's Case* (1), his Lordship concluded by saying: "Under these circumstances their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted; that the Supreme Court of Justice was a Court of Record; and that, as a Court of Record, it had power to commit for the particular contempt. As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt."

Acting upon these authorities, and holding that the High Court had jurisdiction to commit the publisher of the libel in question for contempt, their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise Her Majesty to dismiss the petition.

Solicitor for the Petitioner: *T. L. Wilson.*

(1) 8 Moore's P. C. 54.

8th November, and 1st December, 1883.

PRESENT :

Members of the *Judicial Committee* :— The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North-Western Provinces.

RAM KIRPAL SHUKUL ... *Petitioner*,

and

MUSSUMAT RUP KUARI ... *Objector*.*

Construction of decree in order made in execution proceedings—Finality of such order.

A Court having jurisdiction decided in the course of execution proceedings, (in an order which was not appealed), that the decree to be executed awarded mesne profits according to its true construction. *Held* that this decision had become final between the parties, not under s. 13 of Act X of 1877, but upon general principles of law, as an interlocutory order in the suit.

The order construing the decree having been made in the same suit in which the application was made, the question whether the law of "*res judicata*" applied was not relevant, that term referring to a matter decided in another suit.

Appeal from a decree (10th August, 1880,) reversing, after a reference to a Full Bench, a decree (26th July, 1879,) of the Judge of the *Gorakhpur* District (1).

Mr. *Horace Davey*, Q. C., and Mr. *W. A. Raikes*, for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK :—

This is an appeal from an order of a Divisional Bench of the High Court of Judicature for the North-Western Provinces of *Bengal*, dated the 10th of August, 1880, by which an order of the Subordinate Judge of *Gorakhpur* and an order of the Judge of the same district were reversed. The order of the Subordinate Judge was dated the 10th of May, 1879, and was made upon a claim by *Ram Kirpal Shukul*, the present Appellant, for mesne profits in execution of a decree of the late Sudder Court, by which a decree of the Principal Sudder Amin of the district of *Gorakhpur*, dated the 12th June, 1862, in a suit in which *Shambhu Pershad Shukul*, under whom the Appellant claims, was the Plaintiff and the present Respondent was the Defendant, was upheld upon appeal. Upon the claim for execution being made, a question arose whether or not the decree in execution awarded future mesne profits. That question had been determined in the affirmative on the 20th of December, 1867, by Mr. *Probyn*, the Judge of *Gorakhpur*, in a previous stage of the proceedings for execution of the same decree by the widow of the said *Shumbhu Pershad Shukul*, who in consequence of his death was the holder of the decree, and had been declared entitled against the present Respondent to proceed with the execution. The Subordinate Judge considered himself bound by the decision of Mr. *Probyn*, and he held that the debtor's objection in respect of mesne profits and his prayer for the exclusion thereof should be disallowed, and that the officer should prepare a correct account of the mesne profits. He accordingly made the order of the 10th of May, 1879, to that effect.

The order of the Subordinate Judge was affirmed on appeal by order of the Judge, dated the 26th of July, 1879. The order of the Subordinate Judge, and that of the Judge affirming the same, were appealed to the High Court, and came on to be heard before a Divisional Bench, who referred to a Full Bench the question whether the law of *res judicata* applies in proceedings in execution of a decree. The Full Bench, after referring to sect. 13, Act X of 1877, answered the question in the negative, whereupon the Divisonal Bench, on the 10th of August, ordered

* 11 Cowell's Ind. Ap. 37 ; I. L. R. 6 Alla. 269

(1) See I. L. R., 3 Alla. 141.

that the appeal be decreed, and that the orders of the Judge and the Subordinate Judge be reversed, and that the execution of the decree for mesne profits be disallowed.

The judgment of the Divisional Bench upon which the order was drawn up was in the following terms:—

"The Full Bench has expressed an unanimous opinion that the law of *res judicata* does not apply in proceedings in execution of decree.

"The question which the lower Courts held to be finally determined by Mr. *Probyn's* decision, dated the 20th of December, 1867, is therefore open to re-adjudication by us; and, on examining the terms of the late Sudder Court's decree, we are constrained to declare that mesne profits are not awarded by it.

"The execution of the decree for mesne profits must therefore be disallowed, and we need not consider any other matters.

"The appeal is decreed by reversal of the orders of the lower Courts; but, under the circumstances, we direct that the parties bear their own costs in all the Courts."

It is unnecessary for their Lordships to express any opinion as to the answer of of the High Court to the question propounded by the Divisional Bench, though they must not be understood as concurring in it (1). The question, if the term "*res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. *Probyn* was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon sect. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation. The judgment or order of Mr. *Probyn* was an interlocutory judgment, he merely held that according to the proper construction of the decree of the Sudder Court mesne profits were awarded by it. He did not assess the amount. That had to be done in a subsequent stage of the proceedings in execution. The report of the mohurrir of the 11th of March, 1879, gives a detail of the proceedings by which the Plaintiff in the suit, in which the Sudder Court gave judgment, and those claiming under him had been striving without success to obtain execution of the decrees of the Sudder Court from the time of Mr. *Probyn's* judgment of the 20th of December, 1867, to the 11th of September, 1878, when the application for execution upon which the orders under consideration were made was presented. In the course of those proceedings the case was, for various reasons, several times "struck off," that is to say, struck off the file of the business pending in the Court of the Subordinate Judge; but the application for execution, upon which Mr. *Probyn's* judgment was pronounced, was not dismissed, or finally disposed of. Mr. *Probyn's* judgment and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final; if an appeal did lie and none was preferred the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if, after endeavouring for eleven years to obtain execution for mesne profits in accordance with a judgment of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgment was erroneous, and that they were not entitled to mesne profits. It was contended at the bar, on behalf of the Respondent, that if the decree of the Sudder Court did not award mesne profits,

(1) Law Rep. 8 Ind. Ap. 133.

Mr. *Probyn* had no jurisdiction to hold that it did, and consequently that in that case the subsequent orders, which were based upon Mr. *Probyn's* judgment, were properly reversed by the High Court, who were correct in putting their own construction upon the decree of the Sudder Court. Their Lordships cannot concur in that view. The decree of the Sudder Court was a written document. Mr. *Probyn* had jurisdiction to execute that decree, and it was consequently within his jurisdiction, and it was his duty to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. *Probyn*, who, whether right or wrong, had decided that it did; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them(1). It is not necessary, nor would it be correct, for their Lordships to put their construction upon the decree of the Sudder Court. If the Subordinate Judge and the Judge were bound by the order of Mr. *Probyn* in proceedings between the same parties on the same judgment, the High Court were bound by it, and so also are their Lordships in adjudicating between the same parties.

For the above reasons their Lordships are of opinion that the High Court was in error in putting a construction upon the decree at variance with that of Mr. *Probyn*, and reversing the orders of the Judge and Subordinate Judge. The High Court acted as if they had been sitting upon an appeal against the order of Mr. *Probyn*, but they were not so sitting.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the order of the High Court, and to order that the orders of the Judge and Subordinate Judge be affirmed, and that the Respondent do pay the costs incurred in the High Court by the present Appellant. The Respondent must also pay the costs of this appeal.

Solicitors for Appellant: *Oehme* and *Summerhays*.

Solicitor for Respondent: *T. L. Wilson*.

(1) Law Rep. 8 Ind. Ap. 123.

9th November, and 1st December, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North-Western Provinces, Allahabad.

CHAUDHRI HIRA SINGH (Plaintiff) ... } *Appellant,*

and

CHAUDHRI GUNGA SAHAI, AND AMIN SINGH (Defendants) ... } *Respondents.**

Arbitration—Submission—Reciprocity of obligation of parties to award.

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of village houses and property, such member being deaf and dumb, and not a party to the arbitration and award. He afterwards sued for separate possession as against the others, who in their defence denied his title to inherit by Hindu Law on account of his physical infirmity which was from birth. The award having been produced at the hearing, *held* that this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award; and that he, consequently, could not avail himself of what the award contained in his favour.

Appeal from a decree of the High Court (12th April, 1882), which reversed the decree of the Judge of the *Meerut* district (9th May, 1879), and restored that of the Subordinate Judge of *Meerut* (24th December, 1877).

* 11 Cowell's Ind. Ap. 20; I. L. R. 6 Alla. 322.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, for the Respondents.

1st December 1883.

The judgment of their Lordships was delivered by—

THE RIGHT HON'BLE SIR RICHARD COUCH :—

This is an appeal in a suit brought by the Appellant against the Respondents for complete possession after partition of two-thirds of six houses and a tank in mauzah *Asaura*, in zillah *Meerut*, the Plaintiff being alleged to be a co-sharer and possessor of two-thirds and the Defendants of one-third thereof.

The Plaintiff is the son of *Har Dial Singh*, who had two sons, the Plaintiff and *Debi Singh*. The Defendants are the sons of *Golab Singh*, the uncle of *Har Dial*. The Plaintiff's grandfather, *Dharam Singh*, and *Golab Singh* were the sons of *Baji Rai*, whose brother, *Bhore Singh*, had a son, *Halas Rai*. *Har Dial* died in 1871. It did not appear when *Halas Rai* died. After his death his widow, *Rup Koer*, adopted *Debi Singh*. It was admitted that the Plaintiff was born deaf and dumb, and was consequently, by Hindu law, incapable of inheriting. But it appeared, by a proceeding of the Revenue Court, on the 24th of April, 1872, and an order of the Collector on the 6th of May, 1872, that on the death of *Zalim Singh*, the lamberdar of mauzah *Asaura*, *Hira Singh* was appointed lamberdar under the management of *Debi Singh* with the consent of the Respondents; and an issue in this suit whether *Debi Singh* was in possession, on behalf of the Plaintiff (the Appellant), of any property belonging jointly to the Plaintiff and the Defendants (the Respondents), was found for the Plaintiff by the District Judge.

On the death of *Rup Koer*, the date of which did not appear in the proceedings, disputes arose in the family as to the succession to the property, and to the property of *Har Dial*, and, on the 26th of December, 1874, an agreement for arbitration was made between *Amin Singh* and *Gunga Sahai* (the Respondents), *Ram Bukhsh*, son of *Phul Singh* (a brother of *Golab Singh*), *Jawahir Singh*, and *Nawal Singh*, sons of *Ram Dial Singh*, another brother of *Golab*, and *Shadi Ram* and *Khasi Ram*, sons of *Shankar Singh*, the first party, and *Debi Singh*, the second party, whereby, after stating that there was dispute between them "in respect to three matters, (1), as regards the legal heir to the property left by *Mussumat Rup Koer*, deceased, (2) as regards the heir now and hereafter to the property left by *Chaudhri Har Dial Singh*, and (3) as regards property and documents which stand recorded '*ism-farzi*' between the first and the second parties," they appointed *Chaudhri Zalim Singh* as arbitrator to decide all the aforesaid matters, and declared that if any other matter besides those in dispute should be submitted to the arbitrator, he should have power to decide the same. The submission was signed by *Debi* solely on his own behalf. *Zalim Singh*, by his award, found, as to the first point, that *Rup Koer* had adopted *Debi Singh*, and that he was the lawful heir to the entire property left by *Hulas Rai* and *Rup Koer*. "As regards the second point," he said, "I am of opinion that *Chaudhri Har Dial Singh* has two sons, *Hira Singh* and *Debi Singh*, *Chaudhri Har Dial Singh* died in 1871, and then the name of *Hira Singh* alone (*Debi Singh* having been adopted by *Chaudhrain Rup Koer*), who, though dumb, was the sole heir, was entered in the column of proprietorship, and he is in proprietary possession of the property, and enjoys the profits thereof. And the parties admit that *Hira Singh* is the heir and exclusive possessor of the property left by *Chaudhri Har Dial Singh*, therefore *Hira Singh* should, in my opinion, continue to be the owner and possessor of the entire property, as he is, and that after him his male issue will become owners; that if (God forbid) he may have no such issue, the said property also will devolve on *Debi Singh*, and his descendants will have no right whatsoever to the property left by *Chaudhri Har Dial Singh*, moveable or immoveable."

On the 3rd point the arbitrator decided as to some parts of the property which was the subject of it in favour of *Gunga Sahai* and *Amin Singh*. He then stated that the first party had requested that as they had no property near *Asaura*, their place of residence, they should have a portion of *Debi Singh's* property by purchase, which appeared to him to be reasonable; that *Debi Singh* reluctantly and coercively agreed to give certain property mentioned, on receipt of consideration; and he, the arbitrator, by agreement of the parties, had fixed the price at Rs. 30,000, which was paid in his presence.

All the parties to the arbitration signed the award in token of their consent to it, and the parties of the first part, on the same day, executed a *razinama*, relinquishing all claim to the inheritance and the property. *Hira Singh* did not sign, nor did *Debi Singh* do so on his behalf.

The question in this appeal is, what was the effect of the arbitration and award and *razinama* as regards *Hira Singh*, it being contended before their Lordships that he acquired an interest under the award, and had a right to insist upon it. The case first came before two of the Judges of the High Court for the North-Western Provinces at *Allahabad*, who referred it to a Full Bench. Of the five Judges, by whom it was then heard, four were of opinion that the award could only bind the parties to the arbitration, and the Plaintiff not being a party thereto was not bound by it, and not being bound by it could not claim to take any advantage from it, and that it could not confer on him, who was not a party to the arbitration, a right which he did not possess by law. The remaining Judge was of opinion that the award might be evidence of a family arrangement or cession of claim by the Defendants which might be enforced as against them. Accordingly the suit was dismissed.

Their Lordships are of opinion that the decree of the High Court should be affirmed. It did not appear that *Hira Singh* or any one having authority to act for him in that behalf had consented to be bound by the terms of the award. He was in possession before the arbitration, and continued in possession, and he made that possession and not the award the foundation of his claim to a partition. The award was produced by *Debi Singh*, who was indeed his witness, but who proved that it was signed by *Amin Singh* and *Gunga Sahai*, in answer to a question by the pleader for the Defendants. *Hira Singh* was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it. Their Lordships will therefore, humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, and the costs thereof will be paid by the Appellant.

Solicitor for Appellant: *T. L. Wilson.*

Solicitor for Respondents: *W. & A. Ranken Ford.*

13th and 14th November 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

[TWO CONSOLIDATED APPEALS.]

On Appeal from the High Court for the North-Western Provinces, Allahabad.

RAM SARUP (Plaintiff) *Appellant*,

and

MUSSUMAT BELA and Others (Defendants) *Respondents.**

Gift—Condition subsequent—Void condition.

To a gift divesting the doner of all his interest in certain property, a condition cannot afterwards be attached.

Where a gift completed by transfer rested on a valid consideration at the time when it was made: *Held* that even assuming that a condition could be afterwards imported into the transaction, and

* 11 Cowell's Ind. Ap. 44; I. L. R. 6 Alla. 313.

that condition an immoral one, this would not invalidate the gift, the general rule of law being that a gift to which such a condition is attached remains a good gift while the condition is void.

A gift of villages was complete, being followed by transfer of possession. Afterwards, in a petition to the Collector for "*dakhil kharij*" between the parties, the doner, stating the gift, added that it was on certain conditions. *Held*, that the petition must be treated as ineffective for the purpose of adding any condition.

Two appeals, consolidated and heard as one, from a decree, (27th August, 1879) of the High Court affirming a decree (13th September, 1878) of the Subordinate Judge of the *Bareilly* district.

Mr. *J. F. Leith*. Q. C., and Mr. *C. W. Arathoon* appeared for the Appellants.

Mr. *R. V. Doyne* for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

These appeals are presented by the heirs of *Luchmi Narain* in two suits instituted by him for the purpose of enforcing certain judgments obtained by him against the Defendant *Hearsey*, and making them available against property, partly in *Bareilly* and partly in *Badaun*, which formerly belonged to *Hearsey*.

In the first suit the plaint states that *Hearsey* was the owner of the property in question at the time when he gave a bond to *Luchmi Narain* dated the 3rd of February, 1873. It then states that *Hearsey*, in 1870. filed a petition in the Settlement Department alleging that the Defendant, who is generally called *Vilayat Begum*, his second wife, and her three children had been put in possession in equal shares, on condition of the wife obeying her husband and the children remaining faithful to their religion, and that a mutation of names might take place. Then it prays relief against all the Defendants; it seeks to have the property sold to the entire displacement of the Begum, and to the displacement of the children excepting as regards their interest for life.

The real questions in the case are resolved into two, the first being whether *Hearsey* had, at any time prior to the acquisition by the Plaintiff of the interest on which he now sues, intended to divest himself of all interest in this property in favour of the Defendants, and had done acts sufficient to carry his intention into effect; and, secondly, whether that transaction was invalidated by the immorality of the consideration or motive for it?

On the first question, as to the transfer, several witnesses have been examined, and they all tell substantially the same story. The story is this: That early in 1870 *Hearsey* convened a large meeting of his neighbours and acquaintances (forty or fifty are said to have been present), that at that meeting he stated that he had been very ill, that he felt the precariousness of life, that he desired to avoid disputes among the branches of his family (for besides the Begum he had other wives so called, and other children), and that on that account he intended to give, and did thereby give to the Begum and her children, who were very young at that time, his property in the zillahs of *Bareilly* and *Badaun*. He said that the servants were to consider themselves not his servants but hers, and that he was to be no longer the owner of the property. And a formal ceremony took place, consisting of a gift of some rupees to the Begum by the mokuddams of the villages in question, no doubt symbolical of her assuming the ownership of the villages.

It is true that the witnesses, according to the translations that we have before us, differ in the expressions used as to the gifts to the children. They talk of a gift to the Begum and her sons,—a gift to her and her descendants,—to her and her issue, and so forth. How far those different expressions may be due to different translations of the same word, and how far they may represent different words, is not told us; but their Lordships do not doubt that the substantial meaning of the witnesses was that the gift was intended by *Hearsey* for the Begum, whom he calls his second wife, who was acting as a wife to him, and those children whom she had borne to him, and whose interest he intended to protect against disputes

From that day to this the possession has been enjoyed by the Begum, and there is evidence of many acts of ownership which she has exercised over the property. On that evidence both the Courts below have found that the whole of *Hearsey's* interest was divested from him and vested in the other Defendants. It is not necessary to refer to the passages in which their opinions are embodied, but the ultimate result may be stated in the finding on the 4th issue by the Subordinate Court:—"That Defendant No 5"—that is, *Hearsey*—"had no transferable right in the disputed property at the time the Plaintiff lent money to him." That finding is sustained by the High Court.

This case is one to which the general rule of this Board to the effect that they will not disturb concurrent findings of the Courts below on questions of fact is eminently applicable. The evidence is oral. It is given in a language which we have not before us, and which we should not understand if we had it. The Judge of the Subordinate Court had the witnesses before him, and the High Court, which consisted of civilian Judges, must have understood the language in which the witnesses spoke. If, therefore, there was any argument to be founded upon little discrepancies in the story told by the witnesses, those Courts were thoroughly competent to deal with such a question; and their Lordships would be exceedingly reluctant, even if they thought that there was any doubt about the propriety of their judgment, to distrub it. In fact Mr. *Leith* in his opening said that having regard to the evidence given in the suit he could not dispute but that there was an actual transfer of property at the time in question, that the transfer was perfectly *bonâ fide*, and that *Hearsey* was a solvent man at that time, so that no fraud upon creditors could be alleged.

The question argued upon that transaction, independently of the immorality of it, was whether or no the absolute interest passed from *Hearsey* to the Begum and her children, or whether they were entitled for life. The same reason which excludes contention as to the actual transfer taking place appears to exclude contention also as to the amount of interest passed. The question of intention depends upon the oral evidence. The overt acts are the same whether a life interest was to pass, or whether an absolute interest was to pass, and we must look to what the witnesses tell us as to the intention expressed at the time. Both Courts agree that the whole interest passed, and that expressions were used by *Hearsey* which are inconsistent with the notion that he did not intend to pass the entire ownership to the Begum and to her children.

The evidence relied upon by the Appellant is contained in the petition for mutation of names that is mentioned in the plaint. It is true that that petition and the subsequent mutation of names are of no great value for the Defendants' purpose, because the Collector had only jurisdiction with respect to the possession or that evidence of possession which the register affords, and that is the only matter which is dealt with on the mutation of names. The Defendants would be equally entitled to possession whether they were owners of the life interest or owners of the absolute interest. Therefore the petition and the mutation of names only forward the case of the Defendants to the extent of proving a real *bonâ fide* transfer of some kind at the time, but they afford no evidence as to the extent of interest conferred by the transfer. So we must see what the witnesses say upon that subject; and they are all in accord that expressions were used which are inconsistent with the notion that any less interest than the absolute ownership was transferred. What the exact nature of the interests of the Defendants *inter se* may be is a question with which the Plaintiff has no concern. If it be the case that for some interest or other the whole ownership passed away from *Hearsey* at this time and passed into the Defendants, that is sufficient to exclude the Plaintiff from relief.

Now their Lordships pass to the next question that was raised, which depends

on the immorality of the transaction. To impeach it on that ground the Appellant's counsel argue as follows: that by reason of *Hearsey's* descent and religion the case is to be governed by rules of English law; that the Begum could not be his lawful wife; that the stipulation as to her continuing to act as his wife is immoral, though she is under the Mahomedan law, which allows sexual relations forbidden to Christians; and that the gift is so thoroughly vitiated as to leave *Hearsey*, the grantor, still the owner of the property in such a sense that the Plaintiff could treat it as his right title and interest liable to be sold under an attachment.

On those questions their Lordships desire to pronounce no opinion; and for this reason: They think there is no evidence that there was an immoral consideration to vitiate the transaction. In that they concur with the two Courts below. This gift was one entire transaction; there was a single gift to the wife and the children, and a single consideration for that gift. How does the case stand with regard to the children? So far as the oral evidence goes, it is clear that no condition was imposed at the time of the verbal transfer. The only evidence of immorality is contained in the application for the mutation of names. That application states that the gift was made to the children on condition of their adhering to thier religion. It is impossible to suppose that there was a consideration given by the children or any contract entered into with them at that time. They were very young infants. They could not agree to remain Christians; and although on making a gift to them, the donor might attach or purport to attach such a condition, it would be a condition only and subject to the law of conditions. The transaction being an entire one, it is very difficult to treat the gift to the wife differently from the gift to the children. Their Lordships think that the Courts below were right in treating the gift to her as resting on the valid and moral considerations on which it was stated to rest at the time when it took place.

Their Lordships are of opinion that the gift is in fact unconditional, because, as it was complete at the time when the actual transfer took place, the parties could not afterwards import a condition; and the petition must be treated as inefficacious for that purpose. But even if it were otherwise,—assuming a condition, and an immoral condition,—it would be the condition that is immoral and not the consideration; and then the case would fall under the general rule of law that a gift to which an immoral condition is attached remains a good gift, while the condition is void.

On these grounds their Lordships think that the appeal fails. As regards the second suit, the particulars of it have not been stated to their Lordships, but they understand from the Counsel that the issues are exactly the same as in the first suit. Their Lordships think that the decrees of the High Court of *Allahabad* should be affirmed, and these appeals dismissed with costs.

Their Lordships will humbly advise Her Majesty to this effect.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents, except Captain *Hearsey: Barrow & Rogers.*

17th November, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

AJUDHIA BUKSH and another (Plaintiffs) } *Appellants,*

and

MUSSAMUT RUKMIN KUAR & GUJADHUR BUKSH (Defendants) } *Respondents.**

Legal Construction of Will—Devise of talook—The Oudh Estates' Act, I of 1869—Requirement of registration—Acceleration of remainder on failure of life estate.

A gift in remainder, expectant on the termination of an estate for life, does not fail, but is accelerated, by reason of the gift of such prior life estate not taking effect.

The principle of the decision in *Lainson* v. *Lainson* (1) *held* applicable to a will made by a Hindu testator.

A talookdar, whose talook was entered in the third of the six lists prepared in conformity with s. 8 of "The Oudh Estates' Act," I of 1869, devised his estate by a will, which was not registered, to one of his wives for life, and after her death to his younger son by her. *Held*, as a consequence of the above rule, that it was not necessary to decide, upon a claim by the elder son as heir-at law, whether the widow, as a person "who would have succeeded to an interest" in the talook, if the talookdar had died intestate, would have been within the exception, in reference to the effect of non-registration of will contained in s 13 of the same Act.

Appeal from a decree (17th August 1880) of the Judicial Commissioner of *Oudh*, affirming a decree (13th March 1880) of the District Judge of *Lucknow*.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon* appeared for the Appellant.

Mr. *Herbert Cowell* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that, upon the principle laid down by Lord Justice *Turner* in the case of *Lainson* v. *Lainson* (2), to which they have been referred by Mr. *Cowell*, even if the widow was not a person who would have succeeded to any interest in the estate if the Rajah had died intestate, the son's estate was accelerated. That being so, without expressing any dissent from the opinion expressed by the learned Judges of the Court below, their Lordships are of opinion that, upon the legal construction of the will, the Plaintiff has no valid claim to any interest in the estate.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed, and the decision of the Judges of the Lower Court affirmed. The Appellant must pay the cost of the appeal.

Solicitor for the Appellants: *T. L. Wilson.*

Solicitors for the Respondents: *Barrow & Rogers.*

* 11 Cowell's Ind. Ap. 1; I. L. R. 10 Cal 482.

(1) 5 De Gex, M. & G, 751; 18 Beav, 1

(2) 5 De Gex, M. & G 754.

22nd, and 23rd November, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner, Oudh.

BURJORE AND BHAWANI PERSHAD (Defendants) } *Appellants,*

and

MUSSUMAT BHAGANA (Plaintiff) ... } *Respondent.**

Act X of 1877, s. 602—Extension of time for giving security in appeal—Custom—Wajib-ul-arz.

The words in s. 602 of Act X of 1877, relating to the time within which security is to be given, are directory only; and although they are not to be departed from without cogent reason, the Court from which the appeal is preferred has the right of extending the time. In this case, a satisfactory explanation having been given of delay in giving security until after the time limited by the above section had expired, *held* that the Court had rightly exercised discretion in extending the time. *In the matter of the petition of Soorjmukhi Koer* (1) approved.

The paternal grandmother of a deceased village shareholder claiming to inherit in preference to his male collateral relations, the issue was fixed with the assent of the pleaders on both sides, whether the plaintiff, as a female, was excluded from inheriting by the custom of the family, or tribe. *Held*, that this was substantially a question of fact, and that on the evidence, which included the village *wajib ul-arz*, the customary exclusion of females was not proved.

Appeal from a decree (29th October 1880) of the Judicial Commissioner of *Oudh*, affirming a decree (8th July 1880) of the District Judge of *Lucknow*.

Mr. *J. H. W. Arathoon* appeared for the Appellant.

Mr. *J. G. W. Sykes* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This was a suit brought by *Mussumat Bhagana* against the Defendants for the purpose of recovering a certain mouzah. The only question in the case was this, whether the Mussumat, who was the grandmother of one *Pirthi Pat*, succeeded to the real property of *Pirthi Pat*, or whether the male descendants collateral to her husband succeeded to that property? The parties were both represented by counsel, and they agreed to this issue: "Is Plaintiff, as a female, excluded from inheritance by the custom of the family and tribe? On Defendants." It appears to their Lordships that, this issue having been settled by the learned Judge by the consent of counsel, and the cause having been tried upon it, it is the only issue now before us; and the question to be determined is whether, the two Courts, that of the Subordinate and of the Judicial Commissioner, having found as a fact that the Defendant had not sustained the burden of proof laid upon him, viz, that the Plaintiff, as a female, was excluded from the inheritance, that finding shall or shall not be affirmed.

The question of the custom or no custom in the family is substantially one of fact. If their Lordships could see that any proposition of law was mixed up with it they might be disposed to review it, but no such proposition arises upon the evidence, and further, they are disposed to say that the conclusion of the Courts upon the evidence seems to them to have been right. The evidence was in substance that of a great number of members of the family, and strangers, of whom more might have been called, to the effect generally that there was such a custom in the family, which is a mere assertion by the witnesses of the question to be tried in the cause. But it would appear that all the witnesses founded their opinion upon one particular case, viz, that upon the death of *Baijnath*, the father of the husband of the Plaintiff,

* 11 Cowell's Ind. Ap. 7; I. L. R. 10 Cal. 557.

(1) I. L. R, 2 Calc, 272.

instead of his widow or mother taking, his uncles and nephews took. The Courts say that that being the only instance in the family does not sufficiently prove custom. Further it is to be observed that that evidence was in a great degree contradicted by a paper called a "wajibularz," which was put in, whereby the general contention of the Defendants, which was that no female whatever could succeed, was, to a certain extent at all events, modified. The wajibularz is in these terms: "If the deceased have two or more wives, lawfully married, then the property left by the deceased would be divided among the number of wives in this way: that if there be one son from one wife, and two or more from the other, then the one son from the former would take one half, and the two or more from the latter would take the other half, subdividing it equally among themselves; but a wife having no male issue shall receive no share; she shall, however, receive maintenance from the sons of the other wives who have inherited a share. In our family the custom is to give no share to daughters. If none of the wives lawfully married to a deceased co-sharer have any issue, in such a case of course the childless widow shall have possession of the share of the deceased. If a widow being childless desire to adopt a son, she can adopt one of the nearest male members of her deceased husband's family. She shall not be competent to adopt her brother or brother's son. Women not lawfully married, and their issue, provided they bear good moral character, will be entitled to receive only food and clothing, but shall not receive a share." This wajibularz seems very much indeed to qualify the general statement of the witnesses that no female could succeed in the family; for it distinctly states that under some circumstances wives and widows succeed, although it does not distinctly state that grandmothers do.

On the whole, therefore, it appears to their Lordships that the finding upon this one issue, which was settled by both the parties and by both Courts, is right.

It should be stated that it appears in this case that *Pirthi Pat* had a daughter about seven years old, but by consent of both parties that daughter is excluded from consideration in the case; and the case has been treated as if that daughter had not existed. Their Lordships think it right to say that that daughter, being no party to this suit, is in no way bound by this decision, and they give no opinion with respect to what her rights may be.

Under these circumstances their Lordships are of opinion that the judgment appealed from was right; and they will humbly advise Her Majesty to affirm that judgment with costs.

It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon that point have to say that they concur in the view which was taken by the Full Bench of the Court in *Calcutta*, that the words in the Act which have been quoted relating to the giving of security are directory only; and, although not to be departed from without cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the appeal.

Solicitors for Appellants: *Young, Jackson, & Beard.*

Solicitors for Respondent: *Van Sandau, Cumming, & Armitage.*

28th, 29th and 30th November 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

ABDOOL HYE (Judgment Debtor); .. } *Appellant,*

and

MIR MOHAMED MOZUFFER HOSSEIN and Another (Decreeholders) } *Respondents.**

Statute 13 Eliz. c. 5—Fraud upon creditors—Hibba—Equity and good conscience.

Whether or not the Statute 13 Eliz c 5 (1) (which may or may not extend to or operate in the "mofussil") is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles, and those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Courts, and have properly guided the decisions of the Courts in administering law according to justice, equity and good conscience.

A *hibba* having been found on the evidence to have been made not *bonâ fide*, nor on any good consideration, and by it creditors being delayed in their just rights, the maker having intended to protect his property thereby from those who at the time were his creditors;—*Held*, that the *hibba* was void according to equity and good conscience.

Appeal from a decree (23rd April 1880) of a Divisional Bench of the High Court, varying a decree (9th May 1878) of the District Judge of *Dacca*.

Mr. *C. W. Arathoon*, for the Appellant.

Mr. *R. V. Doyne* and Mr. *W. A. Hunter*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD FITZGERALD:—

It is fortunately unnecessary to state in detail the complicated transactions and the very protracted litigation which characterise the case now before their Lordships. The present proceeding relates to the execution of a decree against *Moulvi Abdool Ally*, obtained so far back as 1866 by some of the representatives of his deceased wife *Ifthakharunnissa*, and in respect of which a very considerable sum is still due.

The main question for consideration is whether certain property which the decree-holders have attached, and which they seek to sell, formed part of the assets of *Abdool Ally* at the time of his death, and liable to his creditors; and the answer to this question depends on whether a certain hebanama dated the 19th of Assin, 1256 (October 4, 1849), made by *Abdool Ally* in favour of his son, *Wahed Ally*, is *benamee*, or is fraudulent and void as against his creditors; and in order to determine these questions, it is necessary to examine the position of *Abdool Ally* and the condition of his family when that gift was executed.

Abdool Ally was a zemindar, and prior to 1849 had married twice, first *Ifthakharunnissa*, and secondly, *Nooronnissa*, by whom he had a son, *Wahed Ally*, and a daughter.

In October, 1849, he was under a considerable liability for the dower of *Ifthakharunnissa*, so large that after her decease two of her representatives (the present decree-holders) obtained a decree as for their share for Rs. 62,000.

He was in 1849 the owner of a variety of small properties, collectively of considerable value, but probably not more than sufficient to enable him to meet his engagements, and being thus situated, he appears, voluntarily and without any consideration, to have made the hebanama of the 4th of October 1849.

That instrument is as follows:—

"To the worthy of remembrance,

* 11 Cowell's Ind Ap. 10; I. L. R. 10 Cal. 616

(1) By Statute 13 Eliz c. 5, all covinous conveyances, gifts, and alienations of lands or goods, whereby creditors may be in anywise disturbed, hindered, delayed or defrauded of their just rights, are utterly void.

"*Sriman Meah Wahed Ally*, of good behaviour.

"Deed of gift of *jumma* lands executed by *Moulvi Abdool Ally*: As it is known that in such times as these there is no certainty of any man's life, and as I am now past fifty-five years of age, and that I have only you, my minor son, and a daughter, *Srimati Fukurunnissa Khatoon*, who is now without husband or offspring now in existence; and as on my death it would not be to be wondered at that you and your sister should fall to quarrelling about the property left behind by me; and as my daughter aforesaid having had from her husband zemindaries and talooks, many properties, and is therefore well provided for, and I having already bestowed by regular deeds some of my property to my wife *Srijuta Noorunnissa Khatoon*, and being in undisturbed possession with full rights of the remainder of the zemindaries and talooks which I own and possess" (the properties are here enumerated), "I of my own free will and pleasure, being in sound health and of my full knowledge, and as it would be difficult for you to live well and comfortably without my giving you all those talooks and zemindaries, do hereby confer upon you the above-mentioned 10 annas, 13 gundas, 1 cowri, 1 krant share of pergunnah *Nooroollapore*, and the 7-anna share of pergunnah *Idrakpore* in separate and respective shares, and in pergunnah *Chunder-dip*, the *kharija* talooks of jowar *Lalwa Banekachi*, in their entirety, and I cause you to be put in possession thereof: You shall therefore enjoy possession of all dwelling grounds, garden lands, cultivated and waste lands, homesteads, orchards, churs and sandbanks, new formations and re-formations, roads and pasturages, with trees, rivers and water-courses, ponds and tanks, water and forest privileges, and proceeds of fruits, hauts, markets, ghâts (river crossings), bazars and all matters therein connected with the said talooks and zemindaries, with tenants, zaerats, talookdars, howladars, and all other rent-holders, rents in their entirety, to excavate or to fill up, to settle thereon dwellings, plant orchards and gardens, and by collections of the revenues and by a transfer from the former names to your own of all those talooks and zemindaries, at the office of the Collectorate, and becoming full owner in right of me, with power to give or to sell, and you and your heirs in succession shall enjoy possession thereof, and the rights of myself and my heirs therein are hereby abandoned and cease To which effect I have executed this deed of gift.

"Dated the 19th Assin, 1256."

This grant appears to have been duly registered; but the instrument remained in the hands of *Abdool Ally*, and never appears to have been in possession of or under the dominion of the grantee.

Wahed Ally was then but ten years of age, and his father, *Abdool*, continued in the possession and apparent ownership of the property granted, and took and received and applied to his own use the whole of the income and profits. He appears to have continued in such possession to the time of his death.

The property comprised in the gift seems to have been substantially the bulk of *Abdool's* then assets; and certainly, if that gift was to take effect, he left himself without the means of meeting his then existing liabilities.

The gift was not followed or completed by any actual change of possession or of management or apparent ownership.

On the 24th Jeyt, 1258 (6th June, 1851) *Nooroonnissa*, the second wife of *Abdool* and mother of *Wahed*, also executed a hebanama in favour of her son *Wahed* of considerable property obtained from her husband *Abdool* or inherited in her own right; but no question arises on this instrument in the appeal now before their Lordships.

Wahed being still a minor, and shortly before he attained eighteen, was made to sign two ikrars, both dated 29th Falgoon, 1259 (11th March, 1853). That from *Wahed Ally* to his father recites the hibba of the 19th Assin, 1256 (4th October, 1849); and that his father, mother, and "half-mother" being alive, full brothers

and sisters and half-brothers and sisters might be born to him. After further reciting that as *Abdool*, by reason of his gift to *Wahed*, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift, it then contains an agreement by *Wahed* to maintain his sister *Fukhurunnissa*, and any other sisters or half-brothers to be afterwards born in joint mess during their minority, and on their coming of age to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition :—"And thus I do make my brothers and sisters co-sharers in the property received by me in gift and the profits thereof." The ikrar concludes by declaring that during the father's lifetime the whole of the property named in it will remain in the father's charge, and under his management and control.

Some time after the signing of these ikrars *Abdool* married *Amirunissa*, mother of the minor Appellant.

After *Wahed* attained eighteen he signed a third ikrar dated the 16th Aughran, 1263 B.E. (30th November, 1856), in which, after reciting the two hibbas from the father and mother, it thus refers to the two former ikrars,—"That I being your only son, and on account of your having no other son possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favour, and through the execution of a deed of gift dated the 19th Assin, 1256, your ancestral zemindaries, specified in the schedule. Besides this, having settled upon my late mother, *Noorunnissa*, as her marriage dower, your zemindary of tuppah *Hawali Jehanabad*, and your talooks, &c., my mother aforesaid as the owner thereof bestowed them upon me through a deed of gift dated the 24th Joistee, 1258; and I being the owner and in possession of that property, worth, in accordance with the deed of gift, Rs.80,000, I did formerly give and execute, as addressed to you and to my mother, separate ikrars (agreements), to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should during your lifetime remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that should uterine brothers to me be born, the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising should I have sisters or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with *Amirunnissa*, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier ikrars, and that it was proper to make some provision for her and any children to be born of *Amirunnissa*. It then states an agreement by *Wahed* to make allowance to the daughters of the marriage, and that should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." *Wahed* then grants an allowance to *Amirunnissa* of Rs. 150 per month for her table, and Rs. 500 a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management during his lifetime, and that neither *Wahed* nor his heirs should interfere or lay any claim thereto.

Soon after this last marriage of *Abdool Ally*, disputes arose in the family, which resulted in a suit being filed in 1859 by *Wahed* against his father, to obtain possession of the properties conveyed to him by the hibbas, and to have it declared that the said ikrars were not executed by him but were forged documents.

Abdool Ally's defence to this suit was that the hibbas had not been executed *bonâ fide*, but for the purpose of diminishing his credit.

Pending the litigation *Wahed* died in August, 1866, and *Abdool* died in June, 1867, leaving his widow *Amirunnissa* and her two sons, the Appellant *Abdool* and his brother *Lotif*, surviving; *Lotif* died soon afterwards.

After the death of *Abdool* the decree-holders sought execution against his assets, and, *inter alia*, against parts of the property included in the hebanama of 19th Assin, 1256 (4th Oct. 1849), which they contend is *benamee*; that is to say, they allege that it was a transaction not intended to operate according to its tenor and effect, but merely as a cover from creditors, and further that it was fraudulent and void against creditors. If they are correct in those contentions that instrument cannot stand in their way; the property remained the property of *Abdool*, and the ikrar under which the Appellant claims is equally inoperative against them.

Their Lordships pass by a mass of litigation and a labyrinth of complicated questions which arose from time to time between the parties, and which will be found clearly described in the judgments pronounced from time to time in the progress of the cause by Mr. Justice *Mitter* and other Judges, and their Lordships desire to confine their observations to the questions which arise on this appeal.

The questions which their Lordships have to determine are whether the gift of 1849 was one of those known as a *benamee* transaction, or was it otherwise fraudulent and void as against the decree-holders, whose decree was obtained in respect of a pecuniary liability existing at the time of the grant and still undischarged.

Their Lordships have considered those questions quite irrespective of the statements or declarations made by *Abdool post litem motam* in the litigation between him and *Ahmed*, and where his object was to defeat his own deed.

On a fair and full consideration of the state of circumstances existing at the time of that heba, and the course of conduct pursued afterwards, their Lordships are clearly of opinion that it was *benamee* to this extent—that it was a mere pocket instrument, not intended to operate according to its tenor and effect, but by which property was put in the name of *Wahed* but for the benefit of *Abdool*.

The possession remained with *Abdool*, and he appears during his life to have acted as uncontrolled owner and for his own sole benefit. There is some remarkable documentary evidence too, from which it appears that after the heba, there having been from time to time accretions to the lands comprised in the heba, and which according to the law of *India* follow the principal, those accretions were claimed by *Abdool*; and he obtained grants of them to him and his heirs.

The heba was not, and could not, be dealt with as a family settlement; there does not appear to have been any occasion for it, and the grantee was a boy of ten, who is afterwards made to sign an ikrar, by the concluding provision of which it is declared that the property is to remain in the control and management of *Abdool* during his life, and that neither *Wahed* nor his heirs should lay claim thereto.

But supposing the heba to be operative as between the parties, their Lordships have still to consider whether it is to be upheld as against creditors.

By statute of 13 Eliz. c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in anywise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the Mofussil in *India*) is more than declaratory of the common law so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the

common law for avoiding fraudulent conveyances have been given effect to by the High Courts of *India*, and have properly guided their decisions in administering law according to equity and good conscience.

Mr. Justice *White*, in delivering the judgment of the High Court, observes:—"What was the position of *Abdool Ally* when he executed the heba of 1849? At that time he had hanging over his head a large liability under the kabinnama, or deed of dower, which forms the subject of the present suit, and which he had executed when he married his first wife *Iftarkharunnissa*. She had died leaving a married daughter, who has since died leaving infant sons. The decree-holders, who are only some of the heirs, claim a 2-annas share of the dower, and have been held entitled to Rs.62,000 odd. The entire liability under the kabinnama was, therefore, not far short of 5 lakhs of rupees."

It is not necessary to adopt the whole of that statement. It is sufficient to say that the liability was very large.

The Judge of the District Court at *Dacca* makes use of the following remarkable language:—"However binding the documents may be as among the parties to them, we are beyond all doubt dealing with a gigantic fraud as regards third persons. Until, however, we get a law directed against voluntary and fraudulent conveyances, we must go on searching in each case for specific proof of fraud, &c.; generally, as now, finding that proof insufficient." But in observing on that passage, Mr. Justice *White*, in the Appellate Court, observes, "If the hebas are found, upon proper evidence, to be a contrivance to defraud creditors, they will not stand in the way of the decree-holders executing their decree against the properties mentioned in the hebas. The statute 13 Eliz. c. 5, which was enacted for the purpose of rendering conveyances in fraud of creditors void, is considered to be in affirmance of the general principles of the law by which fraudulent transactions are liable to be vacated at the instance of those affected by the fraud. This statute has been universally applied within the territorial jurisdiction of this Court on its original side; and whether it has or has not been applied by name in the Mofussil, the principle on which it is founded has been frequently asserted there, and is in accordance both with Hindu and Mohamedan law."

Their Lordships observe then that in the primary Court, where the Judge had the witnesses before him, he treats the transaction as a gigantic fraud as regards third persons.

The Judges of the High Court of *Bengal* arrived at a similar conclusion on the facts of the case. Their Lordships would be slow to differ from these tribunals thus concurring on conclusions of fact, and they do not find it necessary to do so. They have come to the conclusion that the heba of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and taking the whole transaction together, they are of opinion that the intention of the settler was to protect the property from those who were his creditors at the time.

Their Lordships are of opinion that according to equity and good conscience the heba is fraudulent and void as against creditors, and that the decree appealed from is right and should be affirmed, and the appeal dismissed; and will so humbly advise Her Majesty.

The costs must follow the event.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for above named Respondent: *Barrow & Rogers.*

28th November, 1883; and 9th February 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Recorder of Rangoon.

MOUNG HMOON HTAW (Defendant.) } *Appellant,*

and

MAH HPWAH (Plaintiff) ... *Respondent.**

Act XVII of 1875, s. 4—Buddhist law in British Burmah—Wife's claim upon husband for maintenance.

By the Buddhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears that this law would not be applicable where she has sufficient means of her own. No authority has been found for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so.

A wife, married according to Burmese rights and customs, claimed from her husband in a Court in British Burmah, a certain sum for her expenses of necessaries and living for a past period during which she had maintained herself. *Held*, that this was a question "regarding marriage," within the meaning of the Burmah Courts Act XVII of 1875, s. 4, and that, therefore, the Buddhist law formed the rule of decision. The law, as stated above, was accordingly applicable.

Semble, that if this had been a case in which, by the above Act, a Court would have had to act according to the rule of justice, equity, and good conscience, there would have been no ground for making the husband liable upon this claim, regard being had to the Burmese law as to the property of married persons.

Appeal from a decree (21st June 1881) of the Recorder of *Rangoon*.

Mr. *J. T. Woodroffe* appeared for the Appellant.

9th February, 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Appellant was the Defendant in an action brought by the Respondent in the Court of the Recorder of *Rangoon*, in which the Respondent alleged that she was married in *Rangoon* to the Appellant according to Burmese rights and customs, and claimed Rs. 10,000 for her expenses of necessaries and living for five years, deducting Rs. 1,400, the amount realized by the sale of a house given to her by the Appellant. The Appellant denied the marriage and that the Respondent was entitled to any maintenance. The Recorder found as a fact that she was the wife of the Defendant by a validly constituted marriage, the Burmese law recognising a plurality of wives, and the Plaintiff being what is generally called a lesser wife. Their Lordships are of opinion that this was quite in accordance with the evidence. He then considered the question of maintenance, as to which the material facts may be taken from the evidence which the Plaintiff herself gave.

They were married in *Tagoo* 1235 (about 1873 A. D.). The Defendant is a trader in timber and a forester, and has forest leases in *Zimmay*, the *Mine-loon-gyee* forest. The Plaintiff carried on a business of her own at *Rangoon*. At the marriage the Defendant gave her a dower of Rs. 20,000, and they lived together for some time, principally at *Rangoon*, but the Defendant's business frequently took him away. He wished her to reside at *Rangoon*, and requested her to live in a respectable style, which she did, entertaining the relatives and friends of the Defendant, and he not giving her any money towards the expenses of those entertainments. The Plaintiff always carried on a business of her own, dealing in mineral oil and rice, and accumulated Rs.80,000 in different kinds of property; and lived, she said, in the same style after marrying the Defendant as she had done before. In the opinion of the Re-

* 11 Cowell's Ind. Ap 109; I. L. R 10 Cal.777.

corder the Plaintiff received from the Defendant about Rs 23,500, but she said she had expended all that and large sums of her own in works of merit for the Defendant at his request.

Upon the question of maintenance, the Recorder said: "There are many passages in the Manoo Wonnanna and Manoo Thara Shwe Myeen Dammathats, both recognised as of high authority, which shew that a husband is bound to maintain his wife, and in the Manoo Kyay Dammathat, translated by the late Dr. *Richardson*, which is the Dammathat hitherto most generally used as a guide in questions of Burmese law, probably from the fact of it being the only one translated into English, in the chapter on the different kind of wives, par. 14, p. 14, the liability is clearly indicated." Then after stating what was there laid down, he said he was of opinion that the Plaintiff was entitled to maintenance suitable to her position as second wife, having reference to the Defendant's means and ability to pay. The judgment, from which it is unnecessary to quote more, ended by saying that the Plaintiff was not estopped from claiming for the period during which she lived at her own cost, provided it was not barred by the law of limitation, and giving the Plaintiff a decree for the amount claimed, viz., Rs.10,000, and costs.

Since this judgment was given, Mr. *Jardine*, the present Judicial Commissioner of *British Burmah*, has published some valuable notes on Buddhist law, with translations of the Wonnanna Dammathat, and several others, on marriage and divorce, and inheritance and partition, with notes, and cases illustrating the Burmese law of marriage and divorce, as now administered in the British Courts. In coming to an opinion upon this appeal, their Lordships have had the advantage of this additional information about Burmese law.

For the purposes of marriage, divorce, and inheritance, the property of the married persons is considered separate or joint.

The following is defined as separate property of the husband and wife by Major *Sparks* in his Code, which has been used in the British Courts as an authority on Burmese law:—

1. What belonged to either before marriage.

2. What has been given especially to either since marriage.

3. What has come into the possession of either by inheritance from his or her own family since marriage.

4. Clothes, jewels, and ornaments.

The profits or interest arising since marriage from the employment or investment of the separate property of either husband or wife, as also the property required during the coverture by their mutual skill and industry, are their joint property.

It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that this law would not be applicable where she has sufficient means of her own. They have not found any authority for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during which she has done so.

By the *Burmah Courts Act*, 1875, sect. 4, it is enacted that where in any suit or proceeding it is necessary for any Court under that Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law, in cases where the parties are Bhuddhists, shall from the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in *British Burmah*. And in cases not provided for by the former part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. It appears to their Lordships that this is a question regarding marriage, and is to be decided according to the Bhuddist law; but assuming that it is a

case in which the Court is to act according to justice, equity, and good conscience, their Lordships have considered whether the decree appealed from can be supported on those grounds. The Recorder seems to have taken this view of the case, for he says, "It seems to me unjust that merely because a wife had tacitly lived at her own expense under a particular set of circumstances, she should, as it were, be taken thereby to have contracted herself out of her rights, and be unable to recover them when those circumstances have become changed, and that through the fault of the husband." Their Lordships do not agree to this. Having regard to the Burmese law as to the property of married persons, they do not see in the facts of this case any ground in equity or good conscience for making the Defendant liable for maintenance. It may be that he requested the Plaintiff to live in a respectable manner, but she incurred no additional expenses in consequence. It did not cause any change in her style of living, and it is not possible to assign any portion of her claim to that request.

It remains to be noticed that in the reasons for the appeal it is said that there had been a divorce according to Buddhist law by the conduct of the parties. This was not made a ground of defence in the Defendant's written statement, and there was no issue upon it. And consequently their Lordships intimated to the counsel for the Appellant that they could not allow this question to be argued.

For the reasons above given their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to order the suit to be dismissed with costs in that Court. The costs of the appeal to be paid by the Respondent.

Solicitors for Appellant: *Sanderson & Holland.*

29th, and 30th November, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

ACHAL RAM (Defendant); ... ... } *Appellant*

and

UDAI PARTAB ADDIYA DAT SINGH (Plaintiff). ... ... } *Respondent.**

"Oudh Estates' Act," I of 1869, s. 8—Taluqdar in the second list—Estate descending to single heir—Primogeniture.

In the "Oudh Estates' Act," I of 1869, rules were laid down as to the title of talookdars whose estates the Government had created, and as to the mode of succession thereto.

On a question whether or not a talook, to which the Act was applicable, descended according to the rules of lineal primogeniture, *held*, that where a talookdar's name was entered in the second, but not in the third, of the lists maintained under the above Act, the estate, although it was to descend to a single heir, was not to be considered as passing according to the rules of lineal primogeniture.

Appeal from a decree of the Judicial Commissioner of *Oudh* (25th January 1881) reversing a decree (20th June 1880) of the Officiating District Judge of *Faizabad.*

Mr. *T. H. Cowie*, Q. C., Mr. *J. T. Woodroffe*, and Mr. *J. E. Howard* appeared for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *J. D. Mayne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This was a suit brought by *Udai Partab* against *Achal Ram*, who was the

* 11 Cowell's Ind. Ap. 51; I. L. R. 10 Cal. 511.

husband of *Brij Raj Kunwari*, deceased, and who obtained possession of the estate in question upon the death of his wife. The Plaintiff alleged himself to be the heir of *Pirthi Pal Singh*, and in the action of ejectment it was necessary for him before he could turn out the Defendant to prove that he had a better title. He attempted in support of his title to shew that the estate was to descend according to the rules of lineal primogeniture. If that rule prevailed he appears to have been the heir of *Pirthi Pal Singh*. A question was raised in the suit whether *Pirthi Pal Singh* had made a will; but it is unnecessary to decide that question, because, whether he made a will or not, or whether his daughter, *Brij Raj Kunwari*, the wife of the Defendant, took an absolute estate or not, is immaterial, if the Plaintiff fails to prove that he has a better title than the Defendant. It is necessary, therefore, for the Plaintiff to make out that the estate descended according to the rules of lineal primogeniture as distinguished from descent to a single heir amongst several in equal decree.

The estate in question was a talook created by the Government of *India* after the confiscation of *Oudh*. *Pirthi Pal Singh*, upon whom it was conferred, died before Act I. of 1869 was passed; but the talook was one in respect of which the Government of *India* laid down certain rules as to the title of the talookdars whom they had created and as to the mode of succession. The preamble of Act I. of 1869, instituted the *Oudh Estates Act*, is in these words:—"Whereas after the re-occupation of *Oudh* by the British Government in the year 1858, the proprietary right in divers estates in that province was under certain conditions conferred by the British Government upon certain talookdars and others: And whereas doubts may arise as to the nature of the rights of the said talookdars and others in such estates and as to the course of succession thereto; And whereas it is expedient to prevent such doubts and to regulate such course and to provide for such other matters connected therewith as are hereinafter mentioned, it is hereby enacted as follows." Among other enactments is sect. 8, which provides that "Within six months after the passing of this Act the Chief Commissioner of *Oudh*, subject to such instructions as he may receive from the Governor General of *India* in Council, shall cause to be prepared six lists; namely, first, a list of all persons who are to be considered talookdars within the meaning of this Act." *Pirthi Pal Singh*, who had been allowed to contract for the revenue, and with whom a summary settlement had been made, was entered in the first of the lists as a talookdar; and he must therefore be deemed a talookdar within the meaning of the Act. He was also entered in the second of the lists, which is a list of the talookdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir. Therefore the talook must be considered as a talook which ordinarily descended upon a single heir; but it omits altogether to state that that heir is to be ascertained by the rules of lineal primogeniture. The third list is "A list of the talookdars not included in the second of such lists to whom sunnuds or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sunnuds or grants shall thereafter be regulated by the rules of primogeniture." *Pirthi Pal Singh* was not entered in that list, and it is contended that because he was in the list of estates which ordinarily devolved upon a single heir it is to be presumed that the heir was to be ascertained according to the rules of lineal primogeniture. Their Lordships cannot concur in that contention. They are of opinion that when a talookdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture.

Now the Plaintiff having to make out his title, the District Judge in the first

Court found that the estate was to descend according to the rules of primogeniture, not saying lineal primogeniture. There was no evidence to shew that the estate had descended according to the rules of lineal primogeniture, even if such evidence could have got rid of the provisions of the Act. The Judicial Commissioner also found that the estate descended according to the rules of primogeniture, and it is said that there were two concurrent findings upon a question of fact; but when their Lordships come to examine the reasons and the grounds of the decision of the Judicial Commissioner, they find that he was in error. He says that there was a sunnud granted to *Pirthi Pal Singh*, according to which the estate was to pass according to the rules of primogeniture. He says:—In the present case the confiscation was admitted in favour of *Bhaiya Pirthi Pal Singh*, and the grant as by sunnud is to him and his heirs male according to the law of primogeniture; so that unless his daughter from some cause takes a full proprietary heritable estate, those entitled to succeed after her must be sought for amongst the heirs of *Bhaiya Pirthi Pal Singh*." Then he enters into the question whether the Plaintiff is the nearest heir according to the rules of lineal primogeniture. Both Courts appear to have failed with reference to the principle that a Plaintiff seeking to recover possession of an estate against a person who is in possession must recover upon the strength of his own title, and not upon the weakness of his adversary's title. That is a principale of law, and a very essential principle to be acted upon. The Judicial Commissioner, after deciding that the male reversionary heirs of *Pirthi Pal Singh* were to come in, says:—"There remains the question as to whether the Plaintiff-Appellant, *Bhaiya Udai Partab Singh*, is such male reversionary heir, considering that, as stated in an early part of this judgment, according to ordinary Hindu law *Harbhagat Singh* was the nearest collateral heir male to *Bhaiya Pirthi Pal Singh* at his death, and failing him *Jabraj Singh*, *Arjan Singh*, and the sons of *Harbhagat Singh* would have precedence as collateral male heirs. Those named above are not parties to this litigation, and no right that they might have as against *Udai Partab Singh* would be prejudiced by a decree in his favour against *Achal Ram*, who is found to have no right or title at all in the talooka. And in one sense there is a community of interest in all the males of the *Bhinga* branch, that the *Birwa Mahnoun* estate should not pass to a stranger, to the prejudice of their reversionary rights to succeed the last male proprietor. In both these estates the succession is to be regulated by the rule of primogeniture; and Plaintiff-Appellant, as senior heir male of the *Bhinga Bissin* family, has succeeded to and is in full proprietary possession of that talooka. He may therefore well be held to be representative of the reversioners in his branch, and anyhow it does not lie in the mouth of Defendant-Respondent, who is found to have no legal warrant for his possession of the *Birwa* estate, to deny that the Plaintiff has a *locus standi*, on the ground that it may be that he may not afterwards be found to be the man among the reversioners whom he represents, who should succeed." In short, the Judicial Commissioner comes to the conclusion that, inasmuch as the Defendant is shewn to have no title according to his ruling, therefore he has no right to say that the Plaintiff is not entitled to succeed. He entirely reverses the rule on which actions to recover possession are founded; namely, that he who seeks to turn another out of possession must first prove that he has a better title. His judgment is consequently erroneous; and ought to be reversed.

It has been stated that the judgment obtained by the Plaintiff has been executed, and that the Defendant has been turned out of possession. There is no evidence to that effect; but if it is the case the Defendant ought to be restored to possession, and ought not by reason of his having been turned out under an erroneous judgment, to be placed in the position of having to seek to recover possession himself and to prove his title.

Their Lordships will humbly advise

Her Majesty that the decree of the Judicial Commissioner be reversed, and the decree of the officiating District Judge affirmed; that the Respondent do pay the costs in the lower appellate Court; and that, if the Appellant has been put out of possession under the decree of the lower appellate Court, he be restored to possession.

The Respondent must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Young, Jackson, & Beard.*

5th December, 1883.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BABOO HURDEY NARAIN SAHU (Defendant) ... } *Appellant,*

and

PUNDIT BABOO ROODER PERKASH MISSER and Others (Plaintiffs) ... } *Respondents.**

Rights of purchaser of co-sharer's interest in joint family property—Formal objection to minor's representative.

When the right, title, and interest of a co-sharer in joint family estate are sold in execution to satisfy a decree against him personally, the purchaser acquires merely the right of the judgment debtor to compel a partition against the other co-sharers. *Deendyal Lal* v. *Jugdeep Narain Singh* (1) referred to and followed.

A money decree having been made against the father of a family, and the decree-holder having caused to be attached the family estate, and brought to sale the father's right, title, and interest therein, *Held*, that by the sale, not the father's share, but that interest which he had, *viz.*, the right which he would have had to a partition, and to what would have come to him under it, passed to the purchaser.

The family, governed by the Mitakshara, consisting of father, mother, and minor son, at the time of the decree, the Court below had decreed to mother and son, one third each, leaving one-third to the purchaser. A second son was born, and the mother died pending this appeal, the two sons becoming parties in respect of her share. *Held*, that on this appeal, preferred by the purchaser, the decree should stand, the appellant having got quite as much as he would have got if the decree had been more correct in form, as he had obtained all that he would have been entitled to on a partition, without being left to demand it.

The suit having been brought by a manager, appointed by the Court of Wards on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed, as merely technical.

Appeal from decrees (23rd April 1881 and 9th September 1881) of a Divisional Bench of the High Court, reversing a decree (25th July 1877) of the Judge of the *Bhagulpur* district.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the Appellant.

Mr. *J. D. Mayne* and Mr. *C. C. Macrae* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Three questions have been raised before their Lordships in the hearing of this appeal. The first was disposed of in the course of the argument. It was this: that the suit was brought by the manager appointed by the Court of Wards on behalf of the infant Plaintiff; and that the manager had not authority to represent the Plaintiff in it. Without considering whether he had authority or not, their Lordships were of opinion that, if the Plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present appeal.

The next and the principal question in the case, was, what right or interest in the property which is the subject of the suit was acquired by the Appellant, *Hurdey Narain*, by his purchase at the sale in execution of a decree which he had obtained against the father of the

* 11 Cowell's Ind. Ap. 26; I. L. R. 10 Cal 626.

(1) L. R. 4 I. A., 247; I. L. R., 3 Calc., 198.

Respondents, *Shib Perkash Misser*. It appears that *Shib Perkash Misser* was indebted to *Hurdey Narain*, partly on account of a mortgage, and partly for further advances; and that *Hurdey Narain* brought a suit against him in order to recover the debt, and obtained a decree on the 4th of March, 1873. The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree had been obtained upon the mortgage and for realisation of the debt by means of the sale of the mortgaged property. It is a simple money decree, which states that the claim was to recover Rs 6,335, principal and interest, and is :—"That a decree be passed in Plaintiff's favour for the amount of claim and interest on the principal for the period pending judgment of the case, and costs with interest on the entire amount, at the rate of eight annas per cent. per mensem from to-day till realisation." The property was attached on the 1st of April, 1873; and the attachment being by an order prohibiting the Defendant from alienating the property, it purported to be, as it must have been, an attachment of the entire eight annas; but what was attached and subsequently sold really was, the right, title, and interest of the father, against whom the decree had been obtained, in the eight annas; and it is clear from the terms of the sale certificate that this is what was sold and purchased by the Appellant. The sale certificate, which was given after some questions had been raised by the father with respect to the regularity of the sale, and the sale had been confirmed by the High Court, which questions it is not necessary to consider,—stated that an application had been made, and the sale proclamation was issued,—"and the said property was on the 5th of August, 1873, sold for Rs.6,800; and whatever rights and interest the said judgment debtor had in the said property were purchased by *Baboo Hurdey Narain*, decree-holder, auction purchaser" It then went on, after speaking of the payment of the purchase-money, to say :—"Therefore this sale certificate is granted to *Baboo Hurdey Narain*, decree-holder, auction purchaser; and it is proclaimed that whatever rights and interests the said judgment debtor had in the said property, having ceased from the date of the auction sale, passed to the said decree-holder, auction purchaser." Therefore what was purchased on that occasion were the rights and interests of the father; and this is precisely like the case of *Deendyal Lal* v. *Jugdeeep Narain Singh* (1) where their Lordships held that, the purchase being, as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the decree was obtained, had. The judgment in that case defines what is actually sold. At page 253, speaking of the decision of the High Court at *Calcutta* in the Full Bench case which is so often referred to, their Lordships say :—"So long as *Bhagwan* lived," —that is, the man against whom the decree was obtained,—"he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate." The bond-holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. *Doyne* argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. *Doyne's* argument that the father was entitled to a half. What the father was entitled to, and what the purchaser became entitled to, was what the father would get if a partition had been made; which was only a third of the eight annas share. According, therefore, to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), the present Appellant

(1) Law Rep 4 Ind. Ap. 247.

became entitled only to the one-third, treating it as if the sale was to operate as a partition at that time.

The case of *Deendyal* has been recognised in a subsequent case of *Saraj Bunsi Koer* v. *Sheo Proshed Singh* (1), in which that decision was acted upon, and which case is also applicable to the present.

The other question which has been raised before their Lordships is this: The High Court, when the case came before it on appeal,—having satisfied itself that the present Appellant by his purchase took only the interest which the father had, and if a partition had been made at the time of the sale the mother would have been entitled to a third, and the son, who was then living, would have been entitled to another third,—directed that the mother should be made a party to the suit, it having been found that the rights of the parties were governed by the Mitakshara law. The mother having been made a party, the High Court then made what in effect is a partition of the property which was the subject of the suit, making a decree that the mother and the son should each recover one-third, leaving the remaining third in the Appellant's possession. After that decree, and pending this appeal, the mother died, and, a second son having been born, the two sons are now parties to this appeal in respect of her share. The question which has been raised is whether the decree which has been made by the High Court ought to stand or not.

According to the judgment of their Lordships in *Deendyal's Case* (2), the decree, which ought properly to have been made would have been that the Plaintiff, the first Respondent, should recover possession of the whole of the property, with a declaration that the Appellant, as purchaser at the execution sale, had acquired the share and interest of *Shib Perkash Misser*, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the Appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition.

Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the Appellant does not suffer by that. He gets all that he would be entitled to if a partition were made.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The Appellant will pay the costs.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitor for the above-named Respondent: *H. Treasure.*

(1) Law Rep. 6 Ind. Ap. 88.
(2) Law Rep. 4 Ind. Ap. 247.

5th and 6th December 1883; and 1st March, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of the North-Western Provinces at Allahabad,

RAI BISHEN CHAND (Plaintiff) ... } *Appellant,*

and

MUSSUMAT ASMAIDA KOER (Defendant) } *Respondent.**

Hindu Law—Transfer of shares in joint family estate, by the head of the family and his son, to minor grandson.—Construction of gift; partial failure not invalidating the whole.

In a joint family, under the Mitakshara, consisting of a grandfather, his son, and that son's son, in pursuance of a family arrangement, the

* 11 Cowell's Ind. A. 164; I. L. R. 6 Alla. 560.

first, with the consent of the second, made by deed a gift of the whole ancestral estate to the third, including with him possible brothers that might be born thereafter. The father, in lieu of his share in the ancestral estate, received money for the payment of debts incurred by him Possession was given to the minor, through his mother, appointed by the deed of gift to be his guardian The minor then died, and the mother retained possession

The family estate, on the death of the grandfather, was attached by one of the father's creditors, who held a decree against him; and, in a suit to avoid the deed of gift, it was *held*, that the transfer to the minor, having been made in good faith, and for good consideration, was valid; and that, though the gift to possible brothers could not take effect, the gift by the head of the family, with the consent of the son, to the next generation, of which the only existing member, *viz.*, the minor grandson, was put into possession, was valid. It was not a partition; for (according to the Mitakshara, Chap. I, section V., verse 31) there could be no partition directly between grandfather and grandson while the father was alive. But it was a family arrangement, partaking so far of the nature of a partition that the father received a portion, and was thenceforth totally excluded; and, *quoad ultra*, the grandfather surrendered his interest to the grandson.

Appeal from a decree of the High Court (11th March, 1880), reversing a decree of the second Subordinate Judge of *Benares* (28th June, 1879).

Mr *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon* appeared for the Appellant.

The Respondent did not appear.

1st March 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

In this case the suit was brought by the Appellant against the Respondent and her husband *Udey Narain*, for the purpose of avoiding a deed of gift made in favour of the children of *Udey Narain*, and of making land comprised in that deed available to answer debts of *Udey Narain*.

Udey Narain belonged to a joint family living in the *Benares* district, and governed by the Mitakshara law At the date of the transaction complained of *Mata Dyal* was the head of the family. *Udey Narain* was his only son, and he had by his wife *Asmaida* one son, named *Satrujit*, who was then between two and three years old. That appears to have been the whole of the family.

Udey Narain was then, and had for some time been, living a profligate life. He had left his wife and the family house, and was living with a prostitute in the city of *Benares*. He is stated to have been an extravagant man, running into debt, and wasting the family property in the pursuit of pleasure.

It was under these circumstances that the deed in question was executed. It bears date the 12th of January, 1875, and is in the form of a declaration by *Mata Dyal*. He recites that he is too old and infirm to attend to the management of the ancestral villages and the family, that *Satrujit* is an infant, that *Udey Narain* pays no attention to the family affairs, that he is frivolous, extravagant, and not likely to support his wife and children, and is placing the family reputation and property in jeopardy. The deed then proceeds as follows:—

"Therefore I have executed this deed of gift of my own accord and free will, and with the consent of *Babu Udey Narain Singh*, and I am getting the signature of the said *Babu* affixed to the margin of this document, so that he (*Babu Udey Narain Singh*) and his heirs may abide by the terms of this document. That *Babu Satrujit Narain Singh* minor himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties, moveable and immoveable, my own property; that so long as the said donee does not attain the age of majority, *Mussumat Asmaida Koer*, the mother of the minors, should duly look after the support, education, and bringing up of the minor and manage the estate and the family affairs as a guardian of the said minor. That with a view to the completion of this document, I the executant will by filing applications in every department having jurisdiction in this matter get my name expunged, and will get the name of the minor under the guardianship of his mother entered in respect of all villages and land or portions of land and

houses, &c.; that the said guradian will in every way be competent to collect rents from the ilaka (estates), realize the outstanding debts, carry on banking transactions, manage all moveable and immoveable properties, and dismiss or employ servants, managers for collections, and Court mukhtars, just as she will think proper; that out of the profits which will accrue, after the payment of the Government revenue and defrayal of other necessary expenses, she will with all possible caution support, educate, and celebrate the marriage of the minor son and of other sons who may be born in future, and of the daughter, and keep the expenses on a moderate scale, and take every care, so that the ancestral property may not be mismanaged or charged with debt; that *Babu Udey Narain Singh* should defray his expenses from the profits arising from the lease of *Tikari* estate acquired by him, and he will have no connection with the ancestral property (and) my own property; that similarly the donee minor and his guardian will not have generally any right to demand the profits and products of the said ilakas under lease from *Babu Udey Narain Singh*, except whatever he (*Babu Udey Narain Singh*) may give of his own accord from the profits of the said ilaka under lease; that if, after the expiry of the term of the lease, a new lease be not granted to *Babu Udey Narain Singh* from the *Tikari* estate, the donee and the guardian should look after the support of *Babu Udey Narain Singh*; that besides this, *Babu Udey Narain Singh* will have no more right or title left to my ancestral property, because all his rights, present and future, to my inheritance have been sufficiently compensated by payment of his heavy debts, defrayal of his extravagant expenses on frequent occasions, and recent payment of Rs. 5,000 on account of debt which he now states to be due by him, which I have been compelled to pay to release the property from every liability, and besides all this, by fixing an allowance for his personal expenses for present and future."

Udey Narain acknowledged the deed under the head of "witnesses," but adding the words "with my own consent." He was therefore a party to his father's gift.

The deed was registered soon afterwards in the registry office of *Benares*, the Sub-Registrar recording that *Mata Dyal*, who was personally known to him, admitted its execution.

In the month of March, 1875, orders were made for the removal of the several mauzas comprised in the deed from the name of *Mata Dyal* into that of *Satrujit* minor under the guardianship of *Asmaida*. These orders were made on the reports of tahsildars that *Satrujit* by his guardian was in possession.

On the 28th of August, 1875, *Satrujit* died. *Asmaida* then claimed as his heir to have the estates transferred into her own name, and as after notices issued no one objected, orders were made to that effect. She also procured a certificate entitling her as a representative of *Satrujit* to realize about Rs 544 outstanding debt due to him, and certain promissory notes and bank shares which were his property. It does not appear that these properties were ancestral, but it is not suggested that the infant had any other property.

On the 21st of April, 1878, *Mata Dyal* died. The Plaintiff was a creditor of *Udey Narain* by virtue of two bonds given in February and March, 1874, for an aggregate sum of Rs.3,000. He had obtained a decree on these bonds against *Udey Narain* on the 26th of April, 1877, for the sum of Rs.5,111. On the death of *Mata Dyal* the Plaintiff took steps to enforce his decree against the family property, and on the 26th of July, 1878, he attached it, with other property, and advertised it for sale as the property of *Udey Narain*.

Asmaida then intervened as an objector to the sale, and on the 4th of November, 1878, the Subordinate Judge of *Benares* allowed her objection, and directed that the family property should be released from attachment. In his judgment he states that *Asmaida* has, as guardian to *Satrujit* and in her own right, been in

possession, and that "her possession up to this day is proved from papers that are extant."

The creditor thereupon brought the present suit, alleging that the deed of January, 1875, was executed merely to defeat the right of the creditors, and was only a paper and fraudulent proceeding; and further that it was illegal as being a gift to unborn persons.

The Defendant *Asmaida* put in a written statement, which was verified by *Bindu Lal* her agent. In it she alleged the profligacy and extravagance of *Udey Narain*; that he had on several occasions incurred illegal debts, which *Mata Dyal* was compelled to pay in order to maintain his reputation; and that he had consented to the deed of gift after receiving Rs. 5,000, which was considered to be the value of his proper share in the property according to his future title.

The Subordinate Judge decided in favour of the Plaintiff. He took the view that *Udey Narain's* consent, without which *Mata Dyal* could not alienate the ancestral property, was a fraud on *Udey Narain's* creditors, and that the deed of gift was wholly void.

Asmaida appealed to the High Court, who reversed the decree and dismissed the suit. That Court considered that the deed was made on good consideration, in good faith, and with a proper provision, not shewn to be insufficient, for *Udey Narain's* creditors. They further thought that the transaction might in some sense be considered as a partition, meaning apparently that *Udey Narain* had received the value of his share, and had in effect been bought out of the ancestral property.

The transaction has been attacked at the bar on several grounds.

First, it is said that the evidence of change of possession after the execution of the deed is insufficient to shew that the parties considered the ownership to be changed. But there are two answers to this argument. In the first place it proves too much. If it is worth anything, it proves that the deed was a pure *benami* transaction, which their Lordships consider to be an inadmissible conclution. They think it impossible to say that, as between *Udey Narain* or *Mata Dyal* and the others, it was intended to have no effect. The second answer is, that, though the evidence of ostensible change of possession seems meagre, there is some, which the Courts below have thought sufficient to prove the fact, though the Subordinate Judge thinks that it is of no validity because tainted by fraud. The Subordinate Judge says:—

"There are papers produced in this case to shew that, subsequently to the gift, affairs connected with the estate were carried on in the name of *Mussumat Asmaida Koer*, as guardian of the minor donee *Satrujit Narain Singh*, and after the death of the latter in her name, as being the proprietor of the estate by right of inheritance to her minor son deceased, and that she has all along been in possession of the estate. But this use of the lady Defendant's name in the affairs, while *Mata Dyal Singh* and *Udey Narain Singh* wished it, and all of them formed the members of a joint family, cannot but be considered to be nominal, and has not the effect of removing the taint of fraud from the gift."

And the High Court says:—

"We see no reason to doubt that the gift was intended to take effect, and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, and in the name of *Satrujit Narain Singh*; and *Mussumat Asmaida* asserted her position as guardian and manager for the minor *Satrujit Narain Singh*, obtaining a certificate under Act XXVII. of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right."

It may be added that in the execution proceeding, where the question was who actually had possession, the then Subordinate Judge decided in favour of *Asmaida*.

The second point made at the bar was that which forms the main discussion

below, viz., that the transaction was a fraud upon creditors. On this point their Lordships concur with the High Court. That it was intended to save the ancestral property from being wasted by the vices and extravagance of *Udey Narain* is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management.

If the statements in the deed are true, it is clear that *Udey Narain* received a substantial consideration for his consent, not only because the ancestral estate was secured for his son, but because his debts had been paid by *Mata Dyal* in the past, and were now being provided for to the extent of Rs. 5,000. It is urged that there is no evidence of the payment of this Rs.5,000, and it is true that *Asmaida* was not called as a witness, that *Binda Lal* her agent who verified her statement was not called, and that the witnesses who speak to the payment speak without much particularity, and do not distinguish between the amount, if any, paid to *Udey Narain* himself and the amount paid directly to his creditors. But it is difficult to suppose that there was any dispute on the point in the Courts below. No special allegation is made about it in the plaint, though the Plaintiff then knew the precise contents of the deed. No separate issue is framed upon it. Besides the written statement, three witnesses speak of *Udey Narain* "taking" Rs. 5,000. Two of them had attested the deed; and two of them had been employed in carrying portions of the Rs. 5,000, Rs. 900 in all, to the Plaintiff himself. All three are cross-examined, but their statements as to the payment are not challenged or tested in any way. The Subordinate Judge treats the payment as one of the facts in the case though he holds that it cannot save the gift from the taint of fraud. The High Court treat it as one of the facts in this case, and to a great extent found their judgment upon it. Neither Court discusses the proof of it, or intimates that there was any dispute or doubt raised upon it. It would be a dangerous thing for this Board to allow a conclusion so formed to be brought into doubt, merely because the evidence of it in the record may not be so good as would be required if the matter had been directly disputed.

It is suggested that the Rs.5,000 came from the joint chest; that it was an inadequate consideration for the interest which *Udey Narain* was giving up; and that he was left insolvent. But the Plaintiff, who now wishes us to draw these conclusions, has laid no adequate ground for them in his allegations or in his evidence. Such as the evidence is, it seems probable that the Rs.5,000 (to say nothing of prior payments on *Udey Narain's* account) was very nearly, if not quite, the value of his share, which on a partition would have been one fourth of the estate. According to the Plaintiff's own valuation of the estate, Rs.5,000 exceeded the value of that fourth. Even if it came from the joint chest, it is an application by the head and manager of the family of a large share of the family property to the separate purpose of one member, who was indulging his inclinations apart from the family. That is a substantial consideration. There is no proof that *Udey Narain* was left insolvent, nor any reason to think that he was. It does not clearly appear that he owed anything except to the Plaintiff, whose debt at the date of the transaction was reduced to about Rs.2,400. And it does clearly appear that *Udey Narain* had other property. He had the *Tikari* lease, mentioned in the deed of January, 1875. And he had a property called mouzah *Sarai Nandan*, which has been taken by the Plaintiff in execution. It may indeed be that he had only one immoveable property, called by two names; but if such things are left in

doubt, it is the Plaintiff's fault for not raising issues upon them.

Indeed the Plaintiff's case has been framed and argued as though the creditors had got some charge on *Udey Narain's* share in the family property, and as if it were for the Defendant to shew purchase for value without notice, in order to retain that property. But all the Defendant has to shew is that the transfer was made in good faith and for good consideration. The document in fact shews valuable consideration approaching, if not equalling, the whole value of *Udey Narain's* then share. And, though *Mata Dyal* seems to have taken the precaution to see that portions of the Rs.5,000 actually reached the hands of *Udey Narain's* creditors, he was not bound to do that, because they were general creditors, and had no lien upon the property. It would place these joint families in a very unfortunate predicament if they could never buy out a vicious member who threatens their ruin, so long as any one of his creditors remains unpaid.

There remains a question of some difficulty, whether the deed, which contemplates benefits to afterborn sons of *Udey Narain* as well as to *Satrujit*, can have any operation in his favour. This question, though raised in the plaint, is not dealt with by either of the Lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the Plaintiff relies, viz, that gifts cannot be made to persons unborn at the time, is well settled.

It is said then that the gift is made to a class, and that, inasmuch as some of the class are unable to take, none can take, and certain sections of the *Indian Succession Act* of 1875 are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindu wills.

Independently, however, of the distinction which may be taken between wills the operation of which is suspended during the testator's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Sect. 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in sects. 100 and 101. And the gift under consideration does not fall within either of these two sections. It may be that illustration (*b*) to sect. 102 imports into *India* an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended, not to define the word "class," but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by sects. 100 and 101.

Assuming that the deed is intended to express a gift to the brothers of *Satrujit* which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson *Satrujit*. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to fail because the parties supposed that they could join with him possible after-born sons, who, if any had happened to be born, could not legally claim under a gift? Is *Udey Narain*, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of *Udey Narain* by passing the property to his sons. That intention is much more

readily effectuated by giving the property to *Satrujit*, the only then son of *Udey Narain*, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of *Asmaida*, did not operate any change at all.

Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if *Satrujit's* possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in *India*. *Satrujit* is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact.

But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. The High Court viewed it in the light of a partition. It cannot be strictly a partition, for, according to the Mitakshara (cap. i., sect. 5, verse 3), there can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that *Udey Narain* receives a portion and is thenceforth totally excluded, and *quoad ultra Mata Dyal* surrenders his interest to his grandson, who on a complete partition among the whole family would be entitled to one fourth.

Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, cap. vii., ss. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the *Benares* school than by the *Bengal* school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between *Satrujit's* heirs on the one hand, and his brothers, if any should be born, on the other. They are only shewing that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class.

It is curious that in the appeal which was argued immediately before this (*Hurdey Narain* v. *Rooder Perkash* (1)), there was a similar gift made from a similar motive. *Shib Perkash* and his infant son *Rooder* constituted the whole of a joint family living under the Mitakshara law. *Shib* was extravagant and embarassed, and to save the ancestral estate he executed a deed of gift to *Rooder*, coupled with a declaration that

(1) 11 Cowell I. A. 26; I. L. R. 10 Cal 226. See *ante*, page 510.

if any other sons should be born to him they should from the date of their birth acquire equal right in the property. It did not occur to any body to contend that the deed was void, except as a fraud upon creditors. The High Court, consisting of *Mitter* and *Tottenham*, JJ., say :—

"But conceding that the gift is void against the father's creditors, it is binding and operative as between the parties to the instrument. Therefore from the moment of its execution *Shib Perkash* ceased to have any joint interest in the family estate."

The appeal turned on other questions, and their Lordships only refer to the case as illustrating the notions present to the minds of Hindus when making arrangements of ancestral property.

The result is that, in whatever light the transaction may be viewed, and whatever questions may arise between those who claim under it, the property effectually passed away from *Mata Dyal* and from *Udey Narain*. The Appellant's claim fails; his appeal must be dismissed, and their Lordships will humbly so advise Her Majesty.

Solicitor for Appellant: *T. L. Wilson.*

6th and 7th December 1883.

PRESENT:

Members of the *Judicial Committee* :—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SYED SADAKUT HOSSEIN (Defendant) ... } *Appellant,*

and

SYED MAHOMED YUSOOF (Plaintiff) ... } *Respondent.**

Mahomedan Law—Legitimation of offspring by acknowledgment.

The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist.

Mahomed Azmat Ali Khan v. *Lal'i Begum* (1) referred to

Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question.

Appeal from a decree of the High Court (3rd June 1880), reversing a decree of the Subordinate Judge of the *Sarun* district.

Mr. *J. F Leith*, Q. C., and Mr. *R. V. Doyne* appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD FITZGERALD :—

In this case some questions of importance have been raised, and their Lordships regret that they have not had the assistance of counsel appearing for the Respondent Their Lordships are therefore impressed with the propriety of not going beyond questions which are absolutely necessary for the purpose of their decision.

The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether *Selim*,—who was beyond question the actual son of *Amir Hossein* by a woman known as *Domni*.—had been so recognised by *Amir Hossein* as to give him the *status* of a son capable of inheriting. The suit relates to the property of *Amir Hossein*. He died in the year 1866: and if *Selim* is in the position of having the rights of a son in reference to heirship, the Plaintiff in the case, who claims as the assignee of his interest, is entitled to succeed. A question of importance was raised by the counsel for the Appellant. He contended that *Selim* could not be treated as having acquired the *status* of a son capable of inheriting, because he alleged that the intercourse between *Amir Hossein* and *Domni* was an adulterous intercourse, as she had been previously married to a person then and still living, and that consequently, whether her connection with *Amir Hossein* was preceded

* 11 Cowell's Ind. Ap. 31; I. L. R. 10 Cal. 663.

(1) L. R, 9 I. A, 8; I. L. R, 8 Calc., 422.

by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the *status* of a son by recognition. It, therefore, becomes necessary to consider in the first instance whether the alleged marriage of *Domni* to a man named *Jummun* has been established by satisfactory proof. *Jummun* appears to have been a person of somewhat the same degree in life as *Domni*, whose father's name was also *Jummun*. This marriage, if it took place at all, would have occurred shortly before or somewhere about the same period as the alleged marriage between *Amir Hossein* and *Domni*. The alleged marriage of *Jummun* with *Domni* is said to have been somewhere about 1852 or 1853, and the alleged marriage of *Domni* with *Amir Hossein* must have taken place about the same period. *Amir Hossein* died in 1866, leaving *Selim* his son then about eight or nine years of age, which would have made him born in 1857 or 1858 Another child had been born of the intercourse between *Amir Hossein* and *Domni* about four years before; so that the marriage between *Amir Hossein* and *Domni*, if it ever took place, is referred to about the same period as the alleged marriage between *Jummun* and *Domni*

Now the account given by *Jummun* is certainly one of an incredible character. The statement is that he became acquainted with *Domni* when he went to live in this particular village. He gives a description of her. He says that he had illicit intercourse with her; that he kept that illicit intercourse on for about a month. Then he says, "I heard that before I had intimacy with *Domni* three children had been born of her." That is his first statement. *Domni* was then a girl represented on the one side to have been twelve, thirteen, or fourteen years of age, and on the other side to have been fifteen or sixteen or possibly beyond that; but let us take a mean between them, and say that she was then fifteen years of age. He says that before he became acquainted with her she had three children by others. That is his first statement. Then, after stating his intimacy with her, he says she came to him,—she who had in this village or elsewhere three children,—and said to him, "The Meahs will reprimand us; let us run away to *Bandah*." Something of the kind might have occurred with a young girl; but with a shameless prostitute, such as *Domni* is represented to be, it is very incredible that such a thing would take place. He then describes the flight; getting to a considerable distance, when they are overtaken and brought back by a servant coming from the house of *Wahid Ali Khan*, who said, "Come back, and I will get you two married." He then says that he went back; and he describes the alleged marriage with minute particularity. He then states these circumstances: that soon after the marriage he found that she had entered upon a course of the most disgraceful prostitution. His story does not bear repetition. He describes her on the bed with four or five men. It is evident from this statement that he intended to lead to the inference that all these persons were having connection with his wife. He then says he is threatened by one of them, who says, "You have no claim over *Domni*." He then applied to *Wahid Ali Khan* for aid and protection, who refused to assist him, and in consequence he left. For twenty-five years afterwards he never revisited the village, and does not appear to have been heard of or seen by anyone there. That statement appears on the very face of it to be exceedingly improbable. There are other circumstances connected with it which lead further to the belief in its improbability. He himself appears to be a person of not very moral character; for he says, "I kept several women without nika." But he says, notwithstanding all this, "I have never been divorced, and I still consider her as my married wife." The circumstances that he is detailing, if true, must have been notorious in this village; the marriage with *Jummun*; her profligacy, her wandering about the village, and being what may be called the commonest of common prostitutes. Those are things

that must have been perfectly public; and yet the case is that, with that publicity, *Amir Hossein*, a person of superior degree, knowing, as he must have known as an inhabitant of the village, of the profligate course of this woman, took her to live in his house as if she was his wife. Undoubtedly he did take her to his house, and cohabited with her as his wife, and she became the mother of his children; but it is exceedingly improbable that he would have done that if there had been this previous marriage and this course of open profligacy on the part of this young woman.

Several witnesses are called to prove the marriage; and their evidence is examined with critical accuracy by the Judge of the Court below. It is necessary for their Lordships now to come to a determination upon it; and their Lordships are of opinion that in dealing with that evidence the criticisms pronounced by the learned Judge of the Court below who tried the case, and who saw the witnesses, are well founded, and that there is no reliable evidence, in confirmation of that extraordinary story which *Jummun* tells, upon which their Lordships can now say that this marriage with *Jummun* ever took place; and on the contrary, they have come to the conclusion that it did not take place.

Domni has been examined; she had been called as a witness for the Appellant. The first question of importance put with a view to establish her marriage with *Jummun* was: "Do you know a person of the name of *Jummun*?"—that happens to be her father's name; and she at once affirms, "I never knew any one of the name of *Jummun* but my father" The examination is immediately dropped There is no attempt to confront her with *Jummun*, or to ask her this question, "Do you see that man there? He is the *Jummun* alluded to. Were you married to him, or is he your husband?" She contradicts the statement brought forward to establish this marriage by deposing that she never knew a person of the name of *Jummun* save her father; and upon her subsequent examination she says, "I was married once, and once only, and that marriage was to *Amir Hossein*."

Their Lordships have then come to the conclusion that the parties fail to establish this marriage between *Jummun* and *Domni*. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for Appellant; namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of *Domni* and *Jummun*, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Nawab Mahomed Azmat Ali Khan* v. *Mussumat Lalli Begum* (1) which is as follows:—"Their Lordships are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the bar; *viz.*, that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case." Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary Court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion; and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir. Other questions have been raised in the case; but in accordance with what

(1) Law Rep 9 Ind Ap 8, 18; I. L. R. 8 Cal 422; *Ante* p 310.

has been stated as their Lordships' view, they think they ought not in a case of this kind to go beyond what is necessary for the decision.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the Court below. There will, of course, be no costs in this case.

Solicitors for Appellant: *Watkins & Lattey.*

5th February, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

NAROTAM DASS (Plaintiff) ... } *Appellant,*

and

SHEO PARGASH SINGH (Defendant) ... } *Respondent.**

Act XXIV of 1870 (The Oudh Talookdars' Relief Act, 1870) - Hypothecation of lands under management.

A talookdar, the management of whose talook at the time was vested in an officer appointed under s 3 of Act XXIV of 1870, made an instrument purporting to hypothecate the talook to secure payment of money borrowed by him.

Held that, as the document contained no personal contract to pay out of personal estate, or any estate other than the talook, it was unnecessary to consider whether a talookdar, whilst his talook is under management in pursuance of the provisions of the above Act, is competent to make a personal contract: this being only an hypothecation of the property falling within s. 4, cl. 3 of the Act, and invalid within its meaning.

Appeal from a decree of the Judicial Commissioner of *Oudh* (13th October 1881), whereby a decree of the Judge of the *Fyzabad* District (19th April 1881) was confirmed.

Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *R. V. Doyne* and Mr. *H Cowell* for the Respondent were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The issue raised in this case is, can the bond be held to be a valid document and binding upon the Defendant when it was executed during the time the estate was under the operation of the *Incumbered Estates Act*, (Act XXIV of 1870)? It is not necessary to consider whether a talookdar whilst his talook is under management in pursuance of that Act, is competent to make a personal contract, inasmuch as it does not arise in the present case. The question depends upon the construction of the document which is set out in the record, and which their Lordships consider to be a mortgage of the estate and nothing else. It contains no personal contract by the Defendant to pay out of his personal estate, but it is a mere contract to pay out of the hypothecated estate.

The contract commences by stating that he has borrowed the sum of Rs 4,100 at a certain rate of interest. Then it goes on: "I have by this instrument hypothecated the whole of my property in talook *Chandipur Birhar*, situate in *Fyzabad*." There he describes it as an hypothecation. "As the aforesaid talook of *Chandipur Birhar* is under management under the *Incumbered Estates Act*, and I have already filed in the office of the Superintendent a schedule of my debts, specifying the names of my creditors, I do hereby promise and give it in writing, that I shall without any plea repay the principal with interest within the term of two years." But the contract does not stop there. It goes on:—"The mode of payment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest"—that is to say, that he will pay this bond after he has paid the scheduled debts. "I shall thereafter appropriate the profits of the estate

* 11 Cowell's Ind. Ap 83; I. L R. 10 Cal. 740.

and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest; if I do take the profits it will be for the payment of this debt. I shall, until this debt is repaid abstain from contracting other debts from the bank or any where else." Up to this period it is evidently a mere hypothecation of the estate as a security for the money. Then he says lower down: "When my estate is released from management under the *Incumbered Estates Act*, I will immediately first of all pay the debt due to the said banker, and will pay the other creditors afterwards." That is merely an intention on the part of the borrower that this debt shall be a prior charge upon the estate after payment of the scheduled debts. "In both cases, that is, while the estate is under management and after it is released, the repayment of this debt will be the subject of my first consideration. In the event of any breach of contract taking place on my part, the said banker is at liberty to institute a suit within the time fixed in this bond and recover the money. I will not transfer or mortgage to any one the hypothecated property till the principal and interest of this debt is paid up; if I do so it will be illegal." Then he goes on: "These few lines have therefore been written as an unconditional bond hypothecating my property, so that it may serve as a document and be of use when required.

"*P. S.*:—I have taken this Rs. 4,100 over and above the Rs. 3,200 borrowed by me by hypothecation of the property, by the mortgage deed attested on the 17th of March, 1873."

Looking at the whole of this deed, their Lordships cannot place any other interpretation upon it than that it was a mere hypothecation of the talook which was then under management.

Then with regard to sect. 4, clause 3, which says, "that so long as such management continues the talookdar and his heir shall be incompetent to mortgage, charge, lease, or alienate their immoveable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom," it appears to their Lordships that this deed being a mere hypothecation of the property, falls clearly within the clause, and consequently that it was invalid. Both the Courts have held that the deed was invalid within the meaning of the Act; and their Lordships think that those decisions are right. They will therefore humbly advise Her Majesty to affirm the decision of the Court; and the Appellant must pay the costs of this appeal.

Solicitors for Appellant: *Watkins* and *Lattey*.

Solicitors for Respondent: *Barrow* and *Rogers*.

6th and 7th February and 1st March 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort Willian in Bengal.

JONMENJOY COONDOO (Defendant) ... } *Appellant*,

and

GEORGE ALDER WATSON (Plaintiff) ... } *Respondent*.*

Construction of Power-of-Attorney—Power to "negotiate" Government notes.

An agent, with whom were deposited Government notes for safe custody, was authorized by power-of-attorney to negotiate, make sale, dispose of, assign, and transfer, or cause to be assigned, and transferred, at his discretion, all or any of them, and on the principal's behalf from time to time, at his discretion, to contract for, and purchase, Government notes, and accept the transfer thereof, into the principal's name; "and for the purposes aforesaid to sign for him in his name, and in his behalf, any and every contract, agreement, acceptance, or other document."

* 11 Cowell's Ind. Ap. 94; I. L. R. 10 Cal. 901.

The agent, purporting to act as attorney, indorsed one of the notes, and borrowed money thereon for himself, and in fraud of his principal.

Held that, with regard to the general objects of the power, the agent had under it no authority to pledge, and that the lender of the money acquired no title to the note as against the principal.

The power-of-attorney was not in the same form as that in the *Bank of Bengal* v. *Macleod* (1), and the *Bank of Bengal* v. *Fagan* (2), not containing, in express words, power to indorse. Had it done so, the question would have been whether there was anything to prevent it from being a power, in the discretion of the donee of it, to indorse the note, and convert it into one payable to bearer, whenever he thought fit to do so, for any purpose.

It was not laid down in the judgment on those cases that the words used in a power-of-attorney, to express its objects, are always to be construed disjunctively, though they may be so construed; and there is no reason why a rule of construction, intended to aid in arriving at the meaning of the parties, should not be applied in construing a power-of-attorney as much as any other document.

Appeal from a decree (3) of a Divisional Bench of the High Court (4th May 1882), reversing a decree of the same Court in its Original Civil Jurisdiction (22nd December 1881).

Mr. *J. Rigby*, Q. C., and Mr. *E. Rolland* appeared for the Appellant.

Mr. *A. Cohen*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Respondent.

1st March, 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Respondent in this appeal, *George Alder Watson*, is a Surgeon-Major in Her Majesty's Indian Army, and the Appellant is a merchant at *Calcutta*. On or about the 18th of October, 1878, the Respondent deposited with Messrs. *Nicholls & Co.*, described in the plaint as a firm carrying on business as bankers and financial agents in *Calcutta*, promissory notes of the Government of *India*, amounting to Rs.37,500, for which a receipt was given to him by *Nicholls & Co.*, headed "Safe custody receipt." One of those notes was for Rs.20,000. This note was payable to *Watson*, his executors, administrators, or assigns, or his or their order, and was subsequently exchanged by *Nicholls & Co.* for a similar note, apparently that the interest might be received at *Calcutta* instead of *Peshawar*, where the interest on the former note was payable; but no question arises upon this.

On the 18th of October, 1878, *Watson* executed and gave to *Nicholls & Co.* a power of attorney, in the following terms:—

"Know all men by these presents, that I, *George Alder Watson*, Surgeon-Major, 19th Regiment *Bengal* Lancers, do make, constitute, and appoint *William Nicholls* and *George Augustus Thompson*, of Messrs. *Nicholls & Co.*, financial agents, *Calcutta*, jointly and severally to be my true and lawful attorneys and attorney, for me and in my name, and on my behalf, from time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes, or other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in my name, or belonging to me, or any part or parts thereof respectively. And also for me, and in my name, and on my behalf, from time to time, at their or his descretion, to contract for, purchase, and accept the transfer into my name of any Government promissory notes or other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in the name or names of, or belonging to, any other person or persons. And also to receive all interest and dividends due, or to accrue due, on all or any of such stocks, funds, and securities. And for the purposes aforesaid, or any of them, to sign for me and in my name, and on my behalf, any and every contract or agreement,

(1) 5 Moo. I. A., 1; 1 P. C. J. 391.
(2) 5 Moo. I. A., 27; 1 P. C. J. 392.
(3) I. L. R., 8 Calc., 934.

acceptance or other document. And to sign, seal, and deliver for me, and as my act and deed, any and every deed which they or he may think expedient."

This power of attorney, when produced in evidence, had on the back of it a seal of the Public Debt Office, Bank of *Bengal*, shewing that it had been registered there, and the new note had on the back two like seals, with the same register number, shewing that a power of attorney had been registered for the receipt of interest and for sale. *Watson* never gave to *Nicholls & Co.* any authority to deal with the notes except the power of attorney. The note when produced bore two indorsements, "*G. A. Watson*, by his attorney, *G. Aug. Thompson*," "*G. A. Watson*, by his attorney, *G. Aug. Thompson*." The former of these indorsements appeared to apply to a receipt for a half year's interest, which was indorsed on the note.

In December, 1880, a broker named *Goberdhone*, employed by *Nicholls & Co.*, applied to the gomastah of the Appellant for a loan to *Watson* of Rs. 19,000, on the pledge of a Government security for Rs. 20,000, and subsequently brought the note for Rs. 20,000. Being asked by the gomastah under what authority the name of *Watson* was signed by *Thompson*, he said there were two seals on the paper, and from the two seals it appeared that Mr. *Thompson* had authority to draw interest and sell the paper, so he had full authority. The gomastah then sent the money by one *Koylash Chunder Roy* to the office of *Nicholls & Co.*, telling him to inquire whether the paper was actually signed by *Thompson*. What then took place is stated by *Koylash Chunder Roy* thus:—"In the office the broker took the paper from *Ameer Singh's* durwan, and gave it to Mr. *Thompson*. Mr. *Thompson* gave that paper to me, and said he wanted money on that paper. I asked him if the signature on the paper was his signature, and if he had pledged the paper with *Ameer Singh Shumar Mull*. He said, 'Yes.' I told him 'The paper stands in the name of Mr. *Watson*, why do you want money on this paper, and what authority have you to sign for Mr. *Watson*?' Mr *Thompson* said, 'I have got a power of attorney. If you wish to see the power of attorney I can show it to you.' He said he had a power of attorney from *Watson* to manage all his business, and he had authority to receive money on that paper. Then he executed a promissory note, in which he signed for Mr. *Watson*, gave the promissory note to me with the Government promissory note, and took the money from me." In the account books of the Appellant the transaction was entered as a payment of Rs. 19,000, on account of pledge of company's paper. *Nicholls & Co.* having failed, the Respondent brought a suit in the High Court of *Calcutta*, praying that the Appellant might be decreed to indorse and deliver up the promissory note for Rs.20,000 to him, and to pay him all such interest as the Appellant might have received thereon, and that the Appellant might, if necessary, be restrained from parting with it.

The Judge before whom the case came on for disposal dismissed the suit, with costs. On appeal to the High Court in its appellate jurisdiction, this decision was reversed, and a decree was made in the Respondent's favour, from which there is this appeal to Her Majesty in Council.

It was properly admitted by the learned Counsel for the Appellant in the argument before their Lordships that the Appellant, having notice that the indorsement was under a power of attorney, was in the same position as if the power of attorney had been perused, and if that power did not authorize the indorsement he must fail. But the Counsel contended that it gave an authority to pledge the Government note, and relied upon the case of the *Bank of Bengal* v. *Macleod* (1). It is necessary to look at the facts, and argument, and judgment in this case somewhat minutely.

The action was one of detinue and debt brought by *James William Macleod* against the Bank of *Bengal*. In 1841

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

the Plaintiff sent from *England* a power of attorney, constituting and appointing *Alexander Donald Macleod* (his brother). and *Christopher Fagan*, carrying on business in *Calcutta* as agents under the firm of *Macleod, Fagan & Co.*, his attorneys, jointly and separately in their individual names, or the name of the firm, and on his behalf, "to sell, indorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the *East India Company* for shares in their public loans," to which he was entitled. *A. D. Macleod* applied to the Bank of *Bengal* for a loan upon his own account, and offered as a security company's paper; No. 13,397, for Rs.5,000. This note bore the following indorsement:—"Pay to *G. J. Gordon*, Esq., Secretary, *Union Bank*, or order *J. W. Macleod*, by his attorney, *A. D. Macleod*." "*Pay to A. D. Macleod*, attorney to *J. W. Macleod*, or order, *G. J. Gordon*, Secretary, *Union Bank. J. W. Macleod*, by his attorney, *A. D. Macleod*." The secretary of the bank, upon inspection of the note and the last indorsement, requested to see the power of attorney, which was shewn to him. The bank then took a further indorsement on the note from *A. D. Macleod* in these words:—"Pay to the Bank of *Bengal*, or order *A. D. Macleod*," and the required loan was then made by the bank in the ordinary course of business. Two days afterwards a further loan of Rs 17,100 was made by the bank to *A. D. Macleod*, upon his depositing two other notes and indorsing them, and his statement that they were his own property.

A verdict was found for the Plaintiff, and a rule which was granted to shew cause why that should not be set aside and a nonsuit entered, or why a verdict should not be entered for the Defendants, or a new trial granted, having been discharged, the Defendants appealed to Her Majesty in Council. The difference between this case and that before their Lordships may be here noticed. The power of attorney contained the word "indorse." The loan was made to *A. D. Macleod* on his own account, and the bank took an indorsement on the note from him on his own account, and not as attorney for *J. W. Macleod*. In this case, and in the similar case of the *Bank of Bengal* v. *Fagan* (1) (the judgment being given in both cases), it was argued for the Appellants that *A. D. Macleod* had power to indorse the notes; that "sell, indorse, and assign" might be read either distributively or conjunctively, and the power to indorse was not auxiliary only but was the real object of the power. For the Respondent it was argued that the indorsement mentioned in the power of attorney was for the purpose of authorizing *A. D. Macleod* as agent for the purposes of a sale, and a power to sell did not give a power to pledge, that the word "indorse" was controlled by the context, and the words must be taken collectively. The following passages (p. 38) from the judgment delivered by Lord *Brougham* shew the ground of the decision:—

"Thus, the main and fundamental question is, had *Macleod & Co.* authority to indorse under the power of attorney, which is in the same words in both cases. It is to 'sell, indorse, and assign, or to receive payment of the principal according to the course of the Treasury, and to receive the consideration money and give a receipt for the same.' It is contended for the Respondent that the words 'sell, indorse, and assign,' used conjunctively cannot be used in the disjunctive, but that the only power given to indorse is one ancillary to sale, and that we are to read it as if it were, power to sell, and for the purpose of selling to indorse. This construction is endeavoured to be supported by referring to the variation of 'or' for 'and' immediately following 'or to receive the money at the Treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. . . . Shall we then say that a power to 'sell, indorse, and assign,' does not mean a power to sell, a power

(1) 5 Moo. Ind. Ap. 40; 1 P. C. J. 392.

to indorse, and a power to assign; and would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction we must hold that these words not only give no powers to indorse without selling, but also that they give no power to sell without indorsing, and we must suppose an agent acting under such a power to be entirely crippled . . . It appears to us that the rational and the natural construction is the one which represents a power to 'sell, indorse, and assign,' as a power to sell, a power to indorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally."

It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case, as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord *Bacon*, *Copulatio verborum indicat acceptationem in eodem sensu*, which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument

The power of attorney in the present case is not in the same form as that in the *Bank of Bengal* v. *Macleod* (1) It does not contain in express words a power to "indorse." If it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to indorse the note and so convert it into one payable to bearer whenever he thought fit to do so for any purpose. But in this power the indorsement is not authorized in express words, but is authorized if it comes within the meaning of the words, "And for the purposes aforesaid to sign for me, and in my name and on my behalf, any and every contract or agreement, acceptance, or other document." The "purposes aforesaid" are these,—

"From time to time to negotiate, make sale, dispose of, assign, and transfer, or cause to be procured and assigned and transferred [there seeems to be a mistake in words here, but it does not make any difference in the meaning], at their or his discretion, all or any of the government promissory notes or other government paper, &c., and also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any grovernment promissory notes or other grovernment paper, &c."

The Appellant's counsel relied mainly upon the word "negotiate," and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to thier Lordships to have been to sell or purchase for *Watson* grovernment promissory notes and other securities, not to borrow or lend money upon them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the Appellant gives to it, and, for the same reason, "dispose of" cannot have that effect.

It did not appear when the indorsement by *Thompson* as *Watson's* attorney was made, but *Nicholls & Co.* did not deal with the note as having themselves become the holders of it by indorsement, as was the case in the *Bank of Bengal* v. *Macleod* (1). They borrowed the money on behalf of *Watson*, giving a promissory note for it signed by *Thompson* as his

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

(1) 5 Moore, Ind. Ap 1; 7 Moore, P. C. 35.

attorney, and pledged the government promissory note as *Watson's*. As they had not authority to do this, the authority to sell not giving an authority to pledge, the Appellant acquired no title to the note by its delivery to him, and the High Court has properly made a decree in the Plaintiff's favour.

Their Lordships will humbly advise Her Majesty to affirm that decree and to dismiss this appeal, and the costs of it will be paid by the Appellant.

Solicitors for Appellant: *Watkins & Lattey*

Solicitors for Respondents: *Vallance & Vallance.*

8th and 12th February 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

THAKUR ISHRI SINGH (Plaintiff) ... } *Appellant,*

and

BALDEO SINGH (Defendant) ... } *Respondent.**

The Oudh Estates' Act I of 1869—Will of a Talookdar—Customary rule of succession in a family to impartible estate—Primogeniture.

However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to impartible family estate, and to a talook also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity with s. 8 of the Oudh Estates' Act I of 1869. Before his death, this eldest brother made an instrument registered as a will, but using the words "tamlik," and stamped as a deed whereby he gave the talook to the third brother, reserving an interest on the whole for his own life, and in half for any son that might be born to him with maintenance to his wife on her becoming a widow.

Held, with reference to the indicia of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act.

Held, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that s. 11 of the above Act, giving to every heir and legatee of a talookdar power to transfer, or to bequeath, his estate, is not controlled by the proviso in s. 19, declaring that nothing in that section shall affect wills made before the passing of the Act.

The impartible family property other than the talook descending, like the latter to a single successor, one of these brothers, the question as to which of them that one should be, depended on the custom of the family. On the evidence adduced as to the custom in this respect, the Plaintiff, who was out of possession, and on whom, in order to make out his title, was the burden of proving that the rule of primogeniture prevailed, failed so to do.

Appeal from a decree of the Judicial Commissioner of *Oudh* (19th March 1881), affirming a decree of the District Judge of *Lucknow* (3rd October 1880).

Mr. *J. T. Woodroffe* appeared for the Appellant.

Mr. *J. H. Cowie*, Q. C., and Mr. *J. G. W. Sykes* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

This case has been argued so recently that the introductory facts need not be recapitulated. It will be sufficient to bear in mind that the suit concerns property of two classes, that comprised in list A and that comprise in list B, to which quite different consideration apply.

With respect to the property in list A, the whole controversy turns upon the validity and the character of the instrument which is marked as exhibit C in the

* 11 Cowell's Ind. Ap. 135; I. L. R. 10 Cal. 792

cause, being an instrument executed on the 28th of June, 1871, by *Maharaj Singh*, for the purpose of effecting a transfer of the property contained in it to *Baldeo Singh*, the Respondent. It will be convenient, first, to consider the character of the instrument, because certain agruments were advanced against its validity depending entirely on the hypothesis that it is a transfer operating *inter vivos*. and their Lordships have come to the opposite conclusion, namely, that it must be considered as a will.

The reasons for considering it to be a will are these:—It answers the definition of a will which is contained in sect. 2 of Act I. of 1869. It was registered as a will, and though that may have been done at the instance of the Registrar, it certainly was done with the full knowledge and assent of *Maharaj Singh*. It provides for contingencies which are not ascertainable, or may not be ascertained, until the death of the testator; for instance, the contingency of his having a child, which he had not at the time of the will, and the contingency of his leaving a widow surviving him. It does not purport to give to any body any possessory or present interest until the death of *Maharaj* the donor. And it makes a gift to the children of *Maharaj*, which, if it be a deed of transfer operating at once, cannot take effect, because no child was in existence; whereas, if it is a will, the gift may perfectly well take effect. All those are very strong indicia of a testamentary character; and the question is whether they are overborne by evidence tending in the opposite direction?

As regards judicial opinion, it may be observed that the question of will or deed was in issue between *Baldeo* and *Ishri* after the death of *Maharaj*, before the Deputy Commissioner of *Sitapur*, upon the application for mutation of names; and he held it to be clearly a will. The Judicial Commissioner in the present case gives no opinion upon the point. The District Judge thinks it is a deed, though he says it is not very material whether it is held to be one or the other. His reasons for thinking it to be a deed are that the donor *Maharaj* uses the word "tamlik" ("assign") and calls his deed a tamliknamah, and he has it stamped as if it were a deed. It appears that the stamp is not exactly that which the instrument would bear if it were a deed of assignment, but the District Judge says it is not so far distant from it but that it carries to his mind a conviction that the stamp, coupled with the use of the name, shews that *Maharaj* intended some thing different from a will. Then he says that it cannot be a will, because it affects the property in the lifetime of *Maharaj*; but that seems to their Lordships to be an assumption of the question. Of course if it affects the property in the lifetime of *Maharaj* it cannot have a testamentary character, but the very question is whether it does affect the property in the lifetime of *Maharaj*. The District Judge does not assign any additional reasons for thinking it does affect the property in that way.

Mr. *Woodroffe*, in his argument, relied very strongly upon the use of the word "assign," and upon the reservation of a life interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. *Woodroffe* wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument; but the instrument was prepared by *Lal Sundar*, and we must not construe with too great nicety, or assign too much weight to, the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. We must remember that wills are comparatively new in any part of *India*, and are of more recent introduction in *Oudh* in respect to this class of property. So with respect to the reservation of a life interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted

with anything in his lifetime, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies.

Upon the whole, therefore, looking at what are the substantial characteristics of the document which have been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that the reasons for holding it to be a will have a decided preponderance over those which would lead them to hold it to be a deed.

It remains to consider the objections to the validity of the instrument considered as a will. First, it was said that the disposition made by it was beyond the power of *Maharaj Singh*, because the property was governed by a previous will or declaration, whichever it may be, of *Beni Singh*, dated the 8th of March, 1860, which fixed a character upon the property that no subsequent possessor could depart from. The answer to that is that Act I. of 1869, s. 11, gives not only to the original talukdar, but to every heir and legatee of talukdar, power to transfer or to bequeath the estate which is granted to him. It was suggested that sect. 11 is controlled by sect 19, in which there is a proviso "that nothing herein contained shall affect wills made before the passing of this Act." But sect. 19 is for the purpose of applying to wills made under Act I. of 1869 a number of sections contained in the *Indian Succession Act*; and their Lordships are of opinion that the proviso only applies to the sections or provisions contained in sect 19, and not to those contained in the whole of Act I. of 1869.

Then it is said that there was undue influence used to coerce *Maharaj Singh* into executing the instrument. On that point there is the finding of both the Courts below against the Appellant, and the subject-matter is one on which this Board would be exceedingly reluctant to disturb concurrent findings of the Court below. But it is said that they ought to be disturbed, because evidence of undue influence was tendered and rejected. It becomes important then to see whether there was any evidence tendered for the purpose of shewing any undue influence. It is not shewn that any such evidence was tendered, excepting what is called a revocation, or an attempt to revoke, by *Maharaj*, long after the date of the instrument in question. Now of course it might happen that a revocation or an attempt to revoke should be accompanied by circumstances shewing that undue influence had been used in procuring the execution of the instrument or throwing light upon that question. But no such circumstances are suggested. In the argument of counsel, in the record, nothing is spoken of but the bare fact of what is called the revocation, which it is said is a relevant fact corroborative of another relevant fact, viz., the undue influence. On the passage which shews how the Court dealt with the matter, the same remark occurs. And the reasons given for appealing to the Judicial Commissioner's Court seem to make it quite conclusive that no other evidence was tendered. There are two separate reasons in the record, one relating to undue influence and the other relating to the revocation. The one relating to undue influence uses this language: "From the time when and the manner in which document C was executed, and the circumstances under which such an unnatural and unusual disposition of a valuable property was unnecessarily made by *Maharaj Singh*, the presumptions and probabilities are very strong in support of the oral evidence adduced by the Plaintiff in proof of the document having been obtained by means of fraud, misrepresentation, coercion, and undue influence." That raises the whole question as to what occurred at the time when the document was executed; and no evidence was excluded on that point. Then the 18th reason for appeal is; "The Lower Court is wrong in having excluded oral evidence of the cancellation of the

document C by *Maharaj Singh*"; and it goes on to argue that oral evidence of that fact was admissible. So that it is quite clear that the fact alone was to be proved by the rejected evidence, and it is impossible to suggest that the fact standing alone would have any bearing on undue influence used on the execution of the instrument.

All the other arguments against its validity, as to its return into *Maharaj's* hands, its cancellation, the non-delivery of possession, and so on, turn upon the hypothesis that the instrument was a transfer and not a will; and therefore it is not necessary to make any further observations upon them. The consequence is that all the objections to exhibit C fail; and as to list A, the suit must be decided against the Appellant.

Now their Lordships come to list B, which comprises things not affected by exhibit C. With respect to that property there was an alteration in the issue settled by the First Court, and a great deal of argument was used to shew that there ought to have been no such alteration; but it is quite clear that the Appellant is not damnified by it, whether it was right or wrong. If he could claim the whole of the property and when that was decided against him could fall back and claim half, he might possibly be injured by the alteration of the issue; but he cannot do that, because the impartibility of the property is and always has been common ground between him and the Respondent. Treating the property as impartible, the case can be argued in favour of the Appellant just as well under the issue as it stands as it could be argued under the issue as it was originally framed.

As the issue stands the argument is presented in this way: Mr. *Woodroffe* says that as between *Beni* and his three sons the latter take by way of unobstructed inheritance; that if the property had been subject to the ordinary law of the Mitakshara, on *Beni's* death the three sons would have taken; but it is impartible property, and therefore the eldest son *Maharaj* took the whole; on the death of *Maharaj* the question comes, who is the heir to *Beni*; and again, the estate being impartible, the eldest must take the whole. And a passage was read from Mr. *Mayne's* "Hindu Law," referring to authorities, and saying that in general such estates—that is, impartible estates—descend by the law of primogeniture.

Now however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descent according to the law of primogeniture, it is impossible to say that there is no such guide in this case. As to the taluka, there is a great deal of evidence to the effect that the law of primogeniture has not prevailed. On the 20th of February, 1860, *Beni Singh*, the then talkudar, being called upon to state what the law of devolution of the estate is, says:—"The usage established by prescription in petitioner's family is still in force; namely, that out of several sons an able one had up to this time been selected and nominated as talukdar, without reference to seniority"; and then he prays that the Government will select an able one. That is to say, according to him, that law which is familiar to us under the name of tanistry, or something very like it, prevailed in his family.

On the 8th of March, 1860, *Beni Singh* executed an instrument by which he states his desire that after his death his estate shall be maintained in his family entire and undivided according to the custom of raj-gaddi, the younger brothers receiving maintenance from the gaddinashin, the successor to the estate for the time being. That document is not without ambiguity, but it does not assert the law of primogeniture with clearness.

The next document is a parwana, issued by the Deputy Commissioner of *Sitapur* to *Beni Singh* on the 19th of August, 1861; and it seems to have been issued because the Government had not been told with exactitude what the rule of succession was or was to be. The parwana runs thus:—"You are instructed that if the rule of primogeniture

or the custom of Masnad Nashing be not in force in your family, it is essentially necessary that you should execute a will naming your successor therein." Now *Beni Singh* does not reply to that, that the rule of primogeniture was in force in his family, and therefore he did not wish to execute a will; but he answers, "In compliance with your order conveyed in the foregoing letter, I will execute my will in favour of an heir." It does not appear that *Beni Singh* did execute any will, but he promised to make a will on the footing that the rule of primogeniture was not in force in his family.

The next act is the formation of the lists of talukdaris; and in that important operation we find the taluka entered, not in list 3 which contains the primogeniture estates, but in list 2, which contains the estates which go to a single heir.

Now in all these proceedings it is the taluka or the property comprised in list A which is the main object, though statements are made in general terms as to the custom of the family. But in 1872 a suit was instituted by *Ishri*, the present Appellant, to recover from *Maharaj Singh* the taluka, and also moveable property valued at Rs.84,000. *Baldeo Singh* was also made a Defendant to the suit, so that whatever was decided in that suit was decided between the parties to this appeal. The Rs.84,000 would seem to come under the same consideration as the moveables in list B in the present suit. It is observable that in the present suit list A contains no moveables at all. All the moveables are in list B; and though it is not so clear as might be wished, the probability is that the moveables which were the subject of the suit of 1872 were governed by the general custom of the family.

In that suit *Ishri* filed a written statement in which he says, "On the 20th of February, 1860, Plaintiff's father, by a will of the same date,"—meaning the statement made to the Government,—"stated the family usage regarding succession, which Plaintiff's father desired to be followed after his death." Then he is examined; and in his examination he says, "In my family the eldest brother has never succeeded to the taluka;" and he gives one or two instances to shew that such is the fact. In giving judgment the Deputy Commissioner of *Sitapur* observes that all he has to consider is the Plaintiff's title to the taluka *Kanhmow*. He takes a distinction between the considerations that apply to the taluka *Kanhmow* and the considerations that apply to *Nimchaina*,—something which was the subject of a subsequent grant; but he takes no distinction between the considerations that apply to taluka *Kanhmow* and those which apply to the moveables on which he is deciding.

The case set up by *Ishri* principally consisted of a document which was held to be forged, and it is remarkable that in that document he continues to put into *Beni's* mouth the assertion of the principle that the ablest person is to succeed—and after extolling the intelligence and gravity of temper and other good qualities of *Ishri*, *Beni* is made to say in the forged instrument that he desires *Ishri* to succeed him in preference to *Maharaj* or *Baldeo*. But the Deputy Commissioner of *Sitapur* dismissed the suit on the ground that though there was evidence that it was the custom of the family for the most able to succeed, there was no evidence that *Ishri* had been selected as such. Towards the end of his judgment he says, "There is no doubt that this was the custom in most talukas in this district, and was probably the custom of the smaller talukas in the greater part of *Oudh*. Wills however at that time were unknown."

That seems very like a decision with regard to property other than the taluka, that tanistry rather than primogeniture was the governing rule of the family. Even if the decision concerns the taluka alone, their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluka to the law relating to all the other family property, and says there is a presumption from the actual decisions

relating to the taluka that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to shew that the other family property followed a line of devolution different from that of the taluka.

Whether the evidence would prove the case as regards list B in favour of the Respondent if he were the party claiming and the Appellant were in possession, is not now the question. The question is, whether the Appellant, having the *onus probandi* on him to shew that primogeniture is the law of the family, has proved his case; and he certainly is very far indeed from proving his case, the evidence so far as it goes being the other way.

The Appellant therefore fails on all his points; and their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitor for Respondent: *W. Buttle.*

12th, 13th, 14th and 15th February; and 22nd March, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of the North-Western Provinces at Allahabad.

RAJAH RUP SINGH (Plaintiff) ... } *Appellant,*

and

RANI BAISNI and the COLLECTOR OF ETAWAH (Defendants) . } *Respondents.**

Mitakshara—Impartible Raj—Succession in joint family to ancestral, impartible, estate—Right of nearest male collateral—Exclusion of widow, where the family is joint, and the estate not separate.

Impartible, ancestral, estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint.

Chintamun Singh v. *Nowlukho Kunwari* (1) referred to and followed.

A female cannot inherit impartible, ancestral, estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.

Maharani Hiranath Koer v. *Ram Narayan Singh* (2) approved. Where Raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, *held* that the nearest male collateral relation of the last Rajah, who died without male issue, was entitled to succeed in preference to the Rajah's widow.

This relation, viz., a brother of the late Rajah's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held* that he had not thereby been deprived of his right of succeeding as a member of the joint family.

The raj estate in question originated in the partition of a more ancient one with others out of which minor estates were formed.

If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another.

Appeal from a decree, (7th May, 1880) of the High Court affirming a decree (25th September, 1878) of the Officiating Judge of *Mainpuri*.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, for the Appellant.

Mr. *C. W. Arathoon*, for the Respondent *Rani Baisni*.

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* 11 Cowell's Ind. Ap. 149; I. L. R 7 All. 1.

(1) I. L. R. 1 Cal. 143; L. R. 2 Ind. Ap. 268; 3 P. C. J. 537.

(2) 9 B. L. R. 274.

22nd March 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a decision of the High Court of Judicature for the *North-Western Provinces* by which a decree of the Judge of *Mainpuri* in favour of the Defendants, the present Respondents, dismissing the Plaintiff's suit, was affirmed. The Appellant, who was the Plaintiff, sued for possession of the estate called raj *Bhara* comprising the villages and other moveable and immoveable properties specified in the schedules annexed to the plaint by right of succession to the deceased Rajah *Mahander Singh*, according, as stated in the plaint, "to the custom prevalent in other estates and the usage of the family of the Rajah of *Bhara*."

The Plaintiff in his plaint stated that:—

"The ancient usage of the Rajah of *Bhara*, in common with the other families of the Rajahs, is that, after the decease of a Rajah, his nearest and eldest male heir succeeds him, to the exclusion of the other male heirs and the total exclusion of women. That when Rajah *Mahander Singh* died on the 22nd of September, 1871, the revenue authorities caused the name of his widow to be recorded, notwithstanding the presence of the Plaintiff, the nearest heir; that they subsequently placed the estate under the management of the Court of Wards, who fixed an allowance of Rs.50 for the Plaintiff, which he still receives."

The Rani, Defendant in her written statement stated, amongst other things, that the custom alleged by the Plaintiff had no existence; that there was nothing in the history of the family of the Rajah of *Bhara* to prove that a widow was ever deprived of the possession of the estate of her husband in the presence of the male relatives of her deceased husband; that as the property of her deceased husband was separate she was, under the general rules of the Hindu law, entitled to enjoy it during her lifetime; that the Plaintiff bore a very bad character; that he had taken arms against the Government during the mutiny, and was guilty of many atrocities; and his property was confiscated and made over to *Lala Laig Singh*.

The Collector as manager under the Court of Wards, also appeared and defended the suit. He in his written statement stated that the family custom alleged by the Plaintiff did not exist; that the Plaintiff and his nephew, the late Maharajah, were separate in estate, and that, therefore, according to the ordinary rules of Hindu law, the Rani, Defendant, was entitled to succeed to the property of her deceased husband in preference to the Plaintiff.

The raj, although it was not proved ever to have been a principality in the strict sense of the word, or endowed with sovereign rights, was an ancient ancestral impartible estate which had always been held by a single member of the family at a time, and had passed for several generations in lineal succession according to the law of primogeniture.

Pertab Singh, the father of the late Rajah, *Mahander Singh*, was the elder brother of the Plaintiff, who, as a younger brother, became entitled, according to the usage of the family, to maintenance, and for some time after the death of his father received an annuity of Rs. 1,000 out of the estate of the raj. The family was joint and undivided down to the time of the Indian Mutiny; but it appeared that, in consequence of the Plaintiff's misconduct during the disturbances, payment of his annuity was withheld with the sanction and under the direction of Government, and that in a suit against the manager of the Court of Wards to enforce payment during the minority of the late Rajah, it was held that there had been that which, adverting to the nature of the property, was equivalent to an attachment thereof, and the suit was dismissed. There had not, however, been any adjudication of forfeiture under Act XXV. of 1857, nor had any proceeding ever been taken under that Act with reference to the estate itself.

It was contended on the part of the Defendants that, in consequence of the proceedings with reference to the maintenance annuity, the legal status of the Plaintiff was altered, and that he ceased to be a member of the joint family.

Their Lordships are clearly of opinion that there is no foundation for contending that the stoppage of the annuity and the proceedings in respect thereof amounted to a confiscation of the estate, or in any manner altered the status of the Plaintiff as a member of the joint family.

The Mitakshara is the Hindu law of inheritance in the district in which the estate is situate, and it is clear that according to that law, in the absence of any special custom to the contrary, the Plaintiff as the uncle of the deceased Rajah, and the surviving member of the joint family, was entitled to succeed to the ancestral estate upon the death of his nephew. According to the Mitakshara a widow is not entitled to succeed to her husband's estate in preference to collateral male heirs, unless he is separate, or as in the *Shivagunga* case, his estate was separate or self-acquired (see Mitakshara, cap. 2, sect. 1, pars. 8–19, and 30 and 31, note).

The cases were all reviewed by the late Chief Justice of Bengal, Sir *Richard Couch*, in the case of *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* (1), in which, in a careful and well considered judgment, it was held that a female cannot inherit an impartible ancestral estate belonging to a joint Hindu family, governed by the Mitakshara, when there are any male members of the family who are qualified to succeed as heirs; that this is a rule of law not dependent on custom, and that a custom modifying the law must be a custom to admit females, not a custom to exclude them That case was upheld by the Judicial Committee in the case of *Chintamun Singh* v. *Mussumut Nowlukho Kanwari* (2), and their Lordships are of opinion that it was correctly dicided and is a binding authority.

In the last-mentioned case, following the decision in 13 *Moore's* Indian Appeals, pp. 333 and 339, it was held that an ancestral estate, even though impartible, is not the separate or self-acquired estate of the single member upon whom it devolves, so long as the family continues joint.

In the argument before their Lordships some importance was attached by the learned counsel for the Respondents to the manner in which the Plaintiff's case was stated in the plaint, but their Lordships are of opinion that in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the Lower Courts.

The following is the issue upon which the parties went to trial, viz., "Whether, according to the custom relied upon by the Plaintiff, and under the Hindu law, the Plaintiff has a right to succeed to the guddi, and whether the Plaintiff's character can in any way affect the suit or not." The plaint stated that "the ancient usage of the raj of *Bhara*, in common with other families of the Rajahs," was, "that upon the decease of a Rajah his nearest and eldest male heir succeeds him to the exclusion of the other male heirs, and the total exclusion of women," that is to say, that females were excluded by a male heir.

The Zillah Judge in dealing with the case, says:—

"Plaintiff alleges that the property in question is ancestral property belonging to a joint and undivided Hindu family governed by the law of the Mitakshara, of which he and the deceased Rajah *Mahander Singh* were members; that by virtue of a custom prevailing in the family, the estate of the Rajah of *Bhara* was impartible; that it was enjoyed by a single members of the family at a time, and devolved, on the death of the holder, on the eldest male heir; that *Mahander Singh*, the last holder, having died without male issue, he, the

(1) 9 Beng. L. R. 274.

(2) Law Rep. 2 Ind. Ap. 263, 270; 3 P. C. J. 537.

Plaintiff, being the eldest collateral male heir, was entitled to succeed to the estate, to the exclusion of the widow of *Mahander Singh*. The Defendant pleads,

"(1) That the custom alleged by Plaintiff, whereby females are excluded from the succession, has no existence.

"(2) That the Plaintiff and his nephew, the late Rajah *Mahander Singh*, were *separate in estate*, and were not members of a joint undivided Hindu family, and that, therefore, according to the ordinary rules of Hindu law, the Rani Defendant, was entitled to succeed to the property of her deceased childless husband in preference to the Plaintiff."

He further says :—

"It is admitted on both sides that the estate is impartible, and is enjoyed by a single holder at a time. It is admitted that the mode of succession is governed by special custom. The dispute is as to what that special custom is."

Ultimately he arrived at the conclusion, first, that the Defendant had clearly made out that the Plaintiff's contention that widows never succeeed to a raj is untrue; and secondly, that there was good evidence that in the family to which the possessors of the estate belonged, the custom was that the widow is not excluded by collaterals, and he therefore dismissed the suit with costs.

Upon appeal, the High Court affirmed the decision. The Chief justice held that there was sufficient evidence of a custom by which the widow, failing direct descendants, was not excluded by collaterals. Mr. Justice *Pearson* agreed with the District Judge, and held, first, that the Plaintiff's contention that widows never succeed to a raj in that part of the country is untrue; and secondly, that there was good evidence that, in the family to which the possessors of the estate in question belonged, the custom was that the widow is not excluded by collaterals.

With reference to the findings of the Zillah Judge, and of Mr Justice *Pearson*, that the contention of the Plaintiff that widows never succeed to a raj in that part of the country is untrue, their Lordships fail to find that the Plaintiff ever made an allegation to that effect. His allegation was that, according to the ancient usage of the Rajah of *Bhara*, male heirs succeeded to the exclusion of females. He, no doubt, in his plaint, used the words "according to the custom prevalent in respect of other estates," and also the words "in common with the other families of the Rajahs." The main allegation had reference to the usage of the raj of *Bhara*, and was "that, after the decease of a Rajah, his nearest and eldest male heir succeeds him, to the exclusion of other male heirs and the total exclusion of women," and that allegation was true; for the raj of *Bhara*, from its earliest creation, had always descended to a male heir, and no female ever succeeded to it. The allegation made no distinction between lineal and collateral heirs, or between widows and other females.

It is not certain to what other estates or to what other Rajahs the Plaintiff referred when he added the words, "in common with the other families of the Rajahs;" whether he meant the Rajahs of the other estates which were formerly united with *Bhara* or not is not very important, he evidently referred to other estates and Rajahs similarly circumstanced, or in some way connected with the raj of *Bhara*, and not to every raj in that part of the country, whether the Rajah was separate or a member of a joint family, or whether the raj was ancestral or self-acquired. But, however this may be, it is clear that the issue did not impose upon the Plaintiff the necessity of proving that widows never, under any circumstances, succeeded to a raj in that part of the country.

The first part of the finding, therefore, is irrelevant, and the case must be decided with reference to the question whether the Mitakshara law of succession had been so far modified by custom, with respect to the ancestral raj of *Bhara*, as that failing lineal descendants of a

deceased Rajah, his widow was entitled to succeed to the raj in preference to the Plaintiff, who was a collateral male heir and the eldest male member of the joint family. No such case ever occurred in respect of the raj of *Bhara*, and their Lordships are of opinion that there is no evidence to prove such a custom.

It was contended that a case had occurred in respect of the raj of *Ruh Ruh*, in which a widow had succeeded in preference to a male collateral.

The District Judge stated that the estate of *Bhara* was—

"One of five, all of which came from a common stock and had a common ancestor, the Rajah *Singandeo*, who lived 650 years ago."

He proceeded,—

"The five were,—

"(1) *Bhara* (the property in suit).
"(2) *Jaggamanpur*.
"(3) *Ruh Ruh*.
"(4) *Kakhouto*.
"(5) *Nakkatpatti*.

"The last family, *Nakkatpatti*, is extinct, and the second family, *Jaggamanpur*, has split up into the families of *Tarsore*, *Sarawan*, *Bhaddek*, *Hardoe*.

"It appears that no instance, as far as is known, has occurred in raj *Bhara*, where the Rajah has died sonless, until the present time.

"But instances of this have occurred in other branches of the common family which descended from Rajah *Singandeo*, and are adduced by Defendant in support of her allegation that the kul-rit, or family custom, and raj-rit, or custom of the raj, is as she alleges it to be.

"Thus, in the allied family termed raj *Ruh Ruh*, it is shewn that Rajah *Kussul Singh* died, and was succeeded by his widows, Rani *Chandelin* and Rani *Bhadaurni*, although his younger brother, *Sambar Singh*, and the sons of *Sambar Singh*, were alive."

A similar statement is made by Mr. Justice *Pearson*, as to the origin of the five estates. He says:—"The estate in question is one of five which originally constituted a single property, and belonged to Rajah *Singandeo*, the common ancestor of the families which have since held them separately, a partition of them having been made between his five sons."

The fact of the formation of the five separate estates by the partition of one entire estate is not disputed, and it may be assumed, although not necessary to be decided, that there was such a connection between *Ruh Ruh* and *Bhara*, that evidence of a custom of descent in one of them would be admissible in support of a similar custom in the others. There is, however, no evidence except in one single instance in *Ruh Ruh* that a female ever held any one of the other four principal estates.

With respect to that exceptional case in *Ruh Ruh*, the district Judge held it to have been shewn that when Rajah *Kussul Singh* died he was succeeded by his widows Rani *Chandelin* and Rani *Bhadaurni* although his younger brother *Samber Singh* and the sons of *Samber Singh* were living.

Mr. Justice *Pearson* also treated the case as an instance of widows succeeding in preference to a niece's son, meaning probably the son of a nephew.

It appears, however, to their Lordships that it was not a case of succession by inheritance at all.

Rajah *Raghunath Singh*, a member of the *Ruh Ruh* family, and a great great grandson of the deceased Rajah *Kussul Singh*, was examined as a witness and stated that in his family women never sat on the guddi; that upon the death of his great grandfather *Kussul Singh*, *Himmanchal Singh*, his nephew's son, sat on the guddi, and after him *Kussul Singh*, who appears from the pedigree to have been the son and nephew of the deceased Rajah.

Mr Justice *Pearson*, in dealing with the evidence of this witness, says:—

"The Plaintiff's witness, Rajah *Raghunath Singh*, the representative seemingly of the *Ruh Ruh* branch, avers generally that females are altogether excluded from succeeding to their husbands' estates by the custom of his raj. The only instance mentioned by him in support of his

assertion is that his great grandfather, *Kussul Singh*, was succeeded by his niece's son, *Himmanchal*."

He should rather have said the son of his great nephew, *Ram Khaman Singh*

He proceeds :—

"His statement on this point is opposed to the evidence of *Rao Jodha Singh*, of *Kikhouto*, of *Kuar Roshan Singh*, and of *Kalander Singh*, witnesses on the other side, which is corroborated by two exhibits on the record, one being a copy of a proceeding of the Provincial Court at *Bareilly*, dated the 12th of April, 1813, and the other being a copy of a proceeding of the Civil Court of *Mainpuri*, dated the 12th of December, 1849. From the evidence indicated it appears that *Himmanchal's* claim to succeed to his grandfather was based on the allegation of his having been adopted by one or both of Rajah *Kussul Singh's* widows and was disallowed. The instance cited by Rajah *Raghunath Singh*, so far from proving the custom alleged by him, is really an instance of widows succeeding in preference to a niece's son."

It appears from the record of the Provincial Court, referred to by the learned Judge, that Rani *Bhadaurni*, the widow of the deceased Rajah *Kussul*, who is supposed to have succeeded on his death, and who was one of the Defendants in an action at the suit of *Himmanchal*, was the junior widow, and that she in her answer admitted that, after the demise of *Kussul Singh* (he died in 1774), his estate fell under the management of the agents (karpardazen) therein named, and that a nankar allowance was assigned by the Government (which must have been the Native Government) to her and Rani *Chunder Bans*, the elder widow of the deceased Rajah; that in the year 1195 = A. D. 1787, she caused the settlement of the estate to be made with *Himmanchal*, who kept the accounts, and became the proprietor; that in that year losses amounting to Rs.7,300 occurred, which she paid to the Government, that her name, with that of *Sundun Singh*, having been entered in the decennial register, she in 1210 Fusli = about A.D. 1802 (which was shortly after the cession of *Etawah* to the *East India Company*) caused the settlement to be made with *Himmanchal Singh*, under the suretyship of *Sundun Singh*. She contended in her answer, that under that settlement *Himmanchal Singh* was one of her karindas, and that he having become insubordinate, she subsequently procured the second and third revenue settlements to be made with herself. *Himmanchal*, on the other hand, contended that he had been adopted by the elder widow as the son of the deceased Rajah, that the Defendant, *Bhadaurni*, the junior widow, had obtained the second and third revenue settlement by fraud in his absence, and he sued to recover possession. The litigation commenced in 1810, and it seems that the only issue raised between the parties was as to the validity of the alleged adoption. That issue was decided against *Himmanchal* by the Provincial Court upon the ground that Rani *Chunder Bans* had no authority from her husband to adopt, and on the 12th of April, 1813, it was ordered and decreed by that Court that *Himmanchal's* suit should be dismissed. The decision of the Provincial Court was, on appeal to the Sudder Court, affirmed on the 11th of August, 1817, and it was decreed that the property in dispute should, in right of succession, descend to *Koer Ghunshiam Singh* as the proprietor thereof. Subsequently, on the 10th of August, 1818, it was ordered that possession be given to *Koer Ghunshiam Singh*, if he should enter into sufficient security for subscribing to the appeal to Her Majesty in Council. This he appears to have done, and the appeal was heard, and in 1834 the decree of the Sudder Court was affirmed by Her Majesty in Council, so far as it affirmed the decree of the Provincial Court of the 12th of April, 1813, and reversed so far as it decreed that the landed property should, in right of succession, descend to *Ghunshiam Singh* as proprietor thereof, and had the effect of declaring him entitled to be put into possession.

It is clear from the above statement that the widows did not succeed to the

raj by inheritance, or to an impartible estate according to the rule of primogeniture, even if such a rule could be applicable to the case of two widows; on the contrary, it appears that upon the death of *Kussul* the estate was put under management of Karpardazen by the Native Government, and an allowance assigned not to the elder widow, but to the two widows jointly, probably as the guardians of *Himmanchal*, and that subsequently the revenue settlement was made with *Himmanchal*, and afterwards with the younger widow, *Bhadhaurni*.

It is not clearly shewn who obtained possession of the estate after the decree of Her Majesty in Council. Rajah *Raghunath Singh* stated that *Kussul Singh* sat on the guddi after *Himmanchal*. This, however, is not very material, as it is clear that both the widows died before 1834, and that no other female ever obtained possession of the estate. Rajah *Raghunath* must have been under a mistake when he stated that his grandfather's widow was living at the time when he gave his evidence.

It is rather remarkable that the District Judge, having found that the two widows succeeded upon the death of their husband (a finding in which Mr. Justice *Pearson* concurred), should have considered that a descent to the two widows jointly was evidence of a custom as to descent in *Bhara*, which he admitted to be an impartible raj held by only one member of the family at a time, and that one of the eldest.

It was stated by *Koer Roshan Singh* that the elder widow succeeded to *Ruh Ruh* on the death of her husband, and the younger widow on the death of the elder, but that is quite contrary to the evidence, and to the findings of the District Judge and of Mr. Justice *Pearson*.

In the case of *Ramalakshmi Ammal* v. *Sivanantha* (1) it was said:—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usage in particular districts and families in *India*, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further necessary that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Their Lordships entirely concur in that doctrine, and they are clearly of opinion that there is not sufficient evidence that, even in the raj of *Ruh Ruh*, a custom existed by which a widow succeeded by inheritance to the estate of her husband in preference to collateral heirs on his dying without issue.

The contention of the Defendants was, that the Plaintiff and the late Rajah were separate, not that there was a custom for widows to inherit in preference to collaterals in the case of an undivided ancestral estate in a joint family; yet inferences were drawn in favour of such a custom by the District Judge and Mr. Justice *Pearson*, from descents to widows in the case of certain minor estates carved out of some of the five principal estates, such, for example, as *Tursore*, *Sarawan*, *Sahbad*, and *Mulhousie*. These estates, it was said, descended to widows, though collaterals must have been living. Three of these estates were granted for maintenance. Neither *Tursore* nor *Sarawan* was a raj. *Mulhousie* was not impartible. No clear or satisfactory evidence was given that the estates were not separate estates of the last holders; whereas, if they were separate or self-acquired (which estates granted for maintenance probably would be), the widows would succeed, in due course of law, as in the *Shivagunga Case* (2) and the case of *Periasami* v. *Periasami* (3). In the only instance, as regards *Sarawan*, in which a widow succeeded to a minor estate created out of the raj estate, her

(1) 14 Moore, Ind. Ap. 570; 3 P. C. J. 108

(2) 9 Moore, Ind. Ap. 539; 2 P. C. J. 25

(3) Law Rep. 5 Ind. Ap. 61; 3 P. C. J. 795.

husband left a son, and upon a mutation the name of the son as well as that of the widow was entered. The case shews how easily witnesses may create a false impression when speaking generally of the succession of widows without shewing, and probably without knowing, the circumstances under which such successions took place. Other cases, such as one in *Mirzapore* and another in *Cawnpore*, were relied on, in respect of which no connection between them and *Bhara* was shewn to exist. Such cases, even if they could have any weight, were not admissible as evidence to prove a family custom in *Bhara*. (The *Marquis of Anglesey* v. *Lord Hatherton* (1)).

Upon the whole their Lordships are of opinion that the Plaintiff made out his case satisfactorily, viz., that the raj of *Bhara* was an ancient raj, and an ancestral estate, and that by virtue of an ancient custom in the family it was impartible, and to be held and enjoyed by only a single member at a time. His title then depended upon his legal right under the Mitakshara, and according to that law, the estate being ancestral, and the family undivided, he, as the nearest male heir of the deceased Rajah, and the surviving member of the undivided family, was entitled to succeed to the raj in preference to the widow. The Defendants did not prove their allegation that the Plaintiff and the deceased Rajah were separate, as alleged by them, and it was for them to prove, by clear and unambiguous evidence, that the law of succession, according to the Mitakshara, was modified by an ancient uniform custom in favour of a widow. This, in their Lordships' opinion, they failed to do. The result is that their Lordships will humbly advise Her Majesty to reverse the decrees of both the Lower Courts, and to order and decree that the Plaintiff do recover possession of the estate called raj *Bhara*, together with his costs in both the Lower Courts.

The Respondents must pay the costs of this appeal.

(1) 10 M. & W. 218.

Solicitors for Appellant: *W. & A. Rankin Ford.*

Solicitor for Respondent the Collector: *H. Treasure.*

Solicitor for Respondent Rani *Baisni*: *T. L. Wilson.*

15th and 16th February, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Commissioner of Ajmore.

RAO BAHADUR SINGH, (Plaintiff) . ... } *Appellant,*

and

MUSSAMATS JAWAHIR KUAR AND PHUL KUAR (Defendants) } *Respondents.**

Claim by istemrardar to resume a subordinate tenure.

A custom was alleged, entitling a Patwi Thakur, or Chief, belonging to the Rathor Clan of Rajputs, who was the istemrardar of an ancient and impartible talook in Ajmere, to resume land formerly part of it but granted some generations back, as a subordinate estate, to a collateral relation of the chief. The ground of the resumption claimed was that the last successor to the estate so granted had died without issue and without adopting. *Held*, that the Commissioner's judgment, which was that a right of resumption, exercisable merely on the above ground, had not been established, was correct; being supported, to some extent certainly, by answers received by the Chief Commissioner on inquiry from the neighbouring durbars of Rajputana Chiefs; and, on the whole, by the balance of the evidence.

Appeal from a decree (16th February 1884) of the Commissioner of *Ajmere*, reversing a decree (14th June 1887) of the Assistant Commissioner, *Ajmere*.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne* appeared for the Appellant.

The Respondent did not appear.

* 11 Cowell's Ind Ap 75; I. L. R. 10 Cal. 887.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

This is an action by the Rajah of *Masuda*, in the *Rajpootana* district, for the purpose of recovering possession of a subordinate estate within the taluka of *Masuda*, consisting of the village of *Nandwara* with two or three hamlets appurtenant to it, against the widows of the last owner, *Balwant Singh*, who died without natural issue. The plaint avers that,—"The subject-matter of the claim is that the Plaintiff is the proprietor of the taluka of *Masuda*, and by old-established custom, like his predecessors, enjoys the right to resume at any time any village assigned to any of his brethren for maintenance, and to provide for them in some other way." His case is that this sub-taluka, as it may be called (though it is sometimes called a jaghire), had been granted, some hundred years ago, to an ancestor of *Balwant*, the last owner, for maintenance; and that he is entitled at any time to resume it upon providing pecuniary maintenance for the tenants for the time being. This contention has scarcely been attempted to be supported. The Plaintiff therefore falls back upon the circumstances of this case and a more limited right; namely, a right to resume upon the death of the tenant without issue. The question is whether he has established this right.

In the suit a question was raised as to whether the widows had adopted a son in pursuance of alleged directions of their husband; and further whether, assuming that no such directions had been proved, the Rajah had by his conduct recognised the adoption. These questions have been found against the Defendants by the Lower Court; and that finding, though not in terms affirmed, appears in substance to have been adopted by the Court above, and it is in favour of the Appellant.

The Defendants denied that the grant was for the purpose of maintenance, alleging it to have been made in pursuance of some family arrangement or partition, and they denied the right claimed by the Rajah and most of the allegations in the plaint. The case came, in the first instance, before the Assistant Commissioner of *Ajmere*, who gave an elaborate judgment upon a number of issues which have become immaterial. The material finding is upon issue 13, viz.:—"Whether the Rao of *Masuda*, as head of the family, has the right to confiscate the tenure of *Nandwara*—(*a*) in spite of a legal adoption?"—that may be put aside; "(*b*) in spite of the existence and presence of a natural heir?" Here it may be stated that there is no dispute that *Ram Singh*, who was alleged to be adopted, would be the next heir to *Balwant* in the ordinary course of descent. The finding of the Assistant Commissioner is in these terms:—"I feel bound to decide this issue in the affirmative, and to decide that the Thakur of *Nandwara*, having died without a legitimate heir of the body, the chief of *Masuda* is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the daughters also, of the deceased. The evidence before the Court goes to show that confiscations have occurred frequently in former times, sometimes because the minor chief died childless." The case went on appeal to the Commissioner of *Ajmere*. The Commissioner, not himself deciding the suit in the first instance, stated a case for the consideration of the Chief Commissioner. The Chief Commissioner directed various inquiries to be made of certain *durbars* of native princes. They reported to him; and, after considering their reports, he expressed his opinion that the judgment of the Assistant Commissioner should be reversed, and found that no such custom and no such right as that which the Rajah claimed existed. The Commissioner, acting on this opinion, reversed the judgment of the Assistant Commissioner. This appeal is preferred from the judgment of the Commissioner.

Documentary and oral evidence have been given, to which it is unnecessary to

refer at great length. The first important evidence consists of certain depositions which appear to have been taken before Mr. *Cavendish* in the year 1829, Mr. *Cavendish* being then Superintendent of *Ajmere*, and apparently charged with the duty of obtaining information with respect to tenure in *Ajmere* for the use of the Government. Various depositions have been put in, which were used before him. One or two of those depositions, which are very short, go the length of supporting the contention of the Plaintiff; but that is by no means their uniform tenor. There are others which qualify his right. There are some which state that, although he has a right to resume an estate, it must be upon substituting for it another estate. It is to be observed that *Bahadar Mal*, who probably represented him on that occasion, because he speaks of him as his client, being asked, "What powers does your client (the Istimrardar of *Masudah*) have with regard to the ejectment of the jagirdars?" answers, "In case of disloyalty, insurrection, and impropriety of conduct on the part of any jagirdar, my client can turn him out of the village; but if he shew no disobedience he may be allowed to continue in possession of his village as usual, or at his request my client may exchange his village for another, or fix a cash allowance." So it appears that the person who represented the Rajah on that occasion claimed no such right as that on which he bases his present suit, but simply a right of resumption for cause. Further, it would appear that all these depositions are given upon the hypothesis of its being shewn that the grant originally made to the jagirdar was a grant merely for maintenance; but that appears to their Lordships not to be established, the finding of the Assistant Commissioner on that subject being at least ambiguous, viz.:—"That the grant of *Nandwara* to the ancestors of the deceased thakur was an ordinary grant in 'gras' or 'hawalah' tenure: no evidence has been produced to rebut this natural presumption. The word 'bhaibat' has not been exactly defined or interpreted by the defence, and is a term which is vague in its meaning." Such a finding does not appear to shew that the grants were necessarily grants for maintenance, neither of these terms necessarily importing maintenance. If that be so, the evidence does not directly bear upon the question. However, assuming that the grant was made for maintenance, still these depositions do not, as a whole, amount to proof of the right claimed.

The next documentary evidence relates to a proceeding in 1853 before Colonel *Dixon*, which arose in this way: The tenant of *Jamola*, one of the dependent jagirdars, had refused to pay road cess, and had in other ways offended the Rajah. The Rajah thereupon claimed to resume possession of *Jamola*; and, in order to establish his case, he applied to various other jagirdars,—among others he applied to the father of *Balwant*—to give a deposition or statement in his favour. He wrote to them this letter: "You need not entertain any apprehension on account of the letter which I got you to write in the *Jamola* case. The signature formerly attached (to certain writings) by *Bhopal Singh* (the grandfather of the present Thakur of *Shergarh*), both at the time of the dispute regarding *Ramgarh* and the assessment made by the Honourable *R. Cavendish*, shall be respected. Moreover, you will be put to no inconvenience whatever; don't think it otherwise. I am at one with you. Should I act otherwise, God is between us, *i e.*, between yourself and myself." The substance of this letter, which is spoken to by one of the witnesses, rather points to this, that the Rajah asked these persons, who were to a certain extent dependent upon him, to sign a paper on the understanding that it would be of advantage to him and no detriment to themselves. Under those circumstances they did sign a paper, which is to this effect: "After usual compliments. By the grace of God we are all well, and trust that, by the blessing of God, this will also find you in good health. You are (our) master. You ask for our opinion in the matter of the aplication filed by the Thakur of

Jamola. We accordingly beg to state that we are all members of your family, and look to you for our support. We have no (adverse) intention as regards the villages which you may confiscate, if you intend to do so, as you are our master. What we ask is only bread; you may confiscate the villages if you like." This and the letter which has just been read are nearly contemporaneous. Their Lordships, under the circumstances, do not attach any great importance to this declaration.

A great deal of verbal evidence also has been adduced; but it is by no means of uniform character or all of it supporting the contention of the Plaintiff. The first witness, a zemindar, who seems to be a man of position, aged sixty years, gives this view of the right claimed: "For fault shewn, the masudah patwi has power to resume villages given as hawalah. I cannot say what power the patwi has to so resume in the absence of fault."

Without going through all this evidence, it appears to their Lordships that, although several cases of what is called confiscation or resumption are shewn, they have been, in almost every instance, from some fault or other. There is one instance indeed in which a jaghir is resumed upon the owner dying without issue, but in that case it happened that the Rajah was the nearest heir.

There appears to their Lordships no sufficient evidence to support the finding of the Assistant Commissioner that the Rajah had the right in the first of the three cases which he puts, namely, in the case of minor chief dying childless, to confiscate or resume the estate. The opinions of the *durbars*, which were taken by the Chief Commissioner, are, on the whole, adverse to any such right; two are distinctly adverse to it, and two are equivocal. Their Lordships, having regard to the opinion of the Chief Commissioner, who states that "In *Rajpootana* no positive rule of law exists on the matter, but there is no doubt that the patwi thakur is not entitled to resume an estate held as *Nandwara* was held merely because the holder died without adopting an heir,"—supported as that finding is, to some extent certainly, by the answers which were received from the neighbouring *durbars* and, on the whole, by the balance of evidence in the case—are of opinion that the judgment of the Commissioner of *Ajmere* should be affirmed.

They will therefore humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed.

Solicitors for Appellant: *W. & A. Rankin Ford.*

19th February, and 22nd, March, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Resident at Hyderabad, Deccan.

GOKULDASS GOPALDASS (Defendant); ... } *Appellant,*

and

RAMBUX SEOCHAND and Another (Plaintiff) ... ... } *Respondents.**

Effect of payment of prior mortgage by a subsequent incumbrancer, as against intermediate charge.

The mortgagor's right, title, and interest in certain immoveables in the *Deccan*, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid off the first mortgage

Held that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable But in India a formal transfer for the purpose of a

* 11 Cowell's Ind. Ap. 126; I. L. R. 10 Cal. 1035.

mortgage is never made, nor is an intention to keep it alive ever formally expressed.

It was ruled in the English Court of Chancery in *Toulmin* v. *Steere* (1) that the purchaser from an owner of an equity of redemption, with actual or constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that, as against such other incumbrance, the prior mortgage, paid off out of the purchase-money, is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid off afterwards by the purchaser. The above ruling, however, is not to be extended to India; where the question to ask is, in the interests of justice, equity, and good conscience, there applicable,—what was the intention of the party paying off the charge.

Appeal from a decree of the Resident at *Hyderabad* (24th June 1880), affirming a decree of the Judicial Commissioner of the *Hyderabad* Assigned Districts (28th February 1880), affirming a decree of the Deputy Commissioner of *Amraoti*, (8th August 1879).

Mr. *A. Kekewith*, Q. C., and Mr. *R. Hornel* appeared for the Appellant.

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe* for the Respondent *Rambux Seochand*.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

This is an appeal from an order of the Court of the Resident at *Hyderabad*, in the *Deccan*, dismissing an appeal from a decree of the Judicial Commissioner of the *Hyderabad* Assigned Districts, by which a decree of the Deputy Commissioner of the *Amraoti* district was affirmed. This decree was dated the 8th of August, 1879, and it was decreed by it that the Respondent *Rambux Seochand*, who was the Plaintiff in the suit, was entitled, as mortgagee, to possession of nine houses thereinafter described, and it was directed that he be put in possession thereof. The facts out of which the suit arose are as follows. On the 22nd of June, 1873, a firm carrying on business as bankers at *Amraoti* under the name of *Puranmull Premsukdoss*, by which name it has been sued, executed, by their manager *Bhairaodin*, a mortgage to *Rambux Seochand* of immoveable and moveable property at *Amraoti* for Rs.26,500, and interest. On the 18th of December the firm, having become further indebted to *Rambux Seochand* in Rs.40,000, executed in like manner to him a mortgage of other immoveable property in *Amraoti*, to secure the repayment of that sum, with interest. Of the nine houses which were the subject of the suit, and are described in the decree of the 8th of August, 1879, one was included in the former mortgage, and the other eight in the latter. The mortgagee was put in possession of six of the houses. As to the remaining three, the latter mortgage contained the following provision:—

"On account of the following three houses, which we have already mortgaged to the *New Bombay Bank* for Rs.30,000, reserving the mortgaged lien of the bank on these houses, we mortgage them to you in payment of the sum of Rs.16,000, subject to the condition that the *New Bombay Bank* has a prior right for the recovery of money due to it from these houses, and, after full recovery by it, you will be entitled to the balance, if any left. If the balance falls short, we ourselves will be responsible for the payment. At present, these houses being in the possession of the *New Bombay Bank*, we cannot put you in possession of them, and as soon as they will be redeemed, that is, as soon as the bank's possession of them ceases, you should understand that they are put in your possession."

The Appellant, *Gokuldass Gopaldass*, having obtained a decree for about Rs.19,000 against *Puranmull Premsukdoss*, caused the nine houses to be attached and sold in execution of it, and in September, 1876, himself purchased the right, title and interest of *Puranmull Premsukdoss* in them. On the 21st of April, 1877, he paid the bank Rs.5,000 on account of the mortgage debt, and on the 10th of May, 1877, Rs. 137. 2*a*. 10*p*. as payment in full of its claim upon the mortgage. The debt to the bank had previously been reduced. He

(1) 3 Mer. 210

appears to have taken possession of the nine houses, and on the 11th of July, 1877, *Rambux Seochand* brought a suit against him and *Puranmull Premsukdass*, who was made the first Defendant, to recover possession of them, alleging that he was entitled to it under the two mortgages to him. And if the houses were not restored to him, he claimed the mortgage money and interest.

The defence of *Gokuldass Gopaldass* was that the mortgages to the Plaintiff were fraudulent and without consideration, and made to defeat creditors, and that the agent had no authority to execute them. And, further, as to the houses mortgaged to the *New Bombay Bank*, that he had paid the money due to the bank, and had obtained the right of mortgage thereon, and the Plaintiff could not claim them until they had been redeemed by *Puranmull Premsukdass*. Issues were framed, the fourth being:—

"What was the effect of the payment made to the bank of *Bombay* in satisfaction of *Puranmull's* debt on the rights of the Plaintiff as mortgagee? Did possession vest in him thereupon?"

There was a dismissal of the suit by the Deputy Commissioner, and a remand by the Judicial Commissioner, of which it is not necessary to take any further notice. On the remand, the Deputy Commissioner found that the mortgages to the Plaintiff were "*bonâ fide*," that there was good consideration, that "possession passed to the Plaintiff in accordance with the terms of those deeds," and the Plaintiff was in possession when the Defendant attached the houses. Upon the fourth issue he held that when *Gokuldass* had paid the debt to the bank, he stood to the Plaintiff in the exact position in which the mortgagor, first Defendant, would have stood had he redeemed the bank's mortgage, and that the effect of the payment to the bank was to entitle the Plaintiff to immediate possession of the houses mortgaged to it. He gave the Plaintiff a decree for possession of the nine houses, and directed him to be put into possession.

This judgment was affirmed on appeal by the Judicial Commissioner, and a special appeal therefrom to the Court of the Resident at *Hyderabad* was dismissed.

Two grounds have been taken in the appeal to Her Majesty in Council from the decree of the Resident; (*a*) that the mortgages to *Rambux Seochand* were not *bonâ fide* or made for good consideration; (*b*) that as regards the three houses in mortgage to the *Bombay Bank*, the Appellant was entitled to stand in the place of the bank, and to retain possession of them until the amount paid by him to the bank was repaid.

As to the first ground, there are concurrent judgments of the Lower Courts against the Appellant, and the propriety of them was not disputed at the bar. Consequently the appeal fails as to this ground, and altogether so far as it relates to six of the houses.

Upon the second ground the question is whether the doctrine in *Toulmin* v. *Steere* (1) should be applied in this case. In the judgment of Sir *William Grant*, M.R., in that case there is a passage to the following effect:—

"The cases of *Greswold* v. *Marsham* (2) and *Mocatta* v. *Murgatroyd* (3) are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

The authority of *Toulmin* v *Steere* (1) has been much questioned, and it has been found upon examining the Registrar's book that *Greswold* v. *Marsham* (2) is no authority whatever for the proposition in support of which it has been usually cited (2 *Dart's* Vendor and Purchasers, 5th ed. p. 917). Vice Chancellor *Hall*, in *Adams* v. *Angell* (4), shews in how unsatisfactory a state the law is upon this point. He says (at p. 641):—

"Doubtless those cases have been questioned. In *Gregg* v. *Arrott* (5) Sir *E. Sugden* said that he and Sir *Samuel Romilly* thought 'at the time' it was

(1) 3 Mer. 210. (2) 2 Ch. Cas. 170.
(3) 1 P. Wms. 393. (4) L. R. 5 Ch. D. 634.
(5) Ll. & Goo. 251.

wrong; and in *Watts* v. *Symes* (1) Lord Justice *Knight Bruce* expressed doubts as to the decision. In the recent case of *Stevens* v. *Mid-Hants Railway Company* (2), Lord Justice *James* said as to *Mocatta* v. *Murgatroyd* (3), *Toulmin* v. *Steere* (4), and *Parry* v. *Wright* (5), 'Those cases, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines, saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off.' But the decision in *Toulmin* v. *Steere* (4) was recognised by Sir *George Turner* in *Squire* v. *Ford* (6), by Sir *J. Leach* and Lord *Lyndhurst* in *Parry* v. *Wright* (5), in effect by Lord *St. Leonards* in *Armstrong* v. *Garnett* (7), and by Lord *Cranworth* in *Otter* v. *Lord Vaux* (8). In *Anderson* v. *Pignet* (9) it was referred to by Lord *Selborne* as having been questioned by some persons, but his Lordship did not say that he approved or disapproved of it. It is said in some of the cases that the priority may be preserved."

When *Adams* v. *Angell* (10) came before the Court of Appeal, Sir *George Jessel*, M.R., said as to *Toulmin* v *Steere* (4),—"Assuming it, however, to be binding upon us, it amounts to no more than this, that, in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrances of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." This principle was acted upon in *Watts* v. *Symes* (1), where, as in *Toulmin* v. *Steere* (4), a first mortgage was paid off by the purchaser of the ultimate equity of redemption at the time of his purchase, and out of the purchase-money, but a declaration by the vendor that the first mortgage should be kept alive was considered sufficient to prevent a second mortgagee from treating it as extinguished.

In the case before their Lordships, the debt to the bank was not paid off out of the purchase-money. The Appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off that debt. When he paid the bank, some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin* v. *Steere* (4), but their Lordships do not think it necessary to do this, as they are not prepared to extend its doctrine to *India*.

There are some decisions in *India* which their Lordships think they ought to notice. In *Gaur Narayan Mazumdar* v. *Brajanath Kundu Chowdhry* (11), *A.* mortgaged certain lands to *B.*, and afterwards mortgaged the same to *C.*, who, having obtained a decree for the redemption of the mortgage to *B.*, paid off the debt to him; but it did not appear that he took an assignment of the mortgage. It was held by the High Court at *Calcutta*, on the authority of *Toulmin* v. *Steere* (4), that the first mortgage was extinguished and that a lease made by *A.* between the two mortgages was binding upon *C.* In *Itcharam Dayaram* v. *Raiji Jagha* (12), the High Court at *Bombay* held that, generally speaking, the purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation as regards such subsequent incumbrances as if he had been himself the mortgagor; he can neither set up against such subsequent

(1) 1 De G. M. & G. 244.
(2) Law Rep. 8 Ch. App. 1069.
(3) 1 P. Wms. 393. (4) 3 Mer. 210.
(5) 5 Russ. 142, 148. (6) 4 D. & War. 198.
(7) 9 Hare, 60.
(8) 2 K. & J. 650; 6 De G. M. & G. 642.
(9) Law Rep. 8 Ch. 187. (10) 5 Ch. D. 834.
(11) 5 Beng. L. R. 463.
(12) 11 Bomb. H. C. R. 41.

incumbrances a prior mortgage of his own, nor consequently a mortgage which he or the mortgagor may have got in. For this, *Toulmin* v. *Steere* (1), *Greswold* v. *Marsham* (2), and *Mocatta* v. *Murgatroyd* (3) are quoted. On the other hand the High Court at *Madras*, in *Ramu Naikan* v. *Subbaraya Madali* (4), held that a prior mortgagee, having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees, saying that in later cases the Judges had sought to mitigate the rigidity of the doctrine of Sir *W. Grant* in *Toulmin* v. *Steere*. The doubts as to that case, or the propriety of introducing the doctrine of it into *India* as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at *Calcutta* or *Bombay*.

The doctrine of *Toulmin* v. *Steere* (1) is not applicable to Indian transactions, except as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

In *India* the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* (1) seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

The obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid.

Their Lordships are of opinion that the Lower Courts in this case were wrong in holding that the Appellant was in the same position as the mortgagor. They hold that the mortgage to the bank was not extinguished, and that the Appellant, the second Defendant, had a good defence to the suit for possession of the three houses included in that mortgage. They will therefore humbly advise Her Majesty that the decree appealed from should be modified by omitting from it the houses which are described in it under the numbers 4, 5, and 6, and by dismissing the suit so far as it regards those houses with costs in the Lower Courts in proportion. And as the Appellant has failed on the question of the validity of the mortgages to *Rambux Seochand*, they make no order as to the costs of this appeal.

Solicitors for the Appellant: *Merriman, Pike, & Merriman.*

Solicitors for the Respondent *Rambux Seochand*: *Sanderson & Holland.*

(1) 3 Mer. 210. (2) 2 Ch. Cas. 170
(3) 1 P. Wms. 393. (4) 7 Mad. H. C. R. 229

20th and 21st February, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GOOROO DAS PYNE (Defendant) ... } *Appellant,*

and

RAM NARAIN SAHOO and another (Plaintiffs) ... ... } *Respondents.**

Limitation Act, IX of 1871, Sch. II, Arts. 48, 60, and 118.

The Defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands: *Held*, that neither Art. 48 of Sch. II of Act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor Art. 60 of the same schedule, fixing the limitation of three years to suits for "money payable by the Defendant to the Plaintiff," and to suits "for money received to the Plaintiffs use," were applicable to the present suit; but that, as a suit for which no period of limitation was provided elsewhere, it fell within Art. 118 of the same schedule, fixing for such suits the limitation of six years.

Appeal from a decree of a Divisional Bench of the High Court (4th July 1878), reversing a decree of the Subordinate Judge of the *Midnapore* District (12th September 1876).

Mr. *R. V. Doyne*, appeared for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that the Judgment of the High Court ought to be affirmed.

It appears that, as far back as March, 1865, *Modhoosodun*, who was the brother of the present Appellant, had taken some 1260 logs of timber which belonged to the Plaintiffs, and converted them to his own use. Soon after that a suit, No. 10 of 1865, was brought by the Plaintiffs against *Modhoosoodun* and another for the conversion of the timber, and a decree was obtained on the 30th of March, 1868, for the sum of 25,200 rupees, in favour of the Plaintiffs. That decision was appealed from to the High Court, which in January, 1869, reversed the decreee. An appeal was preferred to Her Majesty in Council, and on the 12th of December, 1873, the decision of the High Court was reversed, and the decree of the first Court established, namely, that the Plaintiffs were to recover a sum of Rs 25,200 from *Modhoosoodun* and the other Defendant. In the meanwhile *Modhoosoodun* had died, and the decree in the Privy Council was against his widow, as his representative, that the Rs 25,200 should be recovered from her. Subsequently an application was made to the District Court of *Midnapore* to execute the decree, and certain property was attached which the present Appellant claimed as his separate property. Only a very small portion of it was held liable to the decree, and the rest was ordered to be given up. Upon that the present suit was instituted for the purpose of trying whether the Plaintiffs had not a right to execute their decree against the property mentioned in the attachment, and which had been ordered to be given up. The Plaintiffs, however, did not rely merely on the fact that they had obtained the decree, and that the property was liable to be seized; but they made a further allegation, and stated that "*Gooroo Das Pyne*," the present Appellant, and the Defendant in the suit, "was benefited by the aforesaid timber taken by the *kurta Modhoosoodun*, and, after the death of *Modhoosoodun*, himself sold the aforesaid timbers, and appropriated the moneys obtained by the sale of the aforesaid timbers, and regularly

* 11 Cowell's Ind. Ap. 59; I. L. R. 10 Cal. 860.

conducted the aforesaid case. Both the brothers are, for the reasons mentioned above, answerable under the decree we have obtained in the aforesaid case for the afore-mentioned acts, although the name of *Modhoosoodun* alone was mentioned in that decree; and therefore we are fully entitled to realise the whole amount by the sale of the properties of both the brothers." Strictly speaking, the claim was to realise the decree from the property of the Defendant. The first Court held that a portion of the property which was claimed by the Defendant was liable to the execution, but that a great portion of it was not. Upon that an appeal was preferred by the Plaintiffs to the High Court, and notice of objections was given by the Defendant. The High Court held that notwithstanding the sale of the timber by the Defendant, and his receipt of the assets which were derived from the sale, he was not liable to have his property attached and sold under the execution against his brother; but they went on, and said :—"But although the Plaintiffs have been ill-advised in bringing their suit in the particular form adopted by them, and though we are unable to give them the particular form of relief desired, we think that on the facts proved we ought if we can, and that we are able to grant them such relief as they would have been entitled to obtain on a properly drawn plaint." It is quite clear that in this case the Plaintiffs did rely in their plaint upon the fact that the Defendant had sold the timber, and had received the proceeds.

That the Defendant understood the plaint as intending to make him liable is clear, for in his answer he says:—"Afterwards the case of the Plaintiffs was dismissed by the Honourable High Court; and an order being passed to release the timbers from attachment, I, according to the permission of *Moti Dasi*,"—that is, the widow of *Modhoosoodun*,—"sold the timbers and paid her the moneys that were realized by the sale of the timbers, and took a receipt, and she repaid me the moneys I had expended. But the Plaintiffs, notwithstanding these facts, are unjustly placing upon me the liability by falsely alleging that I, as a sharer, conducted the aforesaid suit, and that I myself took the moneys realized by the sale of the timbers." He knew that the Plaintiffs intended to make him liable because he had taken the moneys realized by the sale of the timbers. It is found by the first Court that "The payment of money to *Moti Dasi* being disproved, it must be presumed to be in the hands of the Defendant, who is the active male member of the house." Therefore, according to that finding, the money which was the proceeds of the sale of the timber was in the Dedendant's hands, and the Plaintiff by his plaint shewed that he intended to make the Defendant responsible because he had got the assets which were produced from the sale of the timber.

Then the judgment of the High Court proceeds thus:—"It is quite clear that, *Modhoosoodun* having misappropriated the Plaintiff's timber, the value of the same came into the hands of *Gooroo Das* his brother, whence it ought to have passed into the hands of *Moti Dasi*, and from her the Plaintiffs might have obtained it in execution of their decree. We find on the facts that *Gooroo Das* has retained the Rs. 22,000 received by the sale of the timber; and this money is the Plaintiff's porperty. If a portion of it has been invested in the lands which Plaintiffs seek to sell, then such lands belong to them in equity. Whether *Gooroo Das* has appropriated the money without the consent of *Moti Dasi*, or whether he has done so in collusion with her with the object of defeating the Plaintiff's attempt to execute their hard-won decree, the Court ought to compel him to disgorge the amount. We therefore set aside the decree of the lower Court, and in lieu of it we make a decree with costs in favour of the Plaintiffs against the Defendants jointly and severally for the sum of Rs 22,000, which Plaintiffs will be entitled to realize in execution." They therefore give against the two Defendants, the present Appellant and the widow, a decree for the

Rs. 22,000, which was the amount which the Defendant had received, and which they find that he held from the proceeds of the timber of the Plaintiffs.

Their Lordships think that the Plaintiffs had a right to follow the proceeds of their timber, and, the Defendant having received the money, and not having paid it over to *Moti Dasi*, they have a right to recover the amount from him.

Mr. *Doyne* has contended, and certainly there was a good deal of weight in his argument, that a suit to recover the amount would have been barred by limitation. He said that the timber was sold as far back as the year 1870, that this suit was brought in 1876, and that consequently nearly six years had expired. He contended that if the Defendant was liable to the Plaintiffs, he was liable only for money had and received to the Plaintiffs' use. He relied upon article 48 of the second schedule of Act IX. of 1871, and also upon article 60. Article 48 is, "For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion." Their Lordships think that the case does not come under that article. There was no dishonest misappropriation or conversion. The Defendant sold the timber on account of his brother; he held the proceeds on account of the widow; and there was no dishonest misappropriation, although the Plaintiffs had a right, finding the money in his hands, to attach it and make him responsible to them.

Article No. 60 is, "For money payable by the Defendant to the Plaintiff; for money received by the Defendant for the Plaintiff's use." Mr. *Doyne* contended that in this case the money was received for the Plaintiffs' use when the Defendant sold the timber in May, 1870; but that appears to their Lordships not to be the case. When he sold the timber he was selling it as the agent of *Moti Dasi*, and he received the money for her. The suit is to enforce an equitable claim on the part of the Plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the Defendant, to make him responsible for the amount. That does not fall either within articles No. 60 or No. 48; but comes within article 118 as "a suit for which no period of limitation is provided elsewhere in this schedule," and for suits of that nature a period of six years is the limitation. Their Lordships think that the Plaintiffs had a right at any time within six years from the time when the Defendant received the money to hold him responsible to them for the amount as long as it remained in his hands: they might have given him notice not to pay it over, and held him responsible in equity if he had done so.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed and this appeal dismissed. As no appearance has been entered for the Respondent, there will be no costs of this appeal.

Their Lordships think it right to add a declaration that any money which may be recovered under this decree shall be treated in part satisfaction of the former decree against *Modhoosoodun* or his widow, in the same way as if it had been levied under that decree, and *vice versâ*.

Solicitors for Appellant: *Lambert, Petch & Shakespear.*

22nd and 23rd February, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

KISHNA NAND (Plaintiff) ... ... } *Appellant,*

and

KUNWAR PARTAB NARAIN SINGH (Defendant) ... ... } *Respondent.**

Limitation Act XV of 1877, Sch. II, Art. 109—Mesne profits—Interest.

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, Sch. II, Art. 109. An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Talukdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits.

Held, that a person who had not himself received the mesne profits having come into possession of the taluk upon its being released from management under the above Act, would not be chargeable with sums, which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default; there being nothing to show that such talukdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not.

Appeal from a decree (15th December 1881) of the Judicial Commissioner of *Oudh*, affirming a decree (19th May 1881) of the Additional Judge of the *Faizabad* District.

Mr. *J. F. Leith*, Q. C., and Mr. *J. G. W. Sykes* appeared for the Appellant.

Mr *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The facts of this case are that on the 22nd of May, 1873, the Plaintiff instituted a regular suit for possession of certain villages which are named in his plaint, and he obtained from the Court of the Settlement Officer a decree for sub-settlement right enjoyable for life. This decree was set aside by the first Court of Appeal, which was confirmed by the second Court. The Plaintiff then appealed to Her Majesty in Council, and the decree in his favour was restored, so that he was declared entitled to recover possession of these villages, of which, in January, 1871, the manager under the *Oudh Talukdars Act*, Act XXIV. of 1870, had taken possession, and dispossessed the Plaintiff. The present plaint is entitled *Kishna Nand Misir*, Plaintiff, against the *Mehdowna* estate, Defendant; but it appears from the proceedings that a summons had been issued and served upon the manager of the estate. On the 21st of October, 1880, pending the suit, the estate having been released by the Government, it was asked that a fresh summons should be issued. Although this summons does not appear on the proceedings, it would appear to have been a summons to the present Respondent, who had been put in possession of the estate on its being released by the Government. His counsel appeared for him before the Judge on the 24th of November, 1880. It may, therefore, be taken that he became the Defendant in the suit. The plaint stated that the Plaintiff, having thus regained possession under the decree of Her Majesty in Council, was entitled to profits from the time of the dispossession and during the pendency of the suit, and claimed mesne profits for nine years. No written statement was put in; but it appears from what was stated by the counsel for the Defendant, when he appeared before the Judge, that the defence raised was that the suit was barred by the law of limitation, except as to the mesne profits for three years before the filing of the plaint;

* 11 Cowell's Ind. Ap. 88; I. L R 10 Cal. 785.

that is, before the 26th of July, 1880. The first Court gave judgment for mesne profits for that period, and refused to allow the mesne profits for the previous time. That judgment was affirmed by the Judicial Commissioner. There was also a claim for interest, which was not allowed; both Courts saying that they did not think it reasonable to allow it.

Upon the appeal to Her Majesty in Council which has now been heard, three questions were raised by the learned counsel for Appellant. First he contended that under the law of limitation he was entitled to a greater amount of mesne profits than had been allowed. The article 109 of the second schedule of Act XV. of 1877, which was the *Limitation Act* in force at the time when the suit was brought, was referred to. That article is in these terms: "For the profits of immoveable property belonging to the Plaintiff which shall have been wrongfully received by the Defendant:—when the profits are received, or, where the Plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession." The learned counsel sought to shew that the dispossession was in the nature of a dispossession under a decree, because the settlement officer, or the manager acting under the *Oudh Talukdars Act*, was acting, as it were, judicially; but when he found that, in the course of the argument, he could not support such a contention, he very properly abandoned it. The question of the law of limitation may be therefore considered as disposed of.

Another question raised was that the Courts had only allowed in the mesne profits for the three years the sums which had actually been received; and it was sought to charge the present Defendant, who was not the person who received the mesne profits, but who had come into possession of the estate upon its being released by the Government, with sums which might have been received except for wilful default. It seems clear that, whatever case might have been made against the manager of the estate, there is nothing to shew that the Defendant could be charged with anything more than was actually received by him. That disposes of the second question.

The remaining question was whether interest ought to have been allowed on the mesne profits for the three years. It is not necessary to say anything upon the question whether in the present state of the law, having regard to the provision in the *Procedure Act*, in which there is an explanation of mesne profits, interest was allowable. In the present case the claim cannot be put higher than that it is a matter for the Court to determine under the circumstances, whether it is reasonable to allow interest. There is no rule obliging the Court to allow the intefest. It is a matter in the discretion of the Court, upon the consideration of the facts of the case. In this case both the Courts have considered that it was not reasonable that interest should be allowed; and there are no facts proved which would enable their Lordships to say that this is a wrong decision. Mr. *Sykes* argued that the interest ought to be allowed, because the persent Defendant, in getting possession of the estate at an earlier period than he might otherwise have done, has had the benefit of the use of the money. But there is nothing in the evidence to support this, or to shew that it was the fact. The question must be left as it has been decided.

Consequently the decision of the lower Courts ought to be affirmed, and their Lordships will humbly advise Her Majesty to affirm it, and to dismiss the appeal; and the Appellant will pay the costs of it.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Watkins & Lattey.*

12th and 13th March, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

CONSOLIDATED APPEALS.

JUGOL KISHORE (Plaintiff) ... ... } *Appellant*,

and

MAHARAJAH JOTINDRO MOHUN TAGORE and others (Defendants) } *Respondents*.*

Test of what passes under execution sale of Hindu widow's estate.

Although a Hindu widow has, for some purposes, only a partial or qualified right, title, and interest in the estate which was her husband's, yet for other purposes she represents an absolute interest therein.

The question, whether on the sale of the right, title, and interest of the widow in execution of a decree, the whole interest, or inheritance in the family estate does, or does not, pass, depends on the nature of the suit in which the execution of the decree takes place. If the suit is a personal claim against the widow, then merely the widow's limited estate is sold.

If, on the other hand, the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution sale. The judgment which the decree has followed, may be examined in order to determine which of these two results attends the execution sale of the widow's right, title, and interest.

The principle in *Baijun Doobey* v. *Brij Bhookun Lall Awasti* (1) referred to and applied.

Consolidated appeals against four decrees of the High Court (29th April 1881) (2), founded on one judgment delivered on appeals preferred by the Appellant against two decrees of the Subordinate Judge of *Nudden* (12th September 1879), and two cross appeals.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe* appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C, and Mr. *J. D. Mayne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decision of the High Court is correct, and that it ought to be affirmed.

The suits out of which these appeals arise relate to the share in certain joint family property which belonged to *Norendro chandra*, deceased.

The Defendants claim through a sale in execution of a decree against *Sharodamoyi*, the widow of *Norendro*, who had succeeded to his share.

The Plaintiff claims under a purchaser at a sale after the death of *Sharodamoyi* of the alleged interest of *Behari Lal*, as reversionary heir of *Norendro* in the said share, in execution of a decree against *Behari Lal*.

The main question in the case is, as stated by the Chief Justice in delivering the judgment of the High Court, "whether under the sale of the right, title, and interest of *Sharodamoyi* in her share of the family property, the whole inheritance in that share passed to the purchaser, or only the widow's interest subject to the right of the reversionary heir to succeed to the property at her death." If the whole inheritance passed under the sale in execution of the decree against *Sharodamoyi*, then the Plaintiff is not entitled to succeed. If, on the other hand, the only interest that was sold under that decree was the qualified interest, which is usually called the widow's estate, then the reversionary heir was not bound by it, and the claimants under the purchase at the sale in execution of the decree against him are entitled to succeed.

The suit in which the decree against the widow *Sharodamoyi* was obtained was brought by *Umamoyi*, who was the

* 11 Cowell's Ind. Ap 66; I. L. R. 10 Cal 985.

(1) I. L. R, 1 Calc, 133; L. R., 2 I. A, 275.

(2) I. L. R, 7 Calc., 357.

daughter of *Bhoirub Chandra*. She brought a suit against the other members of the joint family to recover the share of the property which belonged to her father, who in his lifetime was a member of the joint family. *Bhoirub* having died without parting with his interest, *Umamoyi*, as his daughter, became entitled to his share of the property; but some of the members of the joint family set up that *Bhoirub*, before his death, had executed a hibanamah by which he conveyed his share to them. *Sharodamoyi* and the other members of the joint family, including *Behari Lall*, were made co-defendants. The record is very defective in many respects. It includes a number of valuations and other documents which are wholly unnecessary for the purposes of this case, and it omits many documents which were very important to be looked at. *Sharodamoyi*, though made a party to the suit, did not appear. Other members of the family appeared, and set up as a defence to the suit that *Bhoirub Chandra* had conveyed his share by the hibanamah. The First Court dismissed the suit, holding that the hibanamah was a genuine document. Upon appeal to the Sudder Court, that Court held that the hibanamah was not a valid document or binding upon *Umamoyi* as the daughter of *Bhoirub Chandra*; and they reversed the decision of the First Court, and decreed that *Umamoyi* should recover her share of the property, together with mesne profits and the costs of the suit. It was urged in the course of argument that *Shardamoyi* never received those mesne profits; but it is unimportant whether she did receive them or not. She was made a party to the suit and did not appear. The other Defendants appeared and set up a defence, and it was by reason of that defence that the principal part of the costs in that suit were incurred. *Sharodamoyi* not having appeared, she was not represented at the trial, but the case was tried *ex parte* against her upon the evidence which was produced by the other members of the family. Upon that defence the Sudder Court gave a decree against all the Defendants If in the execution of that decree *Umamoyi* had attached and sold the right, title, and interest of all the other members of the family, although one portion of it was represented by the widow, the whole property would have passed to the purchaser. The reversionary interest of *Behari* would have passed although the share of *Norendro* was represented by the widow. If that would have been the case if the execution had been against the whole property, why should not it be so when the execution was against only the widow's share of the property? The first Judge held that under the execution against *Sharodamoyi* the reversionary interest of *Behari Lall* could not have been sold. He was quite right in that respect, because *Behari Lall* during the widow's life had no reversionary interest to sell; but it was a strong reason why when the sale was against the widow, who represented her deceased husband's share, the whole interest in the estate should pass under it. It was held in the *Shivagunga* case, that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir. Their Lordships, in that case (1), say: "Assuming her,"—that is the widow,—"to be entitled to the zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified intereest."

A difficulty was caused by sect. 249 of Act VIII of 1859, which enacted that the proclamation of a sale in execution shall declare "that the sale extends only to the right, title, and interest of the Defendant in the property specified therein." In the case of a widow it is necessary that the proclamation shall make that statement. But then there are many cases in which when the right, title and interest of the widow is sold the whole interest in the estate passes. In other cases the whole interest does not pass. The case depends

(1) 9 Moore's Ind. Ap. Cas. 604.

upon the nature of the suit in which the execution issues. There are many authorities to that effect. It is unnecessary to recapitulate them,—they are referred to by the Chief Justice in his judgment in the High Court. If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes. In many of the cases, although the right, title, and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir to be bound by it.

In the case referred to, which is reported in Law Rep. 2 Ind. App., p. 275, *Baijun Doobey and Others* v. *Brij Bhookun Lall Awusti*, it was held that only the widow's qualified estate passed by the sale in execution. That was a suit brought against a widow for arrears of maintenance. It was stated in the judgment that the maintenance was a charge upon the inheritance; but the Judicial Committee held that the claim against the widow was for a personal debt due by the widow; although the maintenance might be a charge upon the inheritance, still the widow whilst in possession of the estate had received the profits and failed to pay the maintenance. The arrears created a personal claim against the widow for which she was personally liable. The Judicial Committee held that the suit was to enforce the personal liability of the widow, and consequently that the execution in that suit passed merely the widow's interest.

Their Lordships think that upon the authorities referred to by the Chief Justice the Court was at liberty to look to the judgment to ascertain what was sold under the right, title, and interest of the widow. Looking to that in the present case, their Lordships are of opinion that not only the widow's right but the whole interest in the estate passed under the sale in execution of the decree.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decrees of the High Court; and the Appellant must pay the costs of these appeals.

Solicitors for Appellant: *Sanderson & Holland.*

Solicitors for Respondents: *Miller, Smith, & Bell.*

13th and 14th March, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

HAJI ABDUL RAZZAK (Defendant) ... } *Appellant,*

and

MUNSHI AMIR HAIDAR (Plaintiff) ... } *Respondent.**

"*Oudh Estates' Act,*" *I of 1869, s. 13—Compulsory registration of will devising taluq—Deposit of will distinct from registration under Act VIII of 1871.*

A will devising a taluq to a sister's son of a taluqdar, in the lifetime of the taluqdar's brother, is not excepted from the necessity of being registered under s. 13 of the Oudh Estates' Act, I of 1869, such sister's son not being one of those who, in the event of the taluqdar's having died intestate, would have succeeded to an interest in his estate, within the meaning of the exceptions made in s. 13, sub s. 1, of that Act.

It may be doubted whether the mere title to maintenance would be such an "interest" as would come within the meaning of the exceptions.

The deposit of a will under part IX of Act VIII of 1871 does not amount to the registration required by the above section of Act I of 1869.

Appeal from a decree of the Judicial Commissioner of *Oudh* (22nd March

* 11 Cowell's Ind. Ap. 121; I L. R. 10 Cal. 976.

1882), modifying a decree of the District Judge of *Lucknow* (2nd September 1881.)

Mr. *J. G. W. Sykes* and Mr. *J. Duthi* appeared for the Appellant.

Mr. *R. V. Doyne* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case *Mussumat Kutub-un-nissa* was the talukdar of an estate called *Gauria*, under a sunnud granted to her by the Government of *India*. She died in 1879, having made a will on the 30th of April, 1874. The present suit is brought by her heir-at-law, her brother, who claims what he is entitled to of her estate as heir. The Defendant is a nephew of hers, a sister's son; and he sets up the will, under the provisions of which he was entitled to the taluka and the greater part of her property. The Plaintiff denied the execution of the will; he imputed fraud, he denied the capacity of the testatrix, and in other ways impugned the will. It is not necessary to dwell upon those issues, which both Courts have found against him, and which have not been argued again by his counsel here. A further question was raised which certainly had been alluded to, if not mentioned as distinctly as it might have been in the plaint, that the will had not been properly registered under the *Oudh Talukdars Act*. The subordinate Judge declined to entertain this question, because it was raised at a late stage when apparently the evidence had been finished, and because on the settlement of issues it had not been suggested on either side that an issue should be raised on this point; and he found the will to be established. Thereupon an appeal was brought by the Plaintiff to the Judicial Commissioner. The Judicial Commissioner agreed with the subordinate Judge as to the factum and validity of the will, except so far as it was not registered; but he came to the conclusion that it had not been properly registered under the provisions of sect. 13 of the *Oudh Tulukdars Act*. That is the question before their Lordships. Many other questions were raised in the ingenious argument of Mr. *Sykes*; but inasmuch as the greater part of them have been disposed of in the course of the argument, their Lordships do not think it necessary further to advert to them.

The 13th section is to this effect:—"No talukdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof, or to an interest therein, if such talukdar or grantee had died intestate." Sub-sect. 2 follows, which is not material to the present case, and then come the words:—"Except by an instrument of gift or a will executed and attested, not less than three months before the death of the donor or testator, in manner hereinafter provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution." There is an interpretation clause, which says "'registered' means registered according to the provisions of the rules relating to the registration of assurances for the time being in force in *Oudh*." The two questions, then, which arise are these: In the first place, was it necessary that this will should be registered? In the second place, was it registered?

The first question depends upon whether the devisee came under the description of persons in the 1st sub-section of clause 12—"a person who under the provitions of this Act, or under the ordinary law, would have succeeded to such estate or to a portion thereof, or to an interest therin, if such talukdar or grantee had died intestate." The only plausible argument adduced on the part of the Appellant on this sub-section was that the Appellant would have been entitled to maintenance, which, if not an "estate or a portion thereof," was "an interest

therein," and therefore that a devise to him need not be registered. Their Lordships are far from affirming that a mere title to maintenance would be such an "interest therein" as would come within this clause; but it is not necessary to decide this question, because the section which, if at all, confers this right to maintenance—sect. 26.—(taken in conjunction with sect. 24), speaks of "nephews of the deceased, being fatherless minors," and it is not shewn that this Appellant was a minor either at the time of the death of the testatrix or at the execution of the will. It is scarcely necessary to observe that under sect. 22, which regulates the succession to taluks, his claim cannot be supported. There appears no pretence for speaking of him as an adopted son under the 5th clause; and none of the other clauses have been contended to be applicable to him.

This being so, it follows that the will is one which, in order to be valid so far as to pass the taluk, requires registration; and then we come to the question whether it has been registered in accordance with the Act.

The interpretation clause before referred to leads to the inquiry what were the rules relating to the registration of assurances for the time being in force in *Oudh*. They are to be found in Act VIII. of 1871. It is to be observed with reference to that Act that it contains a very distinct set of provisions with respect to what is called depositing wills and registering them. Section 27 is in these terms:—"A will may at any time be presented for registration,"—that is one thing,—"or deposited in manner hereinafter provided,"—which is another thing. When we proceed with the Act we find that Part VIII. relates to presenting for registration wills, and authorities to adopt. Section 40 is in these terms:—"The testator, or any person claiming as executor or otherwise under a will, may present it to any registrar or sub-registrar for registration." Section 41 runs thus:—"A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document." Part IX. refers to the deposit of wills, and sect. 42 says:—"Any testator may, either personally or by duly authorized agent, deposit with any registrar the will in a sealed cover superscribed with the name of the depositor and the nature of the document." Section 43 says:—"On receiving such sealed cover, the registrar, if satisfied that the depositor is the testator or his duly authorized agent, shall transcribe in his register book No. 5 the superscription on such sealed cover, and note in the register and on the sealed cover the year, month, day, and hour of such presentation and receipt, together with the name of the depositor and the name of each of the persons testifying to the identity of such depositor, and the inscription, so far as it is legible, on the seal of the cover. The registrar shall then place and retain the said cover in his fire-proof box." Section 44 says:—"If the depositor of any such sealed cover wishes to withdraw it, he may apply to the registrar with whom it has been so deposited for the delivery of the cover; and the registrar, if satisfied as to the identity of the depositor with the applicant, shall deliver the cover accordingly." And then, after the death of the testator, there is a provision for its being opened and registered. So it appears that by the deposit of a will no information is given to anybody who may search the register as to its contents, and the testator can at any time during his lifetime withdraw it in the sealed envelope in which it was deposited; whereas, with respect to the registration, in the ordinary and proper sense of the word, of wills and other documents, there are provisions which would enable persons who searched the register to ascertain the contents of those documents.

It appears, therefore, to their Lordships that the will was not registered in accordance with the provisions of sect. 13 of the *Oudh Talukdars Act*. That being so, they are of opinion that the judgment of the Commissioner was right, that the will had no operation as far as the taluk

was concerned; but as far as the personal property was concerned it had an operation, inasmuch as so much of it did not require to be registered; and he gave the Defendant the benefit of its operation in that respect.

Under the circumstances their Lordships will humbly advise Her Majesty that the judgment appealed against should be affirmed. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *W. Buttle.*

Solicitors for Respondent: *Barrow & Rogers.*

11th June 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

NARPAT SINGH (Plaintiff) ... *Appellant,*

and

MAHOMED ALI HUSSAIN KHAN (Defendant). ... } *Respondent.**

Survivorship—Rights of Widow—Grant by Government for maintenance of family.

The lands of three brothers having been confiscated, the Government afterwards assigned revenue paying lands for the benefit, in certain proportions, of the minor son of the eldest brother, also of the widow, minor son, and daughter of the youngest brother, (both these brothers being then deceased); and the second brother, who survived, was put into possession of a proportionate part of the property.

Held, that the widow of the youngest brother, on the deaths of his son and daughter, became, by survivorship, sole owner of the estate so assigned for their and her benefit; so that an alienation of part if made by her could not be set aside at the instance of the second brother, who failed to show, on the above state of things, that the estate was heritable property of the son, as whose uncle and heir he claimed.

* I. L. R. 11 Cal. p. 1.

Appeal from a decree (18th March 1882) of the Judicial Commissioner of *Oudh*, affirming a decree (3rd August 1881) of the District Judge of *Sitapore.*

Mr. *J. D. Mayne*, for the Appellant.

Mr. *J. J. W. Sykes*, for the Respondent, was not called upon.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships see no reason to think that the judgments of the two Courts below are erroneous.

The Plaintiff is suing to recover possession of certain property, and he must recover upon the strength of his own title. He claims as reversionary heir of *Hanuman Bakhsh*, the son of *Jagraj.* In order to succeed he must show that the estate was the heritable property of *Hanuman Bakhsh.* On looking at the letter of the Chief Commissioner of the 13th February 1860, it appears to their Lordships that it was the intention of the Government to make provision for *Jagraj's* widow and family. The Chief Commissioner, in his letter, says: "The party consists of *Beni Madho's* son, a boy of about 13 or 14 years of age, and his betrothed wife; the widow and daughter of *Jagraj Singh*, brother of *Beni Madho*, killed with him; the son and daughter are children; *Narpat Singh*, brother of *Beni Madho*, and his wife and daughter, the latter aged 10 years. They are all at present living with a relative,"—and so on. "*Jagraj Singh* and *Narpat Singh* held up to annexation, landed property quite distinct from that of *Beni Madho.* The estate of the first named" that is, of *Jagraj*—"was assessed at about Rs. 25,000, and of the latter at about Rs. 16,000. Both estates have been confiscated. The Chief Commissioner proposes to assign for the support of the family confiscated lands in the *Sitapore* district assessed at Rs. 11,100, and in the following proportions:—*Beni Madho's* son, Rs. 6,000; *Narpat Singh*, Rs. 2,500; *Jagraj's* widow and his family, Rs. 2,500." Then he goes on to say, at paragraph 8; "The

two boys, *viz.*, the son of *Beni Madho*, and of *Jagraj*, should reside at *Sitapore* for the benifit of the education that is afforded at an excellent school lately established there for the education of the sons of taluqdars, and in the meantime the land can be managed by the local authorities, who can remit the proceeds monthly;" that is, for the benefit of those entitled. "The widow of *Jagraj Singh*, and his daughter, had better reside at *Sitapore* with the boys. When the education of the brother is completed"—that must refer to the brother of the daughter of *Jagraj*; it could refer to no one else. "When the education of the brother is completed, they"—that is, the persons for whose benefit the property was to be assigned, namely the widow and the family,—"can be placed in possession of the properties now assigned to them. The Chief Commissioner has proposed a liberal provision for the members of this family not only because they are objects of compassion in themselves, but also because he is convinced that this generous treatment of the family of so determined an enemy as *Beni Madho* will be regarded by the *Oudh* talukdars as a most magnanimous act on the part of the British Government, and will earn for it enduring popularity."

The Government assented to this proposal of the Chief Commissioner; and their Lordships are of opinion that it was the intention of the Government that the land assessed at Rs. 2,500 should be assigned for the benefit of *Jagraj's* widow and his family as joint tenants, and not as tenants in common or to the son separately. The Judicial Commissioner, in his judgment, appears to their Lordships to have put the case very clearly. He says: "As to the position of *Mussammat Shahzad Kunwar*: The grant was made to the family of *Jagraj Singh* jointly. As the Government in no way defined the rights assigned to each grantee, the three persons who composed the family must be held to have been joint owners; and on the death of the two children their mother, as survivor, became sole owner. The Government, when assigning the land, did not restrict *Mussammat Shahzad Kunwar's* right to a life interest only; and as she acquired possession, not as heir to her son, but as the survivor of three joint owners, her proprietary right was absolute. The fact that the name of *Hanuman Singh* only was at first entered in the Collector's *malguzari* register is unimportant, and cannot affect the rights of the joint owners." It is unnecessary to determine whether the Government did intend to give life interests only or absolute interests. The Plaintiff must recover upon the strength of his own title. The Government has never claimed to resume the land.

It appears to their Lordships that the judgment of the Judicial Commissioner was correct; and their Lordships will, therefore, humbly advise Her Majesty to affirm it. The Appellant must pay the costs of the appeal.

Solicitors for the Appellant: Messrs. *Van Sandan, Cumming & Armitage.*

Solicitor for the Respondent: Mr. *W. Buttle.*

20th June 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porret, Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJAH AMIR HASSAN KHAN (Plaintiff) ... } *Appellant,*

and

SHEO BAKSH SINGH (Defendant) ... } *Respondent.**

Construction of s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879.

A Court that has decided a suit over which it had jurisdiction, cannot, only on the ground that it has arrived at a wrong decision, be said

* 11 Cowell's Ind. Ap. 237; I. L. R 11 Cal. 6.

shortly some of the main outlines of it. It appears that *Ajit* and *Bijai* were two neighbouring taloukdars, distantly related. *Ajit* was the elder. He was a man of acute intelligence, and carried on the business of a money lender. *Bijai* was of weak intellect, had been paralysed soon after his birth, and was afflicted with epileptic fits, the tendency of which would be to deteriorate what understanding he had. *Bijai*, on his father's death, appears to have taken possession of the ancestral estate, and to have so mismanaged it that the Court of Wards thought it necessary to take the management of it upon itself. In 1870 *Bijai* applied to be restored as manager; and having been examined by the Court of Wards, the estate was released to him. The view taken of his capacity by the Court at that time appears from a judgment to be found in the record:—"The Court concurs with the assessors that the Defendant *Rajah Bijai Bahadur Singh* is not of unsound mind and incapable of managing his affairs. He is feeble, and doubtless easily influenced by artful persons, and incapable of any great effort of body or mind, but he is not at all incapable in the sense meant by the Act." Then they go on to say:—"Decree for the Defendant," on the ground "that he is not a lunatic"; whereupon the management of this estate was, their Lordships cannot help thinking unfortunately for him, reintrusted to him.

With respect to his capacity there is some evidence given by himself in this record, by which, if it is correct,—and it was for the Subordinate Judge who heard the witnesses to determine whether it represented or not the true state of his mind,—it would appear, although he signed various deeds that were put before him, he was not acquainted with the nature of their contents; and that evidence, as far as the accounts are concerned, is in some degree corroborated by that of *Wahaj-ud-din*, his agent, who says the accounts were written in Persian, a language which he did not understand. Their Lordships, therefore, think there was ample evidence on which the Judge was justified in his finding as to the capacity of *Bijai*. This being so, it is obvious that a neighbour and a relation, of acute intelligence, would in all probability exercise a great influence over him. Upon his being reinstated in the management of his estates it became necessary for him to borrow for the purpose of paying arrears of the Government revenue; and in 1872 it appears that he sold some fifty villages to *Ajit* for the sum of Rs. 1,25,000, the greater portion of which was appropriated to the payment of the Government revenue. That transaction has not been impugned, and it will not be necessary further to refer to it. At that time, in 1872, the two taloukdars seem to have been somewhat estranged. In 1875 they were reconciled. About the time of the reconcilement *Ajit* took occasion to advise *Bijai* to employ as his agent or karinda a man of the name of *Wahaj-ud-din*. *Wahaj-ud-din* was entrusted by *Bijai* with extraordinary powers. We have a document styled a safinama, of the 25th of August, 1875, wherein *Bijai* entrusts to his manager powers of appointing general agents; of dismissing and confirming patwaris and chowkidars; of executing documents, leases, and so on; power of borrowing money; power of executing simple bonds for borrowing money, or borrowing money by hypothecation or usufructuary mortgage of property; and a number of powers which the Judge of the court of first instance describes as making him in effect the proprietor of the estate. This document was little less than an abdication on the part of *Bijai* of his ownership of the estate in favour of the manager. It appears to their Lordships that a man in full possession of his faculties would not execute a document of this kind. This manager, *Wahaj-ud-din*, in pursuance of the powers here given him, hired a vast number of servants, displacing the old Hindu servants of *Bijai* by his own friends and proteges, as they are somewhere called, so that *Bijai* was surrounded by *Wahaj-ud-din* and *Wahaj-ud-din's* Mahomedan adherents. It seems by the evidence of several of the witnesses that

Ajit and *Wahaj-ud-din* were in the habit of communicating together, and that *Ajit* exercised great influence over *Bijai*. The powers of borrowing given to *Wahaj-ud-din* were soon exercised. In December of that year a bond is prepared by *Wahaj-ud-din*, and is executed by *Bijai*, whereby he borrows a sum of Rs.6,000 of *Ajit* at the rate of 24 per cent. The principal of that sum, together with interest, accumulated, and in February, 1876, two months after, another bond of Rs.9,000 was given; and without going through the details of all these transactions, it appears that as many as twelve bonds were taken by *Ajit* from *Bijai* in the course of about three and a half years, the interest and the principal rolling on until finally it reached the sum of Rs.1,37,000, the subject matter of this suit. In these cases the money was sometimes paid to *Bijai*, and sometimes paid to his manager. He goes through the form—one can hardly suppose it to be much more—of writing his name at the bottom of the deeds, which were witnessed by the Mahommedan servants in the employ of *Wahaj-ud-din*.

It has been contended that there was no foundation for the finding in the following terms of the learned Judge that *Ajit* and *Wahaj ud-din* acted in concert. "It is impossible not to feel convinced that *Wahaj ud-din* was gravely mismanaging the estate; that by duping his master he was dishonestly benefiting himself; that this state of things was fully known to *Ajit Singh* (as admitted by him in his deposition); that the letter was all along anxious, fairly or unfairly, to encumber the estate so completely as to bring about the result which he seems to have had in view, viz., the acquisition of proprietorship of *Bijai Bahadur's* entire taloolka."

It is true that there is no direct evidence in the record of a conspiracy between *Ajit* and *Wahaj-ud-din*; but they acted together against the interest of this unfortunate taloolkdar. His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate; and *Ajit*, whose duty as a relative, a friend, and a neighbour of *Bijai*, a man of weak intellect, was to have warned *Bijai* against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions. Under these circumstances it appears to their Lordships that the learned Judge was amply supported by the evidence in his finding.

Such being the finding of the learned Judge, and the concurrent findings of two Courts, supported by adequate evidence, it follows that that judgment must be supported so far as the cancellation of the deeds is concerned, and that the appeal of *Ajit* must be dismissed.

But another question is raised by the cross appeal. The finding of the learned Judge, with respect to the consideration for the deeds, is in these terms (it seems that the evidence of advances was that money was paid from time to time, in the presence of the registrar of the Court, sometimes being handed to *Bijai* himself, sometimes to his manager):—"But having considered the evidence, I am satisfied that the principal sums in cash said to have been advanced at various times by *Ajit Singh* were made over either to *Bijai Bahadur*, or on his behalf to his karinda *Wahaj-ud-din*;" and in accordance with that finding, he says "I am of opinion that substantial justice will be done between the parties if the Plaintiff is decreed the principal sums advanced by him, together with interest at 8 per cent. per annum on each of the sums calculated from the date of the suit, viz., the 23rd of January, 1880, and no interest allowed subsequent to the date of the suit." He treats as sums proved to have been advanced all the principal payments which were made. It has been argued, not that this finding is wrong in point of fact, but that the learned Judge has made a mistake in point of law; and their Lordships think that the judgment relating to these payments cannot be supported. The finding,

as before observed, is that the sums were paid either to *Bijai Bahadur*, or on his behalf to the karinda *Wahaj-ud din*. The learned Judge appears not to have applied his mind to the question as to how much actually got into the hands of *Bijai* himself; with reference to which sums, it would seem difficult to say that he could have a right to cancel the deeds without repaying them. But considering the relations that have been found to exist between *Ajit* and *Wahaj-ud-din*, their Lordships are of opinion that *Ajit* cannot raise a claim against *Bijai* merely by shewing that he paid money to *Wahaj-ud-din*; he must shew further that his advances were really applied to the benefit of *Bijai*, or were properly borrowed on his behalf.

Under these circumstances it appears to their Lordships that the decree of the Court below requires some amendment; and they propose to advise Her Majesty that that decree should be amended in this way: they think it should be varied by directing that, instead of the account which the munsarim is thereby ordered to take, it be referred to the munsarim to take the following accounts: first, of such sums advanced by *Ajit*, as shall be proved to have been paid to and received by *Bijai* personally; secondly, an account of such sums advanced by him as *Wahaj-ud-din* would have been justified in borrowing in the course of a prudent management of *Bijai's* estate; thirdly, an account of what is due upon such advances for simple interest at 8 per cent. from the date of the advance to the time of payment. Their Lordships cannot quite concur with the learned Judge in holding that the interest should be confined to the date of the suit. Their Lordships think that the decree in the other case, which is in many respects the same, but has peculiar circumstances affecting it, (that is, the first suit by *Bijai* and his wife.) should also be amended to the same extent.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree be varied in the manner stated. It appears to their Lordships that *Bijai* and his wife are entitled to the costs of both appeals.

Solicitors for the Appellant: *Lawford, Waterhouse & Lawford.*

Solicitor for the Respondent: *T. L. Wilson.*

24th and 25th June, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Allahabad.

BANI RAM and another ... *Appellants.*

and

NANHU MAL ... *Respondent.**

Execution Proceedings—Prior adjudication—Conclusive Evidence.

Where questions as to the rate of interest payable under a decree and the period therefore, have been adjudicated between the parties in the course of prior execution proceedings, and such decision has become final, the same question could not be reopened at a later stage of execution in the same or any superior court

Ram Kirpal Shukul v. *Mussumat Rup Kuari* followed. (*Ante* p. 489).

Appeal from a decree of the High Court (January 10, 1881), reversing a decree of the Subordinate Judge of *Aligarh* (August 18, 1880).

Whitehorne Q. C., and *W. A. Raikes*, for the Appellants.

Mr. *J. F. Popham* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in this appeal arises in the execution of a decree of the Court of the Subordinate Judge of *Aligarh*, dated the 7th of May, 1875. It was on

* 11 Cowell's Ind. Ap 181; I. L. R. 7 All 102.

a compromise, the claim in the suit being to recover Rs. 60,000 principal and Rs.14,715 interest. The decree was in these termes: "That a decree for a fixed sum of Rs.78,700, as due up to the 4th of May, 1875, be given to the Plaintiff against the two Defendants under the terms of the compromise; that this sum be paid by the Defendants in two years, with interest at 12 annas per cent. per mensem." The claim was upon a bond of the 10th of July, 1875, which stipulated for interest at 12 annas per cent. Execution proceedings appear to have been taken upon this decree, but the actual application for the execution is not on the record. It would appear, however, that some villages were sold on the 20th of December, 1877, and were purchased by the decree holder; and a petition was presented by the judgment debtors on the 20th of April, 1878, in which it was said that they were willing to pay interest according to accounts.

On the 17th of May, 1878, they presented another petition, in which the statement was made that the decree holder should not get the interest which he then claimed, the question apparently being as to the interest beyond the two years. On the 30th of August, 1878, the question between the parties was more distinctly raised. Then, in a petition of the judgment debtors, it was stated that the Plaintiff had filed an application for execution of the decree in the sum of Rs.38,000 on the 6th of August, 1878, "and charged interest at 12 annas per cent. after the lapse of the term of two years, contrary to the terms of the decree. Prior to this, on the 18th of July, 1878, an objection was filed regarding the same, which was rejected without due consideration. The petitioner therefore prays that an order, after inquiry, may be passed for deducting the excessive interest which the decree holder had charged contrary to the terms of the decree." On this it was ordered that the case should be brought forward for decision on the 1st of November, 1878. It appears from the list of papers that have not been forwarded with the record that the case was twice adjourned, and on the 25th of January, 1879, an order was made in these terms:—"In my opinion the objection is not tenable. The decree of the Court of the Subordinate Judge, dated the 7th of May, 1875, clearly provides that under the terms of the compromise a decree for the payment of a fixed sum of Rs.78,800 be made in favour of the Plaintiff against both the Defendants as due up to the 4th of May, 1875, and that Defendants should pay the amount with interest at 12 annas per cent. per mensem. Hence the plea of the Defendants cannot in any way be held to be a reasonable one." Then it states what the plea of the Defendant was:—"That if the said amount had been paid within two years the interest would have been paid to the decree holder, and that the interest on the decree money could not be recovered after the expiry of the term fixed for payment." Looking at the dates which have been given, it seems clear that this order must have been made in the execution proceedings in which the petition of the 30th August, 1878, had been presented. It is an order by the Judge deciding against the objection which had been made by the judgment debtor, that the decree money could not be recovered after the expiry of the two years. The next step appears to have been an application for the execution of this decree on the 5th of December, 1879, in which an account was made up claiming the interest at the rate of the 12 per cent. up to the time of the execution; and upon that the Judge made these order. As to the first objection,—which is stated at page 10, and which was this: "The judgment debtor has the following objections to the whole of the demand made under the decree: (1) From the date of the decree the decree holder cannot under any circumstances get more than eight annas per cent interest on the decree money according to law, especially when the decree does not provide for any interest after two years, nor has any rate been

(1) Ante p. 489.

fixed in it,"—the Judge says: "The Court is of opinion that the decree holder would get the same interest on the decretal money which has been awarded to him in the Court's decision in the regular suit. It is 12 annas per cent. In the Execution Department the Court cannot, contrary to the decision in the regular suit, reduce the rate of interest from 12 annas per cent. to 8 annas per cent. in any way. The objector's statement, that the decree does not provide any rate of interest subsequent to two years, is altogether wrong. The two years' period in the decree is for the payment of the judgment debt, not for the payment of interest at 12 annas per cent." Then comes this: "Before this also this very objection had been raised on behalf of the objector, and rejected by the Court on the 25th of January, 1879. No appeal has been preferred from that order." From that decision there was an appeal to the High Court, which says in its judgment: "It was urged before us that the decree holder is not entitled to any interest after the expiry of two years from the date of the decree; and this seems to us to be the case. The decree is for a sum of Rs. 78,700 only. The decretal order proceeds to direct that this sum shall be paid in two years, with interest at 12 annas per cent. per mensem, but there is no order as to payment of interest after two years." The High Court took no notice of the ground upon which the Subordinate Judge decided,—that the question had been concluded by his order of the 25th of January, 1879; and their Lordships think it should be remarked, in justice to the High Court, that this may be accounted for by the fact that not long before this the full Bench of that Court had held that the law, which they call the law of *res judicata*, was not applicable to execution proceedings. The question now for their Lordships' decision is, whether the order of the 25th of January, 1879 was not conclusive between these parties? It was an order made in the execution proceedings in this very suit; and the decision of this Board in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (1) is exactly in point. The only question that could be raised, and was raised by the learned counsel for the Respondent, was that there might be some difficulty as to the construction to be put upon the words of the order of the 25th of January, 1879. But looking at the terms of that order, although it may not be so clearly expressed as it might have been, their appears to be no doubt that what was decided on that occasion was the same right to recover the interest, after the expiration of the two years which was fixed by the decree for payment, as is now put in question in the present execution proceedings.

Under these circumstances their Lordships will humbly advise Her Majesty that the order of the High Court be reversed; and the Respondent will pay the costs of this appeal, and also pay the costs of the proceedings in the High Court.

Solicitors for the Appellant: *Oehme & Summerhays.*

Solicitors for the Respondents: *Wilkinson & Sons.*

(1) Ante p 489.

28th June; 1st, 2nd, and 23rd July, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

PARTAB NARAIN SINGH (Defendant) ... } *Appellant,*

and

TRILOKINATH SINGH (Plaintiff) ... } *Respondent.**

Representation of the estate of a Hindu taluqdar by his widow in a suit for the succession—Act I of 1869—Res judicata—Act XXIV of 1870, s. 25.

Issues substantially the same as those raised in the present suit, relating to the succession to a taluqdari estate, had been decided in a former suit, in which an order of Her Majesty in Council declared who had the right to succeed. *Held*, that a claimant, whose interest was such as would vest in him only upon the death of the widow of the last taluqdar, was bound by the order so made, on the ground that he was privy to the former suit, the whole estate, for the purpose of representing it, being vested in the widow, who was a party to that suit. *Katama Natchiar* v. *The Rajah of Shivagunga* (1) referred to and followed.

That order declared that a will made by the last taluqdar, whereby a power to appoint a successor in the taluqdari had been given to the widow, had been revoked, and determined the right to succeed as upon an intestacy. The person whom the widow had appointed, by her will, now contending that he was not bound by the order, having been, when the former suit was instituted, a minor, without any duly appointed guardian, it was *held*, that whether he had, or had not, by acts after attaining full age (having been nominally a party), become estopped from setting up the above, he was, at all events, bound by the order; on the ground that the widow, holding an estate at least as large as that of a Hindu widow in her husband's property, was the full representative of the estate in the former suit; the appointment made by her being such as would operate only on her death. *Held*, also, that although a manager of the estate had been appointed under the provisions of Act XXIV of 1870 (the Oudh Taluqdars' Relief Act), but had not been made a party to the suit. This omission did not, under section 25, affect the *validity* of the decree between the parties.

Appeal from a decree (22nd July 1882) of the Officiating Judicial Commissioner of *Oudh*, reversing a decree (29th August 1881) of the District Judge of *Faizabad*.

Mr. *J. F. Leith*, Q. C., and Mr. *J. Graham*, Q. C., (with whom was Mr. *J. T. Woodroffe*) for the Appellant.

Sir *H. James*, Q. C., (Attorney-General) and Mr. *T. H. Cowie*, Q. C., (with whom were Mr *R. V. Doyne*, Mr. *J. D. Mayne* and Mr. *Howard*) for the Respondent.

23rd July 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR MONTAGUE EDWARD SMITH:—

This appeal arises in a suit brought by the Respondent in which he sought a declaration that he was entitled to succeed to the large talook of *Mahdona*, in *Oudh*, and other property which belonged to the late talookdar, Maharajah Sir *Man Singh*. The District Judge of *Fyzabad* dismissed the suit, but on appeal, the officiating Judicial Commissioner reversed his decree, sustained the Respondent's suit, and made the declaration he prayed. This declaration is directly opposed to the declaration made by the Queen in Council on the report of this Board in a former suit brought by the present Appellant, in which substantially the same issues relating to the succession to the talook as those arising in the present suit were raised and decided.

The first question to be considered, therefore, in the present appeal is, whether the Respondent is bound by the judgment in the former suit, for, if so bound, the question on the merits need not be discussed.

It has scarcely been denied that the cardinal issues which were decided in the former suit are identical with those raised in the present; and the principal dispute arising on the defence of *res judicata*

* 11 Cowell's Ind. Ap. 197; I. L. R. 11 Cal. 186.

(1) 9 Moore I. A., 604; 2 P. C. J. 25.

has been, whether the Respondent is bound either as party or privy to that former suit.

The facts relating to the succession are fully stated in the judgment of this Board in the former appeal (1). But it will be convenient for the elucidation of the question of *res judicata*, to which their Lordships' observations will be confined, to re-state some of these facts.

The late Maharajah was one of the great landholders of *Oudh*, whose status and rights are the subject of Act I of 1869. He died on the 11th of October, 1870, leaving a widow, the Maharanee *Subhao Kooer*, a daughter by a deceased wife, and a grandson (the Appellant), son of that daughter. He also left two brothers surviving him, both having sons; one of these brothers, *Raghuber Singh*, being the father of *Luchmi Nath*, and of *Triloki Nath* (the Respondent), the later being the younger.

Some years before the passing of Act I. of 1869, viz., on the 22nd of April, 1864, the Maharajah executed a will, and deposited it with the Commissioner of the district. This will (using the translation given in the judgment of the officiating Judicial Commissioner, which was adopted at the Bar), is in these terms:—

"In the name of the mighty Lord *Ganesh*.

"I am Maharajah *Man Singh* Bahadur, Kaim Jang, talukdar of raj *Shahganj*, raj *Gonda* and other places.

"Whereas my intention as regards making any boy representative has not yet become fixed, I therefore, for the present, declare my aforesaid Maharani representative, and proprietor, of my estate, and property, moveable and immoveable; until she make some one representative, let her remain representative, like myself, without power to aliene; and as regards my property, moveable and immoveable, no sharer or partner has any claim. Therefore, having written these few words of the nature of a will, I have deposited with the Government, that it may remain a record, and be of use in time of need."

About two years after the Maharajah's death, and on the 16th of August, 1872, the Maharanee executed a document, of which the following (also taken from the above-mentioned judgment) is a translation:—

"I am Maharani *Subhao Kunwar*, widow of Sir Maharajah *Man Singh*, Sahib Bahadur, Kaim Jang, K.C.S.I., Talukdar of the Raj of *Mahdona*, *Gonda*, *&c.*

"Whereas the late Maharajah *Sahib Bahadur*, my husband, departed this life on the 11th of October, 1870, corresponding with Katik Badi, 2nd, Sambat, 1927; and from that time up to date I am, under the will executed by my husband on the 22nd of April, 1864, in proprietary possession of the entire raj and estates, and of the property, moveable and immoveable, of the Maharajah, my husband; and whereas life is uncertain, and after my death disputes may arise with regard to the succession to the raj and dignity of the late Maharajah my husband, it is therefore right that I should make a will regarding the appointment of an heir and representative, after myself, in place of the Maharajah, now in heaven, my husband.

"I, therefore, being in good health, and of sound mind, have, of my own entire free will, and under no pressure or compulsion, appointed the youth *Triloki Nath*, son of Rajah *Raghubar Singh*, Sahib, deceased, nephew of my husband, heir and representative in place of my husband, of all the rights and dignities conferred on the Maharajah Sahib *Bahadur*, now in heaven, by the British Government, and of the entire estate, and all property, moveable and immoveable. The said youth shall, after my death, remain, from generation to generation, in the enjoyment of all the rights and dignities, in place of the Maharajah *Sahib Bahadur*, now in heaven; and the said youth will also own, and enjoy, the property belonging to me, moveable and immoveable. I will fix such maintenance as I may think fit for the youth *Partab Narain Singh*,

(1) Law Rep. 4 Ind. Ap. 228; 3 P. C. J. 740.

and for *Darogah Sham Dhar.* These allowances shall continue to be paid by the said youth, and by his successors, for ever, after my death; and the said youth, and his successors, shall also discharge any money debts, or verbal contracts, binding on me, or on the estate. I have, therefore, written these few words of the nature of a will, that after my death they may be of use when required."

At the time the former suit was commenced, viz., on the 7th of November, 1872, the Respondent's title, if any, rested entirely on these documents, for as the younger son of a living brother of the late Maharajah he was not entitled to succeed to the talook as heir.

The claim of the Appellant, the son of a daughter of the Maharajah, rested on a clause inserted, at the instance of the Maharajah himself, in Act I. of 1869, providing that, in default of a son or son's descendants talooks should descend to such son, if any, of a daughter of the talookdar, "as has been treated by him in all respects as his own son." (Sect. 22, clause 4.)

The former suit was brought by the Appellant, against (1) the Maharanee (2) the Respondent, alleged to be represented by *Lachmi Nath*, his brother and guardian, (3) *Darogha Sham Dhar*, brother of the Maharanee, (4) *Lachmi Nath*. The Appellant, in his plaint, asserted his title to succeed to the talook as heir, by virtue of Act I. of 1869, being, as he alleged, a daughter's son, who had been treated by the Maharajah as a son, and prayed that the above mentioned documents of the 22nd of April, 1864, and the 16th of August, 1872, be cancelled.

This plaint is very general and informal, but it appears from the judgment of the Deputy Commissioner of *Fyzabad* that (in his own words) "the pleadings gave rise to the following issues, which, as amended at the suit of the parties, ultimately stood thus." The 1st, 2nd, and 4th are as follows:—

(1.) Did the Maharajah leave a will, and if so what was the effect of it?

(2.) Did he ever direct the destruction of the will?

(4.) Was Plaintiff ever adopted as a son by the Maharajah, or treated by him as his own son?

Evidence having been given on these issues both the Courts in *Oudh* decided that the Maharajah had left a will, and had not revoked it, and thereupon dismissed the suit of the Appellant.

The Appellant appealed from these decisions to Her Majesty in Council, and obtained their reversal.

In the judgment of their Lordships the questions for decision are thus stated:—

"It is now admitted, if it were ever seriously doubted, that the Appellant can only succeed in his suit by establishing both the following propositions:—

"1. That the testamentary disposition which the Maharajah had undoubtedly power to make, and did make in 1864, was revoked or became inoperative in his lifetime.

"2. That the Appellant is entitled to succeed to the talook as the son of a daughter of the Maharajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of sect. 22 of Act I. of 1869."

After careful consideration of the evidence bearing on these propositions, this Board came to the conclusion that the Appellant had established both; the result being, that the affirmance of the first destroyed the foundation of the Respondent's title, which rested on the Maharajah's will, whilst the affirmance of the second established the right of the Appellant to succeed to the talook as heir. This Board therefore advised Her Majesty to reverse the decree appealed from, and to declare that the will of the Maharajah was duly revoked by him in his lifetime, and that the Appellant was entitled, under Act I. of 1869, to succeed, as *ab intestato*, to the talookdaree estate of the late Maharajah. A declaration to this effect was accordingly made by Her Majesty in Council.

On the 3rd of January, 1879, the present suit was brought by the Respon-

dent, raising the same issue upon the revocation of the will as that stated in the judgment of this Board and decided against him, the fourth prayer in the present plaint being that it may be declared that the will of the Maharajah was not revoked, but was a good and valid will at his death.

The Respondent contends that he is not bound by this judgment, because he was a minor when the former suit was commenced, and *Lachmi Nath*, who is represented on the record to be his guardian, was not duly appointed.

It appears that the Respondent was of the age of sixteen years and ten months when the former suit was commenced, and did not attain his legal majority, which in *Oudh* is the age of eighteen, until the 7th of February, 1874, after both the judgments in *Oudh* had been given. This is not disputed by the Appellant, nor is it contended that *Lachmi Nath* was properly appointed as guardian *ad litem*. But it is insisted that the Respondent is bound by the judgment in the former suit in two ways.—

1st. By having, with knowledge that he was nominally a party to the suit, taken upon himself the prosecution of the appeal to the Queen in Council, not only after he had become of full age, but after the talook had been actually transferred to him by the Maharanee, by an instrument to be presently adverted to, and so had waived the defect of a due appointment of guardian, or was estopped from setting it up.

2nd. That, if he be not bound as a party to the suit, the Maharanee fully represented the estate in the previous litigation and consequently that the judgment in the former suit against her binds the Respondent.

With reference to the first of these points, which was that first argued at the Bar, their Lordships at once intimate that they do not propose to discuss it at length, as their decision will not turn upon it. But to complete the history of the former suit, and to shew the position of the parties when the present was commenced, it will be necessary to refer shortly to some further acts and proceedings. Evidence was given in the present suit that the Respondent was personally served with the original summons in the former one, and that from time to time he was present with the legal advisers for the defence when the case was discussed; but as all these things took place whilst he was still a minor, they are only material to shew his knowledge of the earlier proceedings when he prosecuted the appeal to Her Majesty in Council.

After the Appellant had obtained leave in the former suit to appeal here in that suit, and during the pendency of that appeal, the Maharanee, on the 20th of May, 1875, transferred by deed the full ownership and immediate possession of the talook to the Respondent, who, at the same time, executed a counter deed pledging himself to obey her as a son, and to carry on the business of the estate according to her advice. The Respondent having thus become the owner of the talook, as far as the Maharanee could make him so, appears upon the evidence to have corresponded with Mr. *Wilson*, the solicitor engaged in the appeal, upon the conduct of it, and to have supplied funds for its prosecution. Although it seems that no formal appearance was entered for him, his name appears in some of the proceedings as a party to the suit. Whether in thus carrying on the appeal he should be deemed a party to it, and bound as a party by the final order of the Queen in Council, their Lordships, as already intimated, do not think it necessary to decide. It may here, however, be observed, that although after the transfer of ownership of the talook had been made to him, *pendente lite*, by the Moharanee, he carried on the appeal in the manner just mentioned, he did not think fit to bring that transfer to the notice of this Board until the Order in Council had been issued, and upon his application for a rehearing.

Their Lordships now proceed to consider the second question, viz., whether the Moharanee fully represented the estate in the former suit, which mainly depends on the construction and effect to be given

to the will of the Maharajah, and to the first instrument executed by the Maharanee.

There can be no doubt that the will of the Maharajah is a testamentary instrument. According to the translation of it before set out, he states, as a reason for making it, that his intention as regards making any boy representative had not become fixed. "Therefore, for the present," obviously pointing by this expression to the possibility of his making another disposition before his death, he declared the Maharanee "representative and proprietor of my estate; until she make some one representative, let her remain representative, like myself, without power to alienc." This language in its natural meaning plainly discloses an intention to vest the whole estate in the Maharanee, until she should divest herself of it "by making some one else representative," and the words are sufficient and apt words to accomplish this intention.

As if to leave no doubt of his wish to make his widow proprietor of the talook, until by her own act she appointed another, the Maharajah adds that until she does so she is to remain representative "like myself;" the plain meaning of these words being that until such appointment she was to own and represent the estate as fully as he himself owned and represented it.

It is not necessary to consider whether the prohibition against alienation was or was not an effectual restraint; for, however that may be, it is clear that this provision would not prevent the vesting of the whole estate in the Maharanee.

In what manner the succession would have gone, under this peculiar will, if the Maharanee had died without appointing a representative to the estate is a question which does not now arise. It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the talook was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga Case* is applicable to hers: "The whole estate would, for the time, be vested in her absolutely for some purposes, though in some respects, for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed; . . . . it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." (1)

The Officiating Judicial Commissioner did not disaffirm the proposition that, assuming no appointment had been made by the Maharanee, she would have fully represented the estate. He rests his judgment on the ground, "that with reference to the conditions of the Maharajah's will, the Maharanee divested her estate by the execution of the document of 1872, and the Maharajah's estate became, so far as it could then become, *in bonis* of the nominated successor." This is the principal ground on which his decree was sought to be supported in the arguments at the Bar. It was contended for the Respondent that the document of 1872 was a present irrevocable appointment; whilst the contention for the Appellant was that it was a will taking effect only on the death of the Maharanee, and ambulatory and revocable in her lifetime.

Their Lordships are of opinion that the latter is the true nature of the document. It commences with a recital of the will of the Maharajah styling it "a will" The Maharanee then says that life is uncertain, and that after her death disputes might arise as to the succession to the raj, and proceeds, "It is therefore right that I should make a will regarding the appointment of an heir and representative, after myself, in the place of the Maharajah; I, therefore, being of good health and sound mind, have appointed the youth, *Triloki Nath*,

(1) See 9 Moore, Ind. Ap. 604; 3 P. C. J. 25.

nephew of my husband, heir and representative." She proceeds to say that the youth will enjoy the property after her death. She also bequeaths to him her own property. She says she will fix allowances for maintenance to relatives, which are to be paid after her death by *Triloki Nath*, who is also to pay her debts. She concludes by saying she has written these few words "in the nature of a will," that after her death they may be of use.

The document, both in its beginning and its end, is expressly styled a will. In the beginning, it is so styled after reference to the Maharajah's "will," and an instrument of the same nature as his was evidently contemplated. It is also plainly declared by the Maharanee that *Triloke Nath* was to become representative only after her death, and there is no indication whatever that she intended to divest herself of her husband's property during her lifetime, any more than of her own, which she also bequeaths.

It is to be observed that, when the Maharanee sent a copy of the document to the Superintendent of the Court of Wards to inform him that she proposed the Respondent to be successor of the Maharajah after her death, she calls it "a will."

It was argued that the document was evidence that she had made an immediate appointment, because the words "I have appointed" are used. There is no pretence for saying that she had appointed the Respondent otherwise than by the instrument itself. These words therefore can only have operation according to the nature of the instrument. They are not in themselves inconsistent with a disposition by will, and are altogether insufficient to countervail the express description of the document as a will, and its general tenor.

It was but fanitly contended that the Maharanee had no power to make the appointment of a successor to the talook by will, and therefore, to give effect to the instrument of 1872, it must be construed as a present appointment. But it would be impossible to give effect to the instrument contrary to the intention of its author. Treating it then as a will, which their Lordships hold it to be, the Respondent took no estate by virtue of it; and, of course, if the Maharanee had no power to appoint by will, he never could have taken any. The estate therefore, assuming the Maharajah's will had been unrevoked, would have remained in the Maharanee until the execution of the deed of the 22nd of May, 1875, which, being made *pendente lite*, cannot affect the present question.

An objection to the efficacy of the judgment in the former suit was made during the argument on the ground that the manager of the estate appointed under *The Oudh Tulookdar's Relief Act* (XXIV. of 1870), had not been made a party to it.

On the 4th of December, 1870, the Maharanee presented a petition under the above-mentioned Act, which, after stating that she had succeeded to the estate of her husband, prayed that the estate might be placed under the management of the Government; and, on the 3rd of June, 1871, an order was made by the Officiating Chief Commissioner appointing the Deputy Commissioner of *Fyzabad* to be manager.

The objection was rested on the 25th section of the adovementioned Act, which is as follows:—"Nothing in this Act precludes the Courts of the province of *Oudh* having jurisdiction in suits relating to the succession to, or the rights of persons claiming maintenace from, any immoveable property brought under the operation of this Act, from entertaining and disposing of such suits; but to all such suits the manager of such property shall be made a party."

It appears that in settling the issues in the present suit, the District Judge was asked to frame an issue raising this point. The Judge declined to do so, and the point apparently dropped out of the suit. However that may be, their Lordships think the omission to join the manager as a party does not affect the validity of the decree as between the Appellant and the Respondent. The appointment of

the manager did not vest the estate in him. It remained in the Maharanee as before. Nothing in the previous part of the Act takes away the jurisdiction of the Courts in suits relating to succession, and the 25th section expressly declares that it is not taken away. The Defendants to the suit might have objected to the non-joinder of the manager, or the manager might have intervened under the provision at the end of the section, but the section does not enact or purport to enact that judgments given in such suits shall be void as between the parties contesting the right to succession.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to order that the suit of the Respondent be dismissed and that he do pay the costs in the Courts below. The Respondent must also pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitors for Respondent: *Barrow & Rogers.*

2nd July 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GUNGAPERSHAD SAHU (Defendant) ... } *Appellant,*

and

GOPAL SINGH (Plaintiff) ... } *Respondent.**

Equitable grounds of setting aside sale in execution.

Where a sale in execution took place under an order obtained notwithstanding a concent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for a postponement, the petition, so consented to, having been, by mistake, afterwards presented to, and filed by the judgment-debtor in the wrong Court; *held*, that the judgment-debter was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby.

Appeal from a decree (13th December 1881) of the High Court, substantially affirming, with a modification in its terms, a decree (12th April 1880) of the Subordinate Judge of *Tirhoot.*

Mr *T. H. Cowie*, Q C., and Mr. *C. W. Arathoon* for the Appellant.

Mr. *H. Cowell*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

It appears to their Lordships in this case that the Judges of the Court below were right in ordering the sale to be set aside. The only question is as to the terms upon which it ought to be set aside; and in this respect their Lordships think that substantially the High Court was right. The time fixed by the High Court was two months from the 13th of December, 1881. In consequence of this appeal having been preferred that time has now expired, and the date must be altered. It appears also to be uncertain what is the amount due to the Defendant and his father under the decrees which are mentioned by the High Court.

Their Lordships think the decree should be varied so as to meet those circumstances. They will humbly advise Her Majesty to order that the cause be remitted to the High Court to cause the amount due to the Defendant and his father under the decrees referred to in the decree of the High Court, with interest at the rate, and up to the time mentioned in the decree of the High Court to be ascertained; and that upon the Plaintiff's depositing in the Lower Court, or paying to the Defendant and his father, within two months from the time of that ascertainment, the amount so ascertained to be due, the Defendant do reconvey the property in suit to the

*11 Cowell's Ind. Ap. 234; I. L. R. 11 Cal. 136.

Plaintiff, the said Plaintiff not being entitled to claim from the Defendant any wasilat for the period during which he may have been in possession of the property. In all other respects the decree of the High Court ought to be affirmed.

The Appellant must pay the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent: *Barrow & Rogers.*

3rd and 12th July 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

MADHO PARSHAD (Plaintiff) ... } *Appellant,*

and

GAJADHAR and others (Defendants) ... } *Respondents.**

Foreclosure of Mortgage—Regulation XVII of 1806, *s.* 8—*Service of copy of petition and of parwana, in the manner provided, essential.*

The provisions of s. 8 of Regulation XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. *Norender Narain Singh* v. *Dwarka Lall Mundur* (1) referred to and followed.

Held, that although the mortgagor at the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy petition for foreclosure, and of the parwana signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal.

Appeal from a decree (15th March 1881) of the Judicial Commissioner of *Oudh*, reversing a decree (8th September 1880) of the District Judge of *Lucknow*, and dismissing the Appellant's suit for foreclosure of a mortgage.

Mr. *R. V. Doyne*, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

This is an appeal from a judgment of the Judicial Commissioner of *Oudh*, reversing a judgment of the District Judge of *Lucknow*.

The Plaintiff, a banker, sued to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it. The mortgage was dated the 3rd of May, 1863, seventeen years before the commencement of the suit; of the mortgagors, seventeen in number, eleven survived, the remaining Defendants being representatives of those who had died. The mortgagee was Rajah *Behari Lall*, the father of the Plaintiff. The deed of mortgage purports to be a security for the repayment within five years of Rs. 4,851, with 12 per cent. interest, the receipt of which sum is acknowledged, and it declares that if the principal and interest are not repaid within five years the instrument shall operate as an absolute deed of sale.

The principal sum is stated to be made up of debts due by the mortgagors, or otherwise secured by former mortgages, which they were to be provided with money to pay, of a balance due to the bank, and an advance of Rs. 1,356 "for necessary expenses."

The Plaintiff alleged default in the payment of the mortgage money, that the proper proceedings for foreclosure had been taken, and claimed possession of the land.

The Defendants denied that any consideration was given for the bond, and

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* 11 Cowell's Ind. Ap. 186; I. L. R. 11 Cal. 111.

(1) L. R., 5 I. A. 18; I. L. R., 3 Calc., 397.

alleged that it was given only to secure advances which might be made to pay the costs to which the Plaintiff might be put by the prosecution of an appeal by two persons who had brought a suit against them, and failed in the Lower Court; that no appeal was preferred, and that nothing was advanced.

The issues stated were:—

(1.) Did the Defendants receive no consideration?

(2.) Were the Defendants induced to execute the deed by fraud and misrepresentation.

On the part of the Plaintiff the mortgage was duly proved, which undoubtedly threw upon the Defendants the burden of proving absence of consideration.

The Plaintiff further called witnesses to the actual payment of the consideration money when the mortgage was executed. He put in the former mortgages. He shewed an entry in his books whereby it appeared that the sums due on the former mortgages were either advanced to the Defendants or paid for them; that they owed the balance to the bank stated in the mortgage deed, and received the amount stated to have been paid to them. Against this evidence the Defendants called two witnesses who swore that they were present on the examination of the deeds, and that no money passed, but none of the mortgagors, of whom eleven were living, were called to prove want of consideration, the pendency of the litigation, to meet the possible cost of which they alleged the mortgage to have been given, or indeed any part of their case, which involved a charge of gross fraud against the bankers. The District Judge believed the evidence of the Plaintiff, and gave judgment in his favour.

This judgment was reversed by the Judicial Commissioner on two grounds:—1st, that the mortgage was without consideration; 2nd, that the proper proceedings had not been taken to effect foreclosure.

The finding of the Judicial Commissioner on the first point seems to have been mainly based on three considerations:—

1. That the entries in the books of the Plaintiff contradict his story. Their Lordships have already intimated that in their view these entries confirm it.

2. That the money was said to be advanced before the deed was registered. It is to be observed here that the transaction occured in 1863 a year before the Registration Act of 1864 came into force, which, for the first time, provided that payment of the consideration of deeds might be made in the presence of the Registrar at the time of registration and recorded by him; a practice which has since become common. As the banker was not a party to the deed, his presence before the Registrar was not necessary, while that of the Defendants was. If there is some force in the observation that it is strange that he should after parting with his money have entrusted the deed to the Defendants to have it registered and receive it back from the Registrar, on the other hand it is to be observed that the deed must at some time have been returned to the banker, as he produced it at the trial.

3. The absence of any demand of interest from the time of the mortgage money being due to the date of the suit, nearly twelve years, an observation certainly of some weight.

On the whole, however, their Lordships are of opinion that the evidence preponderates on the side of some consideration having been received by the Defendants, though how much was actually advanced to them in cash may admit of doubt.

The second ground on which the Judicial Commissioner reversed the judgment of the District Judge presents a question of more difficulty. It was contended on the part of the Appellant that inasmuch as the Defendants had in the Court below rested their case solely on the absence of consideration for the mortgage, and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the

foreclosure had been raised in the Court of the District Judge, the Defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings.

The proceedings necessary to effect foreclosure are thus prescribed in sect. 8 of Regulation XVII. of 1806:—

"Whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

These provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often (as in the present case) poor and ignorant men, from fraud and oppression on the part of money lenders. Accordingly, both in the Courts of *India* and by this Board, it has been held that the prescribed procedure must be strictly observed. In the case of *Norender Narain Singh* v. *Dwarka Lal Mundur and Others* (1) it was held that the finding of the zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, was not even *primâ facie* evidence of the regulation having been complied with, and that the service of the petition for foreclosure and the perwannah of the Judge in the form directed by the regulation must be strictly proved. To construe the pleadings in the District Court as a binding admission that the Respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in *India* a stricter construction than is usual.

The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgment he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgment ought to be reversed.

Although the vakeel for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable.

The question remains whether, in the foreclosure proceedings, the provisions of the Regulation of 1806, with respect to the notification to be made to the mortgagor, were or were not duly observed.

Several documents were put in, of which the following is a specimen:—

"Translation of Notice to *Ishri*, dated 30th of March, 1876.

"(Signed) *H. B. H.*

(1) Law Rep. 5 Ind. Ap. 18; 3 P. C. J. 771.

"*Madho Parshad*, son of *Rajah Beharilal, Bahadur, Sahukar* (banker), and talukdar of *Maurawan*, &c. ... ... Plaintiff.

versus

"1. *Gajadhar*, 2. *Jagan*, 3. *Matadin*, son of *Thakur*, 4. *Ishri*, son of *Dhaukal*; 5. *Janki*, son of *Jewrakhan*; 6. *Lalta*, 7. *Badloo*, and 8. *Bhagwandin*, sons of *Madari*; 9. *Sheo Charan*, 10. *Gauri*, 11. *Janki*, and 12. *Mathura*, sons of *Pem*, 13 *Kusuhar*, son of *Baji*; 14. *Kalidin*, 15. *Rajwa*, and 16. *Sheo Singh*, sons of *Badri*, 17. *Sankata*, Minor, son of *Ram Sahaki*, under the guardianship of his mother, and 18, *Bala*, son of *Bhawanidin*, Brahmins, residents, and co-sharers of mouzah *Bhadin*, *Pargana* and *Tahsil Purwa*, in the district of *Unao*, mortgagors ... ... Defendants.

"Claim.—Foreclosure of mortgage of the entire village *Bhadin* in the *Pargana* and *Tahsil Purwa*, in the *Unao* district, under the terms of the deed of mortgage by conditional sale dated the 3rd of May, 1863, A.D. for an amount noted below:—

"Notice.

"To *Ishri*, son of *Dhaukal*, caste Brahmin, resident and sharer of mouzah *Bhadin*.

"Whereas Plaintiff has filed in the Court an application for foreclosure of mortgage in respect of village *Bhadin* described in the deed of mortgage by conditional sale dated the 3rd of May, 1863, owing to non-performance of the conditions entered therein, notice of one year's currency is hereby given to you, as laid down in sect. 8, Regulation XVII. of 1806, that if you will not pay up the mortgage money with interest within twelve months and redeem the mortgaged property, the mortgagee shall, at the expiration of the period stipulated for, become in virtue of the condition as regards non-receipt of the mortgage money and interest the absolute proprietor of the said village, and no objection whatever will thereafter be attended to.

	R.	A.	P.
"Principal mortgage money	4,851	0	0
Interest	6,932	4	0
Future interest for one year	582	2	0
Costs	8	4	0
Total Rs.	12,373	10	0

"Dated the 30th of March, 1876.

"In Hindi.

"(Signed) *Ishri*, Lumberdar, with pen of *Gauri*, Patwari. Witnessed by *Gauri*, Patwari."

H. B. H. are said to be the initials of the District Judge.

The signature at the bottom is said to represent the receipt of the document by *Ishri*, one of the Defendants, but when and where he received it is not very certain.

The following is a sample of another set of notices, dated the 26th of April, 1876:—

"By Order of the Deputy Commissioner of *Unao*.

"Notice of Foreclosure of Mortgage.

"No. 59. Miscellaneous, Civil.

"*Madho Parshad*, son of *Rajah Beharilal, Bahadur*, banker, and talukdar of *Maurawan*, &c. ... Plaintiff.

versus

"*Gajadhar*, &c. (eighteen persons), resident of mouzah *Bhadin*, *Pargana* and *Tahsil Purwa* ... Defendants.

"Claim.—Foreclosure of mortgage by conditional sale of the entire village *Bhadin* in lieu of Rs.12,365.6 in all.

"Notice to *Sheo Charan*, Defendant.

"Whereas the Plaintiff named above has put in a petition in this Court,

requesting that a notice of foreclosure of mortgage be issued to you, you are therefore directed to attend this Court, on the 18th of May of the current year, and take away the aforesaid notices, filed by the Plaintiff after understanding their full purport; consider this urgent.

"Dated this 26th day of April, 1876, A.D.

"(L.S.) (Signed)

It would appear by this that the Defendants are summoned to attend the Court on the 18th of May, in order to receive a notice of foreclosure, and that consequently they had not received notice before.

Accordingly on the 18th of May, they attend the Court.

The proceedings before the Court are headed:—

"Claim to foreclosure of mortgage of village *Bhadin* in lieu of Rs.12,366.6. Application for the issue of notice of foreclosure for the term of one year."

The Defendants objected to receiving the notice on the ground of want of consideration for the mortgage.

A minute of the Court of the Deputy Commissioner, dated the 10th of December, 1876, is in these terms:—

"Parties are present, *i.e.*, the Defendants, who were sent for, have appeared in person, while the Plaintiff's pleader is present for him; notice has been delivered.

It has been contended that on that day at least the notices were delivered to the Defendants, and that on that occasion they signed their names as having received them.

But what did they receive? The document of the 30th of March; none other is suggested, unless it be the document of the 26th April, which is less favourable to the Plaintiff.

This document of the 30th of March, however, is not a compliance with the Regulation. It is not a perwannah under the seal and official signature of the Judge; it does not notify from what date the year during which redemption shall be made begins to run, and it neither was nor purports to be a copy of the petition for foreclosure, the furnishing which to the mortgagor is declared by this Board in the case before cited to be essential. Their Lordships are therefore of opinion that the Judicial Commissioner was right in holding that the requirements of the Regulation had not been complied with, and they will humbly advise Her Majesty that his judgment be affirmed.

Solicitor for the Appellant: *T. L. Wilson.*

4th and 23rd July 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

KALI DAS MULLICK (Plaintiff) ... } *Appellant,*

and

KANHYA LAL PUNDIT (and on his decease BEHARI LAL PUNDIT) and Others ... } *Respondents.*[*]

Construction of gift, as to quantity of estate given—Limitation, Act XV of 1877, Sch. 11. Arts. 134 and 144—Gift when operative without delivery of possession—Hindu Law.

The rule as to the construction of the language in which a gift is made, independently of the "Transfer of Property Act," Act IV of 1882, (which may, or may not, have been expressed so as to lay down, in favour of absolute gifts, a rule more positive.) is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention.

[*] 11 Cowell's Ind. Ap. 218; I. L. R. 11 Cal. 121.

A gift being thus expressed,—"I put a stop to my interest in those taluqs, and withdraw my enjoyment thereof, and I make them over to you;" *held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control;" and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the donee should take the property for life only.

Held, also, that, consistently with the authorities in the Hindu law, a gift, were the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that were a donee, or vendee, is under the terms of the gift, or sale, entitled to possession, there is no reason why such gift, or sale, though not accompanied by possession, whether of moveable or immoveable property, (where the gift or sale, is not of such a nature as would make the giving effect to it to be contrary to public policy,) should not operate to give the donee, or vendee, a right to obtain possession.

Appeal by special leave (obtained 16th December 1882) from a decree of the High Court, setting aside the judgment of the Subordinate Judge of *Cuttack*, as to limitation, but, on other grounds, affirming his decree (30th June 1880), whereby the suit was dismissed.

Mr *T. H. Cowie* Q. C., and Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *R V. Doyne* and Mr. *J. D. Mayne*, for the Respondent.

23rd July, 1884.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

On the 13th of June, 1841, *Roma Sundari Dasi*, widow of *Srinath Bromho*, executed an ikrarnama, which was in the following terms:—

"To the most respectable *Srimoti Ruttonmoni Dasi*, widow of the late *Ram Cumar Brohmo*, mother of the late *Srinath Bromho*, inhabitant of *Kona*, purgana *Havelisuhur*.

"This ikrarnama, executed in 1248 (1841—42) by *Roma Sunduri Dasi*, widow of the deceased *Srinath Bromho*, inhabitant of *Kona*, purgana *Havelisuhur*, at present residing in *Chitpur*, in the district of 24 Purgunas, sheweth:—

"That the taluks comprised in the mouzahs mentioned in the annexed schedule, which were purchased in my husband's name, and which are recorded in my name in the collectorate sheristas of the districts of *Cuttack* and *Puri*, are under your control, with all rights appertaining thereto; and you have been performing the deb-seba, and have been entertaining religious mendicants, and have been celebrating the *dole* and *durgotshub* festivals (which were originally instituted by my deceased husband and father-in-law, by residing in the house at *Kona*. In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control, I put a stop to my interest (in those taluks) and withdraw my enjoyment thereof, and I make them over to you, with this promise, that you may remove my name from the Collector's sherista in respect of the taluks named in the schedule, and you may have your name substituted for it; that you should have undisputed possession in the mofussil; that you should take the lowajima papers and the arrears of rent from the amlas and officers appointed by me; that you should appoint men who are under your control to the offices of amlas, and through them you should collect rents from the tenants in the mofussil; that you should perform the abovementioned *sebas*, and should provide for your support. I have no right or claim to the taluqs. If I advance any claim at any future time, such claim should be rejected. I have nothing to do with the profits and loss of the taluqs. You cannot claim anything from me. I have no claim against you. Wherefore, in health of body, in the enjoyment of my senses, and in calmness of judgment, I execute this ikrar. I shall never act in contravention of the terms of this ikrar

"The 2nd Assar of the above mentioned year (13th of June, 1841).

"Schedule of the Taluqs.

	Mouzahs.
"Taluq *Santrapuri*, &c. ...	19
Purchased *Bhith* mehal ...	1
Mehal *Luckhraj* resumed ...	1
Taluq *Berhampur* ...	1
	22
"Taluq *Jhareswurpur* ...	1
Taluq mouzah *Bangalpur*, zilla *Puri*	1
Mouzah *Durgadaspur*. ...	1
	25"

Srinath Brohmo was the son of *Ram Cumar Brohmo* and *Ruttonmoni Dasi*, and the talooks mentioned in the schedules had been dedicated by *Ram Cumar* and *Srinath* to the service of two idols. *Srinath* died in 1838, having survived his father, the date of whose death did not appear. On the 24th of December, 1864, one *Banchhanidhi Moharana*, having obtained a decree against *Ruttonmoni* on the 25th of February, 1862, and having applied for a sale of a ten-annas share of the zemindary of the talook *Santrapur*, which was the share of *Ruttonmoni Dasi* by virtue of the ikrarnama, the same was publicly sold, and the Respondent *Kanhya Lal Pundit* became the purchaser for Rs. 17,800 of the rights and interests of *Ruttonmoni* therein, as appears by the sale certificate dated the 27th of January, 1865. *Ruttonmoni* died on the 16th of February, 1867. On the 1st of February, 1876, *Roma Sundari* and *Tarini Churn Brohmo*, who was then the presumptive heir on the death of *Roma Sundari*, executed a deed of gift to *Krishna Mohini Dasi*, the wife of the Appellant, which is in the following terms:—

"This deed of gift, executed by *Roma Sunduri Dasi*, widow of the late *Srimoti Bromho*, inhabitant of *Kona*, purgana *Habilisuhur* in the District of 24-Purganas, at present residing in *Dandmal Sahi*, in *Puri*, and by *Tarini Churn Brohmo*, son of late *Bhoyrub Chunder Bromho*, inhabitant of *Kastodanga*, purgana *Rajnuggur*, sub-district *Ranaghat*, in the district of *Nuddea*, sheweth :—

"That, on the death of my husband, I, *Roma Sundri Dasi*, got possession by right of inheritance of his ancestral zemindaries, and the zemindaries which were recorded in his own name, and of the houses, &c. In order to pay off the debts incurred by my husband and father-in-law, I sold taluq *Juggurnath Prosad*, *&c.*, of purgana *Burjang*, and taluq *Rambhila* of purgana *Randia Orgura*, and taluq *Mowajib* appertaining to purgana *Senawut*, pertaining to *Balasur* district, to *Monmohini Dasi* and *Khettermoni Dasi* and *Doyamoni Dasi*, and other taluqs to other persons. By this means I paid off the debts. As I am residing in this holy city, I made over to my mother-in-law, the late *Ruttonmoni Dasi*, under the ikrarnama, dated 2nd Assar, 1248 (14th of June, 1841), taluq *Santrapur* and the purchased mehal *Dihi*, and, resumed mehal *Lakhraj* pertaining to it, and taluq *Berhampur*, and taluq *Jhareswurpur*, and taluq *Durgadaspur*, &c., situate in the district of *Cuttack*, in order to provide thereby for the *seba* of my husband's ancestral idols, viz., *Lukhi Narain* and *Sridhur*, and for the maintenance and religious ceremonies of my mother-in-law, the late *Ruttonmoni*. Accordingly my mother-in-law performed the *seba* of the idols and other duties till her death, which occurred in Falgun, 1273 (February and March, 1867). On her death those properties reverted to us. But as those zemindaries, &c., were in disorder during my mother-in-law's lifetime, after her death *Rungomoni Dasi*, the wife of the late *Hurihur Bromho*, paid from her own funds for the *seba* of the above-mentioned idols. But she too is now unable to discharge those duties. And I am residing in this holy city of *Puri*. And I, *Tarini Churn Bromho*, am also unable to keep up the *seba* of the idols; hence the *seba* of the idols has been interrupted. You are a near relation of ours. You are willing to undertake the *seba* of the idols. We too are pleased with you. We give the idols to you. We give, of our own accord, taluq *Santrapur* and taluq *Berhampur*, zemindaries, and the brick-built

dwelling-house, and garden and lands and jamas, &c., in *Kona*, as described in the annexed schedule, to you, and execute this deed of gift. From this moment you should keep the idols under your control, take possession of the zemindaries, &c., collect the rents, recover the zemindaries and other properties, with mesne profits, from persons from whom they may be due since the death of the late *Ruttonmoni Dasi*, who was the mother-in-law of *Roma Sundari Dasi*, and the grandmother (by relation) of *Tarini Churn Bromho*, pay the revenue in the Collectorate, and the rents to the zemindars, and spend Rs.1,200 a year, or Rs 100 a month, for the *seba* of the idols. From this day we appoint you as the *sebait* of those idols. You, your sons, grandsons, and your heirs may keep up the *seba* of the idols, and enjoy and possess the properties named hereinafter. But you and your sons, grandsons, and other heirs will not have the right to alienate those properties by sale or gift. If at any time we or our heirs claim these properties, such claim should be rejected."

The idols given by this instrument were handed over to the grantee. But as regards the land, *Kanhya Lal Pundit* was at this time in possession, claiming to be so by virtue of his purchase on the 24th of December, 1864, and when *Krishna Mohini Dasi* attempted to take possession she was prevented by his servants. She died on the 4th of November, 1878, having made her will, whereby she appointed her husband, the Appellant, and one *Behari Lal Mitter*, her executors, and directed that the Appellant should, during his life, perform the worship of the two idols and manage the entire estate. On the 23rd of November, 1878, the Appellant alone proved the will, and on the 18th of December, 1878, he brought a suit to recover possession of the ten-annas share of the talook *Santrapur* against *Kanhya Lal Pundit* as the principal Defendant, but also making *Roma Sundari* and the minor sons of *Tarini Churn*, who had died, Defendants. *Roma Sundari*, by her written statement, admitted the Plaintiff's claim, and said that she and *Tarini Churn*, who was her reversionary heir, as also of her husband, made an absolute gift of the zemindary in claim, and the ancestral *deb-seba* to *Krishna Mohini Dasi*. She was also examined as a witness and cross-examined, when she identified the deed of gift and asserted the fact of conveyance to *Krishna Mohini*. *Kanhya Lal*, in his written statement, set up various grounds of defence, including the Law of Limitation, and also that "*Roma Sundari* was never in possession of the disputed property; hence the deed of gift executed by her is of no use, and is invalid."

The Subordinate Judge of *Cuttack* held that the possession of *Kanhya Lal* was adverse to *Ruttonmoni*, and through her also to *Roma Sundari*, and that art. 144 of Act XV. of 1877 was applicable, and as the possession commenced more than twelve years before the suit was brought, it was beyond time. On this ground he dismissed the suit, but in case the Appellate Court might take a different view of the question of limitation, he gave his opinion that *Ruttonmoni*, under the deed, only acquired a life-interest, and that on her death the property would revert to the creator of the trust.

The High Court at *Calcutta*, on appeal, held that the "grant must be deemed to have been at any rate of all the estate in the talooks of which *Roma Sundari* could dispose," and that as she was still alive *Ruttonmoni's* interest "had not expired." On this ground they affirmed the decree. The objection in the written statement that *Roma Sundari* was never in possession of the disputed property, and that the deed of gift was consequently invalid, was not noticed by either Court.

The questions in the present appeal are clearly stated in the reasons at the end of the Respondents' case.

"1. Because the deed of gift, which is the basis of the Plaintiff's title, is utterly invalid, inasmuch as the donor was out of possession, and no possession was ever given to the donee.

"2. Because the interest of *Ruttonmoni*, under which this Respondent (*Behari*

Lal, the representative of *Kunhya Lal*, who has died pending this appeal) was in possession, was and is a valid and subsisting interest as against *Roma Sundari* and the Appellant, who claims under her.

"3. Because the suit was barred by the law of limitation."

Their Lordships will first consider the second question. That depends upon the construction of the ikrarnama.

The rule laid down in the *Indian Succession Act* must not be applied to it, because it is not a will, nor the rule laid down in the *Transfer of Property Act*, because that was not in force until a later date. It is not necessary to decide whether the *Transfer of Property Act* enacts what was unquestionable the law before. The rule of law was that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not, consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument. The words, "I put a stop to my interest (in those taloukas), and withdraw my enjoyment thereof, and I make them over to you," must be read in connection with the words which precede them.—"In order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control." It appears to their Lordships that the indefinite words of the gift must be limited by the purpose of the gift, and that it was *Roma Sundari's* intention that *Ruttonmoni* should take the property only for her life.

It will be convenient to consider next the question of limitation. The learned counsel for the Respondent relied upon arts. 134 and 144 of Act XV. of 1877. The former applies to suits to recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. Their Lordships intimated in the course of the argument that the purchase at the sale in execution of the rights and interests of *Ruttonmoni*, could not, as between the purchaser and *Roma Sundari*, be considered to fall under this article. Art. 144 gives tewelve years from the time when the possession of the Defendant becomes adverse to the Plaintiff. During *Ruttonmoni's* life possession was not adverse to *Roma Sundari* (the Plaintiff's title began long after), and the suit was brought on the 18th of December, 1878, within twelve years of her death.

It remains to consider the third question. In the Respondent's reasons it is broadly stated that the deed of gift was utterly invalid, inasmuch as the doner was out of possession, and no possession was ever given to the donee. But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under her. The doner is a Defendant, and affirms the validity. The person who disputes it claims adversely to both. Several authorities were quoted in support of the Respondent's contention, and it is necessary to see how far they are applicable to such a suit as the present. *Harjivan Anandram* v. *Naran Haribhai* (1) was cited to shew that a gift of land was not complete by Hindu law without possession or receipt of rent by the donee. It came before the High Court on a special appeal. The suit was to recover two bighas of land from the defendant, who held it as tenant. The Assistant-Judge, on appeal from the Moonsiff, found that the land in dispute had been given to the Plaintiff by one *Bapu*, but that the gift had never been completed by a transfer or delivery of the property, and the donor *Bapu* then denied the gift altogether, and he held that the gift never having been completed, the promise to give was null and void. It would seem, from the statement of the defence, that the tenant had conti-

(1) 4 Bomb. H. C. R. (A. C. J.) 31.

nued to pay rent to the donor. The High Court affirmed the decree. It is not necessary to set out here the authorities which were quoted. It is sufficient to say that, with the exception of the passage from the Mitakshara, they all shew that the reason for delivery being necessary is that the gift may not be resumed. This appears very clearly from the text of *Yajnyawalcya* Dig., book 2, v. 32, where it is said "Let the acceptance be public, especially of immoveable property, and delivering what may be given and has been promised, let not a wise man resume the donation." The last sentence of the passage in the Mitakshara is omitted in the report, but if the whole is read in connection with the preceding clauses of the section, it seems to have reference to the comparative strength of a title with possession and a title without it. The case differs most materially from the present, where the donor has done all she can to complete the gift, and is a party to the suit, and admits the gift to be complete. Another of the cases cited is *Girdhar Parjaram* v. *Daji Dulabhram* (1). There the Plaintiff brought a suit to compel the Defendants to pull down a partition wall which they had built between their property and the Plaintiff's, and to restore certain ground which they had encroached upon. The Plaintiff alleged that he had purchased the ground by a deed of sale. It was found that the Plaintiff bought the house and land in question after the supposed encroachments were made, and they were sold to him according to measurements in a former bond which was not before the Court. The High Court quoted the judgment of this Board in 12 *Moore*, Ind. App., 306 (which will be presently noticed) as applicable to the case, but they decided it on the ground that the Plaintiff had given no evidence to shew what was the extent of the land which the deed of sale purported to transfer to him, and there was nothing to prove that the old boundaries included the site in dispute. The head-note to the report takes no notice of this, and represents the case as decided upon the ground that, by Hindu law, it is requisite that the vendor should, at the time of sale, be in possession of the property sold. It was clearly not decided upon that ground, and the inaccuracy of the head-note has led to the case being treated as an authority for what was not decided in it. These cases have been noticed somewhat fully on account of the judgment of the *Bombay* High Court in *Kachu Bayaji* v. *Kachoba Vithoba* (2), which was quoted for the Respondent. There, in a suit to recover possession of a house and land, it was held that by Hindu law a change of possession is necessary to complet the sale of it, and that it could not be supplied where the vendor had no possession to deliver. The judgment contains the following passage:—"It is perfectly clear from the proceedings that, at the date of this transaction (the sale), the house was not in possession of the Defendant *Magan*. The vendor, therefore, sold what he could not sell according to Hindu law, as laid down in *Harjivan Anandram* v. *Naran Haribhai*. The texts there cited make a transfer of possession equally necessary to the completion of a sale as of a gift, and the delivery of possession of things having a material existence is regarded by the Hindu law as essential to their legal transfer. Such appears to be the principle of the decision in *Girdhur Parjaram* v. *Daji* (1)." There appears in this to be misapprehension as to both cases. In the former, the question was whether a gift was complete without delivery. No law was laid down as to a sale, and only one of the texts cited mentioned a sale. That is the passage from the Mitakshara. As to the latter case, it has been shewn what the true ground of decision was.

Their Lordships will consider the two judgments of this Committee upon which the Respondents' counsel relied. In *Rajah Sahib Perhlad Sein* v. *Baboo*

(1) 7 Bomb. H. C. R. (A. C. J.) 4.

(2) 10 Bomb. H. C. R. 491.

Budhoo Singh (1) it is said :—"They (the Judges of the Sudder Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the *Statute of Uses*. Whether such a construction would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it the execution of the bill of sale may be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do." The suit was brought by the purchaser against the vendor, and their Lordships held upon the facts that the purchaser had not done this, and that the contract had become incapable of being performed according to the true meaning and intent of the contracting parties.

In the other case, *Ranee Bhobosoondree Dassee* v. *Issur Chunder Dutt* (2) the suit was based upon a deed executed by *Jogessur Ghose* in favour of the Plaintiff. In the judgment, their Lordships, after quoting what was said in the former case, say :—"Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both *Jogessur Ghose* and the Plaintiff were to be parties."

Neither of these decisions is applicable to the present case. The ground of them is that the Plaintiff was not entitled under the terms of the contract of sale to possession. In this case the Appellant is under the terms of the gift, and according to the construction which their Lordships have put upon the ikrarnama, entitled to possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immoveable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law. On the principle contended for by the Respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee. Mr. *Mayne* earnestly contended that what is said in the books about the completion of a gift by possession is founded on a public policy relating to land and analogous to the feudal rule requiring investiture or livery of seisin. But the texts relate to moveables as well as to land; and, with one not very clear exception, they relate to intended gifts which it is contemplated that the donor may take back until they are perfected. They appear to rest on a principle which has nothing to do with the feudal rules, and the European analogy to which is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, the donor has, in fact, done all she could, and, as she still desires to support her gift, there is no question of compelling her to do more. The Respondent has failed on all the grounds, and the Appellant is entitled to possession of the property in suit with mesne profits. Their Lordships will therfore humbly advise Her Majesty to reverse the decrees of both the lower Courts,

(1) 12 Moore, Ind. Ap. 306.

(2) 11 Beng. L. R. 36.

and to decree that the Plaintiff is entitled to possession of the property in suit, together with all the costs incurred and to be incurred in the lower Courts, and to remit the case to the High Court to pass such a decree for mesne profits as it may consider the Plaintiff to be entitled to.

The Respondent, *Behari Lal Pundit*, will pay the costs of this appeal.

Solicitor for the Appellant: Mr. *T. L. Wilson*.

Solicitors for the Respondent *Behari Lal Pundit*: *Barrow & Rogers*.

14th November, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

THE DEPUTY COMMISSIONER OF RAE BARELI (Plaintiff) ... } *Appellant*,

and

LAL RAMPAL SINGH (Defendant) ... } *Respondent*.*

Construction of instrument of mortgage

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me."

Held, that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.

Held, accordingly, (on the contention that these words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale) that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one, *viz.*, that the mortgagee should take possession upon such a default, and also might sell if the mortgagor objected to his applying the rents in reduction of the principal and interest due.

Appeal from a decree (31st October 1881), of the Judicial Commissioner of *Oudh*, reversing a decree (20th December 1880) of the District Judge of *Rae Bareli*.

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The suit in this case was brought by the present Appellant. The plaint prayed that under the terms of an instrument of mortgage, dated the 10th of March, 1874, possession as mortgagee of thirty-one villages specified in that instrument of mortgage should be awarded to the Plaintiff. At the time of filing the plaint the Respondent *Rajah Rampal Singh* was not in possession of the villages. The person in possession was *Dirgaj Kunwar*, his mother. *Rampal Singh* was made a Defendant on the ground that under the circumstances which were stated in the plaint he was liable to pay the original debt, and was the real owner of the mortgaged villages. *Dirgaj Kunwar* was made a Defendant as being the party in possession. The plaint was filed on the 31st of March, 1880. On the 11th of June, 1880, there were proceedings for mutation of names. It is not necessary

* 12 Cowell's Ind. Ap. 1; I. L. R. 11 Cal. 237.

to go into the particulars of those proceedings, the result of which was that *Rampal Singh* came into possession, and on the 14th of June, in his written statement in the suit, he defended it as being in possession, and *Dirgaj Kunwar* in fact became no longer a real party to it. The contest is between the present Appellant and *Rampal Singh*. The only question which is now raised is upon the construction of the mortgage of the 10th of March, 1874.

The terms of that mortgage, after reciting particulars shewing how it came to be entered into, are these:—After stating that there was to be a mortgage for Rs. 50,000, with a promise to pay it up in five years, from 1875 to 1879, it proceeds,—'Therefore I, while enjoying sound health and proper senses, do hereby mortgage without possession to the Shahzada, in lieu of Rs. 50,000, being the balance of the consideration of the above-mentioned decree, the following villages, as per boundaries given below, situate in the above-named pargana and district, together with all vested and contingent rights, the gross rental of which is Rs. 13,253 12*a*. 3*p*., and the Government revenue, Rs. 7,986; my husband having gifted them to me by a deed of gift dated the 2nd of June, 1873, with power to sell or mortgage or transfer in every way the proprietary right, and I holding possession thereof: Rajah *Hanwant Singh*, my father in-law, has also recognised the fact by the decree dated the 7th of September, 1871; and in case of change of heirs from time to time this property cannot be taken out of my possession; and I covenant as follows:—1. I will pay Rs. 10,000 per annum at both crops to the Shahzada Sahib, and out of that amount his servants will first deduct the interest, whatever it may come to by calculation, and then credit the balance towards the principal: and in case of any disorder which may cause default in payment of the instalment the servants of the Shahzada Sahib Bahadur, taking complete possession of the mortgaged estate, will hold themselves liable for the payment of the Government revenue, including land revenue and cesses of all sorts, and having first deducted from the savings the cost of making collections at the rate of 10 per cent. on the gross rental on account of the pay of servants, will credit the balance towards the instalment money; at the end of each year, in the months of May, June, November, and December, having made up accounts, they will note the date of realization. Till the time the accounts are made up there will be no claim or objection on my part to set off the interest against the amount collected; on the other hand the amount collected will be considered as amount in deposit." To stop here for the present, there is here a distinct provision that upon default in payment of an instalment the mortgagee by his servants was to take possession of the mortgaged property, and to collect the revenue, and apply it towards the payment of the instalment. The words are:—"The servants taking complete possession." That evidently shews that possession was to be taken, the mortgagee was to have power to take possession on the nonpayment of an instalment. What is said by the District Judge in his judgment is very pertinent to this part of the instrument. He says, "The question involved in the fifth issue now remains to be determined, viz., whether under the terms of the deed of mortgage the Plaintiff is entitled to sue for possession. The words of the deed, so far as they bear upon this point, have been carefully read and considered by me in the original Hindustani, and a literal translation has been given above in this judgment. There is no doubt that there is some ambiguity in the language of the deed. That a breach of the condition as to regular payment of instalment has taken place is not denied on behalf of the defence; but it is contended that such breach having taken place the Plaintiff's only remedy is to sue for the recovery of the mortgage debt, and that the Plaintiff's right to enter into possession was intended to be contingent upon the wish of the mortgagor. For this contention the defence relies upon these words of the deed:—'And if this be not agreeable to me then immediately

on the happening of the breach of promise, after the end of the year, they may realize the entire instalment money, &c.' It is contended by the defence that the word 'this' (*yeh*), used in the above sentence, applies to all the preceding conditions in the deed, and that it makes the condition of taking possession entirely dependent upon the mortgagor's wish. But I am of opinion that this is not a fair construction of the Hindustani words as they are used in the deed. The language of the deed shews that the power of obtaining possession on failure of regular and full payment of instalments was given absolutely, the words used being. '*kabya karke*' (having taken possession), and emphasised by the words '*si wakt*,' at once, which, read together, indicate absolute power to take possession." Therefore we have in the first part of this instrument an absolute power on the part of the mortgagee to take possession on nonpayment of an instalment. That this was contemplated is shewn also by the provision at the end of the instrument, which says:—"Should, on the expiry of the term of this instrument, any money remain due, then, till the payment thereof, possession will continue according to the terms herein set out." Then, after the passage which has been read, comes the part upon which the Respondent relies: "If I do not accept this, then as soon as the breach of promise occurs they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me. Should in any way any objection be raised by me, or by my husband, as between us or in Court, it will be void." The contention on the part of the Respondent is, that these words apply to all the previous part of the deed, and that the mortgagee could not take possession, except at the option of the mortgagor, and if the mortgagor thought fit to say that the mortgagee should not take possession but should realize the amount of the instalment by sale of the villages, that course must be adopted, and a suit for possession could not be maintained. Now the consequence of putting such a construction as that on this part of the instrument would be to make it not consistent with the former part, which gives a power to take absolute possession. The instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. A construction which will give effect to all is that the words, "If I do not accept this" may be referred to the part which immediately precedes that passage, namely, that which provides for the setting off the interest against the amount collected by the mortgagee when in possession. The other construction would not only not give the proper effect to the first part of the instrument, but it would also involve what could scarcely have been contemplated by the parties, viz., that the only security, the only remedy which the mortgagee would have if the mortgagor thought fit to insist upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realize the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lordships' opinion the reasonable construction is that there was an absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and the other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships to be the reasonable construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgment.

Their Lordships will humbly advise her Majesty to reverse the decree of the Judicial Commissioner, leaving the Judgment of the District Judge to stand, and the Respondent will pay the costs of this

appeal, and the costs of the appeal in the Court of the Judicial Commissioner.

Solicitor for the Appellant: *H. Treasure.*

Solicitors for the Respondent: *Deane, Chubb, & Co.*

18th November, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BISHENMUN SINGH and Others ... ... } *Appellants,*

and

LAND MORTGAGE BANK OF INDIA, LIMITED ... ... } *Respondents.**

Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it, notwithstanding certain special matters.

The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could not proceed therein, on the ground that the decree for sale was that of the Subordinate Court.

Held, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary.

Matter which had no bearing on the question raised on this appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs.

Appeal from a decree (8th April 1881) of the High Court, dismissing an appeal of the present Appellant from a decree (6th November 1880) of the District Judge of *Bhagulpore.*

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, for the Appellants.

Mr. *R. V. Doyne* (with whom was Mr. *Horace Davey*) for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The question raised in this appeal relates to the propriety of a sale effected on the 6th of November, 1880, under the order of the District Judge of *Bhagulpore.* The Appellants are the judgment-debtors of the Respondents, and the debt was secured by a mortgage. A suit was instituted by the Respondents before the Subordinate Judge of *Bhagulpore*, for the purpose of realising that mortgage, and on the 8th of January, 1877, a decree was made, under which the property comprised in the mortgage was to be sold. Before the sale was effected certain objectors appeared, and then it turned out that the Appellants had assumed to include in this mortgage certain property which, by a previous family arrangement, had passed to other members of the family. But at the same time, and by the same arrangement, the Appellants had received other properties which were not included in the mortgage. The Respondents then instituted another suit, also in the Court of the Subordinate Judge of *Bhagulpore*, for the purpose of bringing within the influence of the mortgage the property which by the family arrangement had been substituted for the property that was professedly mortgaged, but did not belong to the mortgagors. That suit was called up by the District Judge into his Court, and in that suit a decree was made on the 6th of August, 1879, by the District Judge, which has now to be construed.

* 12 Cowell's Ind. Ap. 7; I. L. R. 11 Cal. 244.

The decree was made by the consent of the debtors, and the effect of it was this: The Court declared that the substituted properties were fit to be sold by auction in execution of the decree of the creditors (that is the decree of the 8th of January, 1877), and that for the purpose of that auction sale this suit ought to be taken as supplemental to the former suit. Then it directed that the mortgage given by the debtors to the cerditors, and the aforesaid decree of the 8th of January, 1877, should be amended according to the previous declaration. Another term of the consent decree was that the debtors should have six months time, from the date of the decree in the new suit, for making arrangements for payment of the amount due.

Those were the main terms agreed upon, and embodied in the decree. The six months elapsed, and some time after they had elapsed the creditors, the Respondents, presented a petition for execution of the decree in the second suit. It has been disputed whether it was a petition for the execution of the decrees in both suits. Part of the petition looks one way and part the other, but it may be taken to be, as the Appellants contend that it was, a petition for the execution of the decrees in both suits. Now it is a very odd thing that there is not in this record any copy of the order made upon that petition. All their Lordships find is that an order was made fixing the sale for the 5th of November, 1880, and that an application was made by the Appellants for a postponement of that sale. The application seems to have been made on the very day for which the sale was fixed. The Judge refused that application. The sale took place. The Appellants say they are aggrieved by that sale, and they seek by this appeal in some way to disturb the sale. It is difficult to say what they seek because they now rest their case upon the allegation that the execution proceedings should have been carried into effect by the Subordinate Judge, and that the District Judge had no such power. If so, the order by which the Appellants are aggrieved is the order which was made in answer to the petition for execution, and which ordered the sale; and that order is not appealed from. The order that is appealed from is the order made by the District Judge refusing the application to postpone the sale, which was a totaly different question. It would be exceedingly difficult for the Appellants to succeed, even if there were no jurisdiction, because they have never taken the proper course to complain on the ground of want of jurisdiction. They complain only of that which is discretionary in the Judge, of ordering the sale to take place at the time fixed or to postpone it. That is the ground of appeal to the High Court, and the ground of their appeal here.

But their Lordships do not desire to rest their decision upon that point. They think on the point which has been argued at the bar here, though it is not properly raised by the petition of appeal, that the Appellants have shewn no case for disturbing the order made by the District Judge. It is quite clear that in applying to the District Court for execution of the decree in the new suit the parties must have considered that the decree was one of the District Judge, and to be carried out by the District Judge; and though unfortunately we have not got the order made on the petition for execution, the District Judge himself must have so considered, because he made the order for that sale, and the sole question is whether the decree of the 6th of August, 1879, was the decree of the District Judge.

Now, like other decrees of Indian Courts, this is not drawn in the most artistic form; and it might be open to argument whether in saying the decree of the Subordinate Judge should be amended that decree still remained the decree of the Subordinate Judge; but their Lordships think that, even construing the language of the decree strictly, the better construction is that it was intended the decree should be that of the District Judge, and they think that in point of procedure it was more proper

to make it the decree of the District Judge than the decree of the Subordinate Judge. If then it was desired that the Subordinate Judge should execute the decree, there should have been an order made by the District Judge ordering the Subordinate Court to carry the decree into execution. The District Judge did not take that view. He carried his own decree into execution, and their Lordships consider that the decree which he carried into execution drew up into itself the decree of the Court below, and that it was in effect a decree for a sale of the whole of the property which the new suit approved to be the property affected by the mortgage. It may be observed in construing that decree that there is certainly one term in it which applies to the whole property; that which was originally well mortgaged, and that which was substituted into the mortgage, namely, that six months time should be allowed to the Appellants to make arrangements. Their Lordships think that on the broad construction of this decree the sensible view of it is to hold that it was the decree of the District Judge, that it affected the whole property mortgaged, and that his jurisdiction to order execution was clear.

The result is that the appeal ought to be dismissed, and their Lordships will therefore humbly advise Her Majesty to that effect.

The Appellants must pay the costs of the appeal; but their Lordships observe that in this record, as in many others that come before them, there is matter introduced which could not possibly have any bearing upon the question raised by the appeal. There is a map of the district of *Bhagulpore*, which is nothing but a copy of a public map. It is not an estate map, and even if it were it would be difficult to see how it could bear on the question involved in this appeal. There are also nearly thirty pages of jummabundi accounts, and it is impossible to understand how those could have had any bearing upon the appeal. Therefore, in the taxation of the costs, their Lordships desire that the Registrar shall disallow all such as have been occasioned by the introduction of irrelevant matter.

Solicitor for Appellants: *T. L. Wilson.*
Solicitors for Respondents: *Freshfields & Williams.*

18th, and 19th November; 3rd, 6th, and 8th December, 1884.

PRESENT:

At the first hearing of this appeal:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

PRESENT:

At the second hearing:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Richard Couch, and during a portion of the argument, the LORD CHANCELLOR (THE EARL OF SELBORNE).

On Appeal from the Court of the Judicial Commissioner of Oudh.

THAKUR ROHAN SINGH (Defendant) ... } *Appellant,*

and

THAKUR SURAT SINGH (Plaintiff) ... } *Respondent.*[a]

Tenancy under the Taluqdari Settlement—"Oudh Sub-settlement Act," XXVI of 1866—Tenancy-at-will—Right of Resumption—Absence of under-proprietary right.

At the confiscation and restoration of Oudh lands in 1858, it was intended to settle and restore, under Regulation, to the taluqdars, with certain exceptions, the taluqdars' rights, and also to protect, as far as was necessary by sub-settlement, or otherwise, the existing rights of the occupiers, but there is nothing to show any intention to advance beyond what the rights were at the time.

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[a] 12 Cowell's Ind. Ap. 52; I. L. R 11 Cal. 318.

Where the relation of taluqdar and tenant, at a rent of land within a taluq, has been shown to have existed at that date, and since the tenant cannot defeat the taluqdar's right of resumption on due notice, notwithstanding a lengthened duration of tenancy, either on the ground that, by reason of this estate of things having brought him within the meaning of para 2 of the Schedule to Act XXVI of 1866, he is entitled to an under-proprietary right, or on the ground that time and undisturbed enjoyment have ripened his holding into a species of ownership.

The issues between the parties raising only the question of some form of proprietary right, still, if the tenant had shown any right whatever to remain undisturbed by the taluqdar, such right would have been considered on this appeal, and would have received effect.

The allegation of a grant in perpetuity in 1826 at a rent to be varied according to the amount of revenue payable by the taluqdar, not having been proved, but the existence and origin of a tenancy having been shown at a rent, paid down to the commencement of the suit: *Held*, that length of enjoyment, coupled with such payment of rent, could give no greater force to the tenant's right than it originally possessed.

Appeal from a decree (19th March 1883) of the Judicial Commissioner of *Oudh*, reversing a decree (6th May 1882) of the District Judge of *Faizabad*.

Mr. *J. G. W. Sykes*, for the Appellant.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD FITZGERALD:—

This case is one relating to title to immoveable property, and their Lordships think the parties should present their case with some degree of substantial accuracy, and prove it as alleged; in other words, that their Lordships should deal with the case on the allegation and the proof.

The Plaintiff, *Thakur Surat Singh*, seeks to resume his right as to two villages, *Newada* and *Gadiana*. His petition put his case thus:— "That *Thakur Bharat Singh* is the sanad holding talookdar of talooka *Atwa* and *Nasipur*, which includes the villages of *Newada* and *Gadiana*. According to the sanad granted to him by Government under Act I of 1869, he possessed all proprietary powers over the said villages, and consequently he has made over in gift to Plaintiff all his talooka under a deed of gift dated 31st August, 1878." The allegation is that *Surat Singh* became the assignee of *Bharat Singh's* rights. The sanad gives him all proprietary rights subject to the rights of occupation, and other rights of parties who were in possession at the time of the grant, and which they might have established either as a matter of under-proprietary right or sub-settlement, or a right to be continued in occupation. So far there is no controversy. He then alleges that the Defendant was lessee of the said villages under a lease for an unlimited term,—(it has been agreed in the course of the argument that "unlimited" is to be read as "undefined") —at an annual jama of Rs. 1,628, the lease having been granted by *Thakur Bharat Singh* (the doner), whose successor Plaintiff is under the deed of gift." If that were in controversy, their Lordships think there is evidence in the case which establishes that allegation: for whether the holding of the two villages was originally a separate holding of each, or a joint holding for Rs. 1,454, by the transaction which took place in 1865, at the time of the general regular settlement of *Oudh*, that rent had been increased, under circumstances to which their Lordships will refer, to Rs.1,628 for both, without distinction, and would seem to have constituted a tenancy at that date, in 1865, of both villages at the consolidated rent of Rs 1,628. The remainder of the petition of the Plaintiff is this. He alleges in substance that he had a right to resume possession; that he gave notice of his intention to resume; and the Defendant denied his right. These facts not being controverted, *primâ facie* established the relation of landlord and tenant between the Plaintiff and *Rohan Singh*, who himself would be the lessee in 1865, and is the successor of the original grantee. Unfortunately there is no written statement on the part of the Defendant, but there is a verbal state

ment made at the Bar, very much resembling the old Common Law pleading "*ore tenus*." There is a verbal statement made by Mr. *Sykes*, counsel for Defendant, taken down by the Judge, which is tantamount to this—"I admit your *primâ facie* case, but my case displaces yours, and I will tell you what it is." Accordingly we find that:—"Mr. *Sykes* states the parties are descended from a common ancestor, one *Nuggar Sah*. Defendant's adoptive father, *Kesri Singh*, got the property in dispute"—that is the two villages—"in A.D. 1826 (1233 F.) on a contract from *Gunga Baksh*; that *Kesri* was to hold for ever, at a rental which was a certain percentage above the Government Revenue." Now that is a clear and precise case, and if the Defendant has sustained it in proof, he has a right to succeed here.

Their Lordships have considered the case, in the first instance on the circumstances antecedent to the time, in 1858, when the confiscation of *Oudh* was declared. The main point to consider is, what title the Defendant had immediately before that confiscation. Mr. *Sykes* then, in his statement, adds, "The amount payable during the Nawabi being Rs.1,454, at this rate *Kesri Singh* paid during the Nawabi, and up to 1271—72 F. In A. D. 1865, 1227 F. (*i e.* at regular settlement), on the revenue assessment, on the whole talooka being increased, a corresponding increase in the amount payable by *Rohan Singh* was made, bringing the demand up to Rs. 1,628." With this explanation the rent is said to have been unchanged since 1826. "Prior to annexation *Kesri Singh* had acquired sub-proprietary title in this holding, and maintained that position subsequent to annexation, and through his successor up to date." The parties met before the Judge to discuss the case and settle issues. The Defendant's case was an admission that he had paid rent, and that the Plaintiff was the talookdar to whom he had paid it; and that *primâ facie* imported the relation of landlord and tenant, which carried with it the right to resume possession on proper notice to quit. The Judge very properly said to Defendant:—"The onus is thrown upon you. You allege in answer to that *primâ facie* case that you are a grantee of a particular character, and I proceed now to settle the issues between you." *Ganga Singh* had been the talookdar under the Nawabi, and was the party entitled to the talook at the time of the grant to *Kesri*, and the Plaintiff is the successor of *Ganga*. The two real issues are, "Did *Kesri* in 1826 acquire from *Ganga Singh* an under-proprietary tenure (granted as compensation for death of a relative in battle) in these two 'villages,' subject to payment of a percentage above Government revenue, and is such tenure maintainable under present law?" Then secondly, "Independent of the specific grant alleged, has the holding of *Kesri* been such as to entitle him to an under-proprietary right?" Both issues lay on the Defendant.

Their Lordships would not be inclined to construe these issues adversely to the Defendant as to the terms, proprietary right, or otherwise, but the will consider whether he has established a right to remain as he is, paying the rents for these villages, and to remain there for ever; whether you call it a right to sub-settlement, or an under-proprietary right, or a right not to be disturbed, is not material. If the Defendant has shewn a right to remain there undisturbed by the Plaintiff, their Lordships will give effect to that right.

It is remarkable that though the beginning of this grant is shewn, we have not, on either side, a shred of documentary evidence to establish what it was. It is admitted that at its inception there was no writing. No documents, no accounts, have been produced. This case, extraordinary in its character, rests entirely on the parol evidence of two old witnesses, whose statements are said to be confirmed by the character of the enjoyment. Their Lordships do not find it necessary to consider the law of *Oudh* under the Nawabi. It was said in the course of the argument that under the Nawabi a grant might have been made of

the character which the Defendant seeks to set up unevidenced by writing. Their Lordships may entertain doubt as to whether such was the law of *Oudh*, but for the purposes of this case only, they will assume that the law under the Nawabi was as alleged, that is to say, that such a claim as the Defendant sets up might have been established and maintained, though unevidenced by any written evidence, or any writing, or written contract, or grant. It is not pretended that there was any grant in writing; and the Defendant's witnesses gave evidence that there was none. Further, their Lordships cannot forget that the Defendant rests his title to both villages on one and the same grant, in perpetuity, at a rent to be varied at a certain percentage according to the Government revenue.

Their Lordships will first deal with the case of the village *Gadiana*. That came into the possession of *Kesri* in 1838. There is not a word of evidence to establish what the circumstances were connected with the grant of that village. It plainly was not made in respect of the death of the two relatives, for if the statement which is made is to be believed, they died in battle over twelve years before. The grant as compensation in respect of their deaths would have been the grant of *Newada*. No witness tells us any circumstance connected with the grant of *Gadiana*, save that in 1838 *Kesri* got the village of *Gadiana* from *Gunga Baksh* at a rent originally of Rs 400, afterwards increased to Rs.450. The time or circumstances of the increase from Rs.400 to Rs 450 do not appear; *Kesri* continued to hold the village of *Gadiana*. He paid that rent, and was living at the time of the confiscation of 1858. What was *Kesri's* title at the time of the confiscation to the village of *Gadiana*? He got it in 1838. He had been twenty years in possession. His possession appears to have been the ordinary possession of any person paying rent, that rent having been increased between the time of the original tenure of 1838 and 1858 from Rs. 400 to Rs. 450. It is said also that light is thrown upon the character of his possession by the fact that he exercised the zemindary rights. The evidence upon that is by no means satisfactory. Nothing precise or specific is shewn; and there is a mass of evidence on the other side, that in that particular district of country it was common for an ordinary lessee, who had no rights beyond those of a lessee, to exercise what are called zemindary rights. Nothing specific, however, is made out.

It appears to their Lordships that, as to *Gadiana*, it would be impossible to come to any other conclusion, consistently with the evidence, than that the allegation of the Defendant that he held this village from 1826, or even from 1838, under a grant for ever at a rent varying only with the amount of the Government revenue, has not been proved. It appears to their Lordships that the case as to *Gadiana* is too plain to admit of discussion or argument; it utterly fails. Their Lordships will subsequently consider what took place after 1858, and see whether it could have conferred upon Defendant any greater right than *Kesri* had in 1858. The case fails as to *Gadiana*. One might say that, failing as to that, the Defendant failed as to the whole of his allegation, but their Lordships would be very slow to bind the Defendant in that way. If he has proved a case which entitles him to be protected from ejectment as to the other village, *Newada*, their Lordships would be prepared to give effect to that right, whatever it may have been; but they cannot shut their eyes to this, that the allegation as to *Gadiana* has wholly failed, and it must reflect, and powerfully reflect, on the case that is as made to *Newada*.

The evidence as to *Newada* consists of the verbal statement of two witnesses, *Myku Lal* and *Jhubbu*. It must not be forgotten that the case of the Defendant is a perpetual grant out and out, once and for all, from generation to generation, of this village of *Newada*, at a certain rent. The evidence shews that the rent originally payable was R.900, and probably an allowance for

the chaukidar, subsequently increased, under circumstances to which their Lordships will hereafter allude, to Rs. 1,628, when joined to *Gadiana*. One witness is seventy-five, and the other is eighty years of age, and they make a statement which it was not possible to contradict. *Myku Lal*, aged seventy-five, says, "I knew *Kesri Singh*. He died about a year after the mutiny. He held *Newada* and *Gadiana* till his death. He had held for many years—perhaps fifty years ago from this date. *Rohan Singh*, Defendant, succeeded him." Then he states the circumstances of the fight, in which persons of the name of *Mán* and *Chain* figured. They were Dacoits. There is evidence in the case that those Dacoits were killed, ninety or 100 years ago. The witness then gives an account of the fight in which two relatives of *Kesri* were killed. "On the 11th day (*ekadasa*) *Bhabuti Singh* offered *Kesri* money for his relations. *Kesri* said he would not take money, but land. *Newada* was at that time waste." That probably means waste and unoccupied—"and so *Bhabuti Singh* placed *Kesri Singh* there, telling him to locate cultivators there, pay the Government revenue, and enjoy the zemindari rights. Since that time *Kesri Singh* alone has exercised rights in *Newada*. He has granted maffi and planted groves. I was servant of *Kesri Singh* for one year when I was twenty years old; I was present in the fight. *Kesri Singh* paid the chaukidar. The patwari's pay came from the talookdar. *Rohan Singh* is own nephew to *Kesri Singh*, who had no son. *Rohan Singh* has succeeded to *Kesri Singh's* property. Defendant takes all proprietary rights in *Newada* and *Gadiana*." Cross-examined, he said:—"Nothing was written by *Bhabuti Singh* in favour of *Kesri Singh*. *Kesri Singh* was to pay the Government revenue; the amount was not stated. I do not know if the village of *Newada* was assessed at all. *Kesri* and *Rohan* did not engage direct with the Government. I cannot say what amount the Defendant and *Kesri* paid the talookdar. The talookdar appointed the patwari and chaukidar."

Now it will be observed that the statement made by that witness is not the creation of a holding at a rent; it is the statement of a verbal grant, in which not a word is said about rent: no rent at all of any kind; but he put him in possession with these absolute rights, and he was to pay the Government revenue. That was the sole obligation imposed on him—not at Rs. 900—but to pay the Government revenue. The evidence given absolutely contradicts that case. Their Lordships do not mean to say it contradicts it in this respect, that in some right or other *Kesri* then got *Newada*, but that he got it in the right which this witness describes under such circumstances as that a grant for ever might be implied from it is absolutely contradictory. His statement is, that he was to exercise the zemindary rights and to pay the Government revenue, but no more.

The second witness, *Jhubbu*, says:—"*Kesri Singh* held them till his death, and after him *Rohan Singh*. Defendant *Kesri* first got possession fifty or fifty-five years ago. On the '*ekadasa*,' *Bhatubi Singh* came to *Kesri* and offered him some money. This was declined. *Bhatubi Singh* then located him in *Newada*, and told him to get cultivators and enjoy the zemindari rights and pay the revenue," and about a year or two afterwards he got *Gadiana*. The evidence of that witness is in substance the same as the evidence of the other. It shews, if they are to be believed, a grant under circumstances from which fairly some implication might be made of a continuing grant, but which, in its main particulars, is contradicted by the other evidence in the case. It is now proved beyond doubt that, so far from getting the village subject to no rent, *Kesri* was to pay the talookdar Rs 900, with an allowance of Rs 50 to pay the chaukidar, and that he did not pay the Government revenue; at all events there is no evidence that he ever had dealt with the Government. The evidence is that it was subject to a rent of Rs.950, and that rent he paid.

It remains now to consider whether,

upon the evidence of these two witnesses, contradicted as it is by the other evidence in the case, and supported only by the alleged exercise of zemindary rights, which have already been adverted to, their Lordships could fairly draw any inference that the village of *Newada* had been granted, or was intended to be granted, by *Gunga Singh*, or his son, to *Kesri* for ever, to hold from generation to generation, at a fixed rent, variable only according to the change that might take place in the Government revenue? Their Lordships would be very willing indeed to draw any reasonable inference in favour of a party who has so long enjoyed certain rights; but what their Lordships are here asked to do is to invent a grant, to define its terms, to define the rent not mentioned at the time of the original supposed grant, and further to come to the conclusion that *Kesri* had got a grant for ever. There is nothing intermediate. It is not alleged to be for the life of *Kesri*, or for the life of *Rohan*. It is either an ordinary lease granted by the taloukdar to *Kesri*, as a reward for the services of his family, at a rent profitable to him, but with the incident that it might be resumed upon proper notice by the taloukdar, or it is a grant for ever. Their Lordships are now asked, in a case where the commencement of Defendant's title is shown, to invent a grant in all its terms, and convert it into a holding for ever, by the descendants of *Kesri*. Their Lordships feel, dealing with the title of *Kesri* as it stood in 1858, and quite irrespective of the subsequent increase of rent, there are no circumstances from which they could reasonably come to the inference that in 1858, even as to the village of *Newada* alone, *Kesri* had any such title as alleged.

In 1858 came the confiscation of *Oudh*; the result of which was the determination of all existing interests, and taking them into the hands of the Government. But the Government of *India* did not intend any such injustice as an absolute confiscation of those rights. In certain instances, where taloukdars or others had been guilty of great crimes, absolute confiscation did take place; but otherwise it was intended, under certain regulations, to settle and restore the taloukdars, and to protect, as far as necessary, by sub-settlement, or by some other process, the existing rights of the occupiers. It will therefore be seen how necessary it is to inquire what those rights were at the time of the confiscation; for though in the letter of Lord *Canning* in 1859, and in the subsequent circulars which were issued from time to time, every intention is shewn to do justice to all the parties, and to compel the taloukdars to do justice to the occupiers, yet there is nothing to show any intention to advance beyond what the rights were at the time of the confiscation, and the intention was generally to restore and to protect those rights. The Defendant says: "But I had a right to a sub-settlement of some kind or other." Their Lordships will not at present go into the distinction between a sub-proprietary right or a right to a sub-settlement, and a right to be protected in the occupation which a person already had, nor bind the Defendant too nicely by those terms; but they will take it that, if he had a right, he might have protected it under the Act of Settlement of *Oudh*, or some one of the circulars and rules which are adopted and confirmed by that Act. He might have protected that right by either getting a sub-settlement or a recognition of his existing title or possession. What took place was this, and it also depends on the evidence of two witnesses. The possession, it is to be observed, was not disturbed by the confiscation. The taloukdar remained as he was, and the occupying tenants remained as they were. Then came the Settlement of 1861, which was only temporary. The witness *Canogi* says: "*Rohan Singh*, after the mutiny, wanted to file a petition, but *Bharat Singh* said, 'There will be confusion in the estate; pay what you used to pay,'"—and that in consequence of that he did not file a petition to protect his right, whatever it might have been. Again, a subsequent witness, *Omaid Singh*, says: "At the settlement after the

mutiny, *Bharat Singh* came to *Naihra*, and stopped at the well. *Rohan Singh* said the Government called for petitions. *Thakur Bharat Singh* said: 'If you petition, my talooka will be broken up. Do zemindary as hitherto, and remain in the talooka.'" The Defendant relies upon that evidence. *Bharat Singh* was not produced as a witness. There is objection on the part of the high class Hindus to appear as witnesses in a Court of Justice. The more pregnant observation to be made is that this equitable contract, or whatever it is, was made with *Rohan Singh*, on whom the issue lay, whose title, if he has any, may rest upon this altogether; and he is not called as a witness. Their Lordships cannot tell whether he was present at the trial or not, but it strikes them as a very remarkable fact that *Rohan Singh*, the Defendant and party to this alleged agreement, was not called. Well, then, it rests on the conversation represented to have been overheard by two witnesses, nearly twenty years before the institution of this suit, and being uncontradicted, their Lordships would be quite prepared to consider it; but it is obvious it could only take effect to establish such right as *Kesri Singh* had before the confiscation. As has been pointed out, the real point, therefore, for their Lordships to inquire into, is, what title had *Kesri* at the time of the confiscation? Their Lordships have been obliged to come to the conclusion upon the evidence that *Kesri* at that time had no more than a lessee's right, subject to resumption at the will of the landlord upon giving proper notice. The view their Lordships take of it is this, putting it in the largest way for the Defendant, that the parties at that time probably did not understand exactly what this sub-settlement or re-arrangement was; that *Bharat Singh*, anxious to get his talook in safety, was unwilling that there should be any petitions; and what he says is substantially this: "It might create disturbance, it might break up the talooka; and whatever rights you now have I will preserve;" and to that extent their Lordships would be fully prepared to give effect to this agreement, if such it can be called, but unfortunately in giving effect to that, they could only give effect to and protect the interest which the lessee had in 1858. The case goes a step further, because it is alleged that a transaction took place subsequently which established the right of the Defendant to hold these two villages for ever. The allegation in the defence is that there had been an agreement between *Bharat Singh* and the present Defendant; that the Defendant, agreeing to pay an increased rent, should hold two villages for ever at that increased rent. Let us see what that transaction was, and whether, in place of supporting the Defendant's case, it does not go far to destroy it. It is thus described by the two witnesses:—"At the Regular Settlement *Rohan Singh* went to *Hakuara*," (The Regular Settlement was in 1865, four years after the alleged conversation) "being called by *Bharat Singh*, who said that the revenue had been assessed heavy;" not that *Rohan Singh's* was heavy, but that the talookdar's revenue had been assessed heavy; "that he had to pay Rs.1,022 on *Newada* and *Gadiana*, and he demanded from *Rohan* Rs. 511, Rs. 48, for chaukidar, and Rs. 47 for patwari; since that *Rohan Singh* has paid Rs. 1,628." The exact sums are, Rs. 1,022, Rs. 511, Rs. 48, and Rs. 47; which just make up the Rs. 1,628. There is not a word said to this effect. "If you will pay the increased rent, I will maintain you in possession." It is the simple case of a talookdar whose payment to the Government had been increased, going to his tenant and saying: "I must now increase your rent. I have to pay more myself, and you must pay me more," and in addition to paying for the chaukidars he pays for the patwari, and he pays such a sum as, above the Government rvenue, and over those two payments, will leave a clear profit of Rs.511 at least going into the hands of the talookdar. But it is not shewn what the increase of Government revenue was. It is not shewn that the increase of rent by Rs.174 had any

relation, or what relation, to the increase of Government revenue. It simply shews that the two villages appear to have been consolidated, and that they are held together at a consolidated rent which exceeds by Rs. 174 annually what had been paid before. Their Lordships have already stated their view that he had only the title of an ordinary lessee, subject to the acknowledged right of the landlord to resume upon giving due notice. If there was a contract in 1861, it was a contract only to maintain *Rohan Singh* in that which his ancestor had at the time of the settlement, and nothing more; and the transaction of 1865, in place of establishing any title greater than that of an ordinary tenant in *Rohan Singh*, simply shews that he agreed to hold at an increased rent, and without any stipulation that his tenure was to be, as it is now alleged to be, a tenure for ever.

Their Lordships do not consider it necessary to express any opinion on the questions of law which have been raised. The facts of the case establish that the decision of the Judicial Commissioner of *Oudh* was correct, and that the Defendant failed to establish his case upon the facts. Many cases have been cited, and a very interesting argument has taken place upon the effect of the rules and Legislative Acts with regard to confiscation in *Oudh*. Their Lordships have also had these rules illustrated by a number of decisions to which Mr. *Sykes* referred. It appears to their Lordships quite unnecessary to deal with any of those decisions, or any of those cases. This Defendant has not been protected by any sub-settlement. There has been no Government recognition of his right. Their Lordships arrive at the conclusion that he is probably in as good a position as if his right, whatever it was, had been recognised in some way under the rules regulating the settlement of *Oudh*. But what was that right, to which only we can give effect? Their Lordships have already pointed out what the right was in 1858, and nothing that has occurred since that has giving greater effect to, or increased that right.

Their Lordships therefore think that the decision of the District Judge was erroneous, especially when he says that while holding there was no evidence of any grant, and the evidence entirely failed, he still comes to the conclusion that time and undisturbed enjoyment had ripened this holding into a species of ownership; and again, Defendant had acquired by prescription a holding such as to entitle him to an under-proprietary right. Such propositions are wholly inapplicable to such a case as this, where the origin of the tenancy is shewn at a rent twice increased, and paid down to the commencement of the suit. In such a case, length of enjoyment coupled with the payment of rent can give no greater force to Defendant's right than it originally possessed. Their Lordships have come to the conclusion that the decision of the Judicial Commissioner of *Oudh* was correct. They do not adopt some of his reasons, but they adopt his conclusion.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss this appeal. The costs will be paid by the Appellant.

Solicitor for Appellant: *William Buttle.*

Solicitors for Respondents: *Watkins & Lattey.*

20th and 21st November, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Madras.

THE RAJAH OF PITTAPUR (Plaintiff) ... } *Appellant,*

and

SRI RAJAH ROW BUCHI SITTAYA GARU and others (Defendants.) ... ... } *Respondents.**

Res Judicata—Act X of 1877 s. 13—Estoppel—Privity in estate—costs of inserting irrelevant matter in the printed record.

A competent court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was held that the present suit was barred under Act X of 1877 Section 13 as *res judicata* having been brought by the son of the Defendant in the former suit, claiming through his father to establish the same adoption; and that the section applied although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged the father of the present Plaintiff to share with the adopted son his ancestral estate. That adoption having been negatived, the son in this suit, ought to be estopped from making title on the ground that the adoption had placed the person from whom he claimed to inherit in the relation of father's brother to him.

Where irrelevant matter had been introduced into the record, the Registrar was directed to tax of the costs as if the record had not contained what he might consider to have been inserted unnecessarily.

Appeal from a decree (1st December 1880) of the High Court of *Madras* affirming a decree (18th August 1879) of the Subordinate Judge of *Coconada*.

Mayne (*Laing*, with him), for the Appellant.

Doyne, and *Johnstone*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is a suit brought by the Appellant *Venkata Row* against the mother and sisters of *Venkata Surya*, deceased, and the object of the suit is to have it declared that the Plaintiff is entitled as reversionary heir of *Venkata Surya* to certain property which he claims in the plaint. In consequence of *Venkata Surya's* having died without a son, the mother succeeded to his property and took a Hindu mother's estate therein, and she has conveyed the estate absolutely to her daughters, who are also made Defendants. *Venkata Surya* was the son of *Buchi Tamayya*, and the Plaintiff is the son of *Venkata Surya Row*. The Plaintiff by his plaint claims as reversionary heir to the property left by the son of the first Defendant, and now in her possession and enjoyment, and he also asks a declaration that the alienation of the property mentioned in the plaint which the first Defendant has made in favour of the second and third Defendants was made without any legal necessity or justifying cause and is void and inoperative beyond the lifetime of the first Defendant, and that the Plaintiff is entitled as reversionary heir to the portions so alienated.

The case of the Plaintiff is, that *Venkata Row*, the father of Plaintiff, was the brother of *Buchi Tamayya*, the father of *Venkata Surya*, the deceased, and he says he was the brother of *Buchi Tamayya*, because *Buchi Tamayya* was adopted by *Niladri Row*, his father's father. The Defendants contend that the Plaintiff's father and *Buchi Tamayya* where no relations, and that the Plaintiff is estopped from saying that *Buchi Tamayya* was his father's brother; that he was not his brother by birth, and that he has no right to say that he was his brother by adoption, because in a former suit between the father of the Plaintiff and *Buchi Tamayya* it had been conclusively

* 12 Cowell's Ind. Ap. 16; I. L. R. 8 Mad. 219.

determined, upon an issue raised in a Court of competent jurisdiction, that *Buchi Tamayya* had not been adopted. Thereupon an issue was raised in the present suit, "whether the suit is barred by *res judicata*." The Courts below have both found that the suit is barred by *res judicata*, and the Appellant now contends that the judgment of the High Court, which affirmed the judgment of the first Court, ought to be reversed upon the ground that the suit is not so barred. One of the contentions of the learned counsel for the Plaintiff is, that although in the suit between *Venkata Row* and *Buchi Tamayya* it had been found upon an issue raised between them that *Buchi Tamayya* was not the adopted son of *Niladri Row*, still he is not bound by it, because this suit does not relate to the property which is the subject of the present suit. It is true that the former suit did not relate to the same property as that which is the subject of the present suit; but the issue has been tried between them by a Court of competent jurisdiction whether *Buchi Tamayya* was adopted or not. In fact the allegation of the Plaintiff is substantially this: that *Venkata Row* had a right to say that *Buchi Tamayya* was not adopted when the establishment of his adoption would have given him a right to participate in the property of *Niladri Row* to which *Venkata Row* in the former suit claimed to be solely interested; but that the Plaintiff, deriving title through his father *Venkata Row*, has a right to say that *Buchi Tamayya* was adopted when the fact of his adoption would entitle the Plaintiff to inherit property as the reversionary heir of *Tamayya's* son. If ever there was a case in which the law of estoppel ought to apply, it appears to their Lordships that this is such a case.

It appears to their Lordships that the High Court was right in holding that the decision of the Provincial Court in 1840, upon an issue directly raised in a cause which they were competent to try, that *Buchi Tamayya* was not adopted, would have been conclusive against *Venkata Row*, the father of the Plaintiff, and is also conclusive against the Plaintiff himself, who cannot make a title except through his father.

It was contended on the part of the Plaintiff, by his learned counsel, that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position. In the case of *Outram* v. *Morewood* (1) the second action was not brought for the same subject-matter for which the first action had been brought. The first action was for damages sustained by the Plaintiff in consequence of the wife of *Morewood* having entered upon certain mines and taken coal from them before she was married. The wife contended that she was entitled to those mines by virtue of a certain conveyance; but it was found by the Court that the wife was not entitled to the mines, and the Court gave damages against her. Another action was brought subsequently against *Morewood*, who had afterwards married the lady, for a second trespass committed by them upon the same mines, and the question then arose whether the finding in the first suit, with reference to the damages claimed in that suit, was binding upon the two Defendants in respect of the damages claimed against them in the second suit. It was held that it was. There were two distinct claims. The damages claimed in the two actions were distinct; the trespasses were distinct, and yet it was held that the decision in the first case with regard to the damages claimed in the first case was binding in the second case as an estoppel, the matter having been conclusively tried between the Plaintiff and the Defendant's wife when a *feme sole* in the first case.

The case of *Barrs* v. *Jackson* (2) was also referred to, but there the subjects of the two suits were different. In that case it was held that a decision of an Ecclesiastical Court, holding that the

(1) 3 East. 346.

(2) 2 Sm. L. C. 805.

Plaintiff was a next of kin for the purpose of obtaining letters of administration, was binding in a suit brought in the Court of Chancery for the distribution of the estate. The Ecclesiastical Court decided that the Plaintiff was a next of kin for the purpose of having administration and managing the property Subsequently the question was raised in the Court of Chancery whether he was a next of kin for the purpose of taking a share of the property. Those were perfectly distinct claims. Yet it was held that inasmuch as the Ecclesiastical Court would have had concurrent jurisdiction with the Court of Chancery to try the question with respect to distribution, the decision of the Ecclesiastical Court between the same parties with reference to administration was binding upon the Court of Chancery with reference to distribution. The learned Vice-Chancellor *Knight Bruce* had held that it was not binding, but his decision was overruled by the Lord Chancellor, who held that it was binding.

Certain remarks of the Vice-Chancellor *Knight Bruce* in that case have been referred to, but in their Lordships' opinion they are not applicable to the present case, inasmuch as it depends upon the construction of an Act of the Legislature of *India*. It may be as well to refer to the remarks which were made by their Lordships in the case of *Krishna Behari Roy*, v. *Brojeswari Chowdranee* (1) The question there was with regard to the construction of the expression "cause of action," in the 2nd section of Act VIII. of 1859. That Act is not so extensive as the Act of 1877, because it merely declares that a second trial shall not take place upon a cause of action which has already been decided. The question arose as to what was the meaning of cause of action in that section, and it was there said, "Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense, but however that may be by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot in their opinion be tried again in another suit between them." The point here has been determined in the first suit. It was there determined that the Plaintiff's father and *Buchi Tamayya* were not brothers, because it was found that *Tamayya* had not been adopted. In the present suit the Plaintiff says the parties to the first suit were brothers, and the Court below have held that he is estopped from saying that they were brothers because it was determined in the former suit that they were not brothers.

The Act which governs the present case is the Procedure Code of 1877 by sect. 13 of which Act it is enacted that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they, or any of them, claim, litigating under the same title." The issue which was tried in the former suit in this case was whether *Buchi Tamayya* was adopted by *Niladri Row*, and the issue which the Plaintiff wishes to try in the present case is the same, whether *Buchi Tamayya* was the adopted son of *Niladri Row*.

Their Lordships are clearly of opinion that the issue which was tried in the former suit is the same as that which the Plaintiff wished to be tried in this suit, and that the Plaintiff is estopped from making the allegation which he attempts now to support.

It was contended further, that even if the decision on the issue in the former suit was an estoppel between the parties as to the fact of the adoption of *Buchi Tamayya*, still that estoppel has been got rid of by reason of an arrangement which was afterwards come to by the parties by a razinamah, of which there were two parts. Looking to those documents it appears to be clear that the object of them was not to get rid of the

(1) Law Rep. 2 Ind. Ap. 285.

judgment which was passed in the Provincial Court, but, on the contrary, to maintain it. *Buchi Tamayya* was about to appeal against the decision of the Provincial Court to the Sudder Court, and thereupon *Venkata Row* entered into this razinamah, by which he agreed that if *Buchi Tamayya* would withdraw his appeal *Venkata Row* would pay him Rs. 30,000. It was further stipulated that if *Venkata Row* should break that agreement and not pay the Rs. 30,000, *Buchi Tamayya* should be at liberty to apply to the Court to enforce the payment of the Rs. 30,000 in the same way as if *Buchi Tamayya* had obtained a judgment against *Venkata Row* for the amount. But that did not get rid of the judgment of the Povincial Court, in which it was held that *Buchi Tamayya* was not the adopted son, and that he was not entitled to recover the property. It was a judgment intended to prevent *Buchi Tamayya* from proceeding with his appeal and to allow the judgment of the Provincial Court to remain in force. The decision, therefore, of the Provincial Court stands, and being an estoppel between the parties the razinamah does not prevent it from having the effect which would have been given to it if the razinamah had not been entered into.

Their Lordships are clearly of opinion that the High Court was right in affirming the decision of the Lower Court, and thereby holding that the Plaintiff was barred by the finding of the Provincial Court in the suit between his father *Venkata Row* and *Buchi Tamayya*. They will therefore humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss the appeal. The Appellant must pay the costs of the appeal.

Their Lordships wish to make a remark with reference to the record which has been sent up. It appears that over 900 pages of the record have nothing to do with the question raised by the appeal. It is a great abuse for parties to bring before this tribunal a record with 900 pages of documents and figures, none of which have the least bearing upon the case. It does not appear that they were ever proved in the First Court or that they were ever referred to by that Court or by the High Court. The whole of them which were sent by the First Court to the High Court have been incorporated in the record which the High Court has sent up to the Judicial Committee for the purpose of determining this appeal. Their Lordships have frequently called attention to similar abuses, and a circular has been issued directing the High Courts not to sent up documents or evidence which have no bearing upon the case. The expenses of this appeal must have been enormously increased by that portion of the record which has been unnecessarily sent up Under these circumstances their Lordships, in order to prevent a repetition of such an abuse, think it right to direct that the Registrar, in taxing the costs, shall tax them in the same manner as if the record had not contained such parts as the Registrar may consider to have been unnecessarily and improperly introduced into it.

Solicitors for Appellant: *Frank Richardson & Sadler*.

Solicitors for Respondents: *Burton, Yeates, Hart, & Burton*.

21st, 25th, 27th, 28th, and 29th November, and 13th December, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Robert Porrett, Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAJAH RUN BAHADOOR SINGH (Plaintiff;) ... } *Appellant,*

and

MUSSUMAT LACHOO KOER (Defendant) ... ... } *Respondent.**

AND THE CROSS APPEAL.

Res-judicata—Act VIII of 1859, s. 2—Act X of 1877, s. 13—Cross Appeal—Practice.

The decision in a suit in order to be final and conclusive, as *res judicata*, upon an issue raised in another suit, must be the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive.

This proposition stated in the judgment in *Mussumat Edun* v. *Mussumat Bechun* (1), and affirmed by the Judicial Committee in *Misir Raghobardial* v. *Sheo Baksh Singh* (2), is applicable equally to cases under Act VIII of 1859, s. 2 (as supplemented by the general law), and to cases under the more complete enactment in Act X of 1877, s. 13, which is not to be construed as having altered the former law.

A suit was brought in the Court of a Subordinate Judge by a Hindu against the widow of his deceased brother, claiming his property by right of survivorship, the issue being whether, at the death of the latter, the ownership of the brothers was joint or separate. An order under Act XXVII of 1860, granting a certificate to the widow did not, on the above issue, operate as *res-judicata* in the widow's favour, being a proceeding of representation, and not otherwise of title.

Held, also, that a decision of the same issue in a Moonsiff's Court in a rent suit brought by the widow, the surviving brother, on his application, having been made a party defendant under s 73 of Act VIII of 1859, did not constitute *res-judicata* in her favour.

Krishna Behari Roy v. *Brojeswari Chowdhrani* (3) referred to and followed.

Held, also, that the brother having appealed against a decree dismissing the suit as *res-judicata* (the judgment which that decree followed having, nevertheless, found that the widow was disentitled by reason of the brothers having been, in fact, joint in estate), the widow could have supported the decree, without filing a cross appeal as to that finding, on the ground that the decree had been rightly made, (though not for the reason given) in her favour.

Appeal, and cross appeal, from a decree (August 30th 1880) of the High Court (4), affirming a decree (January 21st, 1878) of the Subordinate Judge of *Gaya*.

Mr. *T. H. Cowie*, and Mr. *C. W. Arathoon*, for the Appellant.

Mr. *Graham*, Q. C., and Mr. *R. V. Doyne*, for the Respondent.

13th December, 1884,

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case *Run Bahadoor Singh* sued *Mussumat Lachoo Koer*, the widow of his deceased brother, *Moorlidur Singh*, to recover possession of the property held by *Moorlidur*, on the ground that the brothers were joint in estate, and that he was entitled to the property by survivorship. The widow maintained that the brothers were separate, and claimed a Hindu widow's estate in the property. She further maintained that this question had been conclusively determined in her favour in a former suit between her and the Plaintiff.

The Subordinate Judge decided the plea of *res judicata* against her, but held in her favour that the brothers were separate in estate, and gave her a decree.

The High Court determined the plea of *res judicata* in her favour, and, as it applied to the whole action, affirmed the decree. Nevertheless, they inquired into

* 12 Cowell's Ind. Ap 23; I. L. R. 11 Cal. 301.

(1) 8 W. R., (F. B.,) 175; 2 Ind. Jur., N. S., 265.

(2) I. L. R. 9 Calc., 439; L R, 9 I. A., 197; *Ante*, p. 395.

(3) L. R., 2 I. A., 283; I. L. R. 1 Calc., 144; 3. P. C. J. 559.

(4) Run Bahadoor Singh v. Lucho Koer, I. L. R., 6 Calc., 406.

the question of fact, and held that the brothers were joint in estate.

From this decree *Run Bahadoor* has appealed.

The widow has not appealed against the decree, nor could she, because it is in her favour, but she has appealed against the finding that the brothers were joint in estate.

It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it. If she had not appealed, she could have supported the decree, on the ground that the Court ought to have decided the question of separation in her favour. But inasmuch as no objection has been taken at the bar to her cross-appeal, and as (the appeals being consolidated) practically the inquiry would have taken the same course, and the costs would have been nearly the same, whether she had appealed or not, their Lordships are not disposed, under the peculiar circumstances of the case, themselves to take the objection.

The question of *res judicata* arose in this way.

After the death of her husband she applied for a certificate, under Act XXVII. of 1860, enabling her to collect the debts of her husband. This application was opposed by the Plaintiff, who set up the case of joint ownership, on which he now relies. A certificate was granted to her, and the grant was confirmed on appeal.

Though this proceeding has been relied upon by her as constituting *res judicata*, counsel at their Lordships' bar have not argued that it has this effect, inasmuch as the only question to be determined in this proceeding is one of representation, not otherwise of title.

Subsequently she brought (in 1874) a suit in the Court of the Moonsiff against a tenant for the recovery of rent, to the amount of Rs. 53. *Run Bahadoor* intervened, asserting precisely the same title to the property of his brother as he sets up in the present suit, viz., joint interest and ownership. An issue was framed in these terms :—

"Did the Plaintiff or her deceased husband realize the rent of the 8 annas separately and in a state of separation before this, or did the Plaintiff's husband during his lifetime realize the rent with *Run Bahadoor* jointly, and after him, did *Run Bahadoor* alone receive rent of the entire 16 annas?"

Witnesses were called on both sides, and the Moonsiff decided in favour of the present Defendant.

On appeal to the Subordinate Judge the decision was affirmed.

The jurisdiction of the Court of the Moonsiff is limited to Rs.1.000. The only appeal from it is to the District Court, from which there is only a special appeal, on points of law, to the High Court.

By Act X of 1859, exclusive jurisdiction was conferred on Collectors to determine rent-suits, with an express limitation of their power in cases of intervention (sect. 77) to determine the "actual receipt and enjoyment of the rent," with a provision that their decisions should not affect title.

By Act VIII. of 1869, s. 33 (of the Lieutenant Governor of *Bengal* in Council), rent-suits were re-transferred to the ordinary tribunals, to be regulated, like other actions, by the Code of Civil Procedure (Act VIII. of 1859) without any re-enactment of the limitation which had been imposed on the jurisdiction of the Collector.

It has been contended on behalf of the Defendant, that, this being so, the Moonsiff had jurisdiction to try the question of title if it were necessary for the purpose of determining to whom rent was due, and that the Plaintiff having intervened and raised an issue directly involving the question of title, is bound by the judgment.

This is the opinion of the High Court.

Their Lordships regard it as having been decided that such a judgment as that of the Moonsiff is not conclusive.

The Indian Act* in force relative to estoppel by *res judicata* was at the time of

the institution of this suit Act VIII. of 1859, s. 2, which is in these terms:—

"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

With reference to this enactment it has been observed by the Board (1):—

"Their Lordships are of opinion that the term cause of action is to be construed rather with reference to the substance than to the form of action, . . . and that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle *nemo debet bis vexari pro eâdem causâ*."

The same view has since been expressed by this Board. (2)

A similar view had been expressed by Sir *Barnes Peacock*, then Chief Justice of *Bengal*, in the well-known case of *Mussumat Edun* v. *Mussumat Bechun*. (3)

He there adopted the definition of judgments conclusive by way of estoppel given by *De Grey*, C. J., in the *Duchess of Kingston's case*, in answer to questions put by the House of Lords:—"The judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court," and Sir *Barnes Peacock* proceeded thus to define "concurrent jurisdiction":—

"In order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

This doctrine has been expressly affirmed in a recent case before this Board (4) decided since the judgment appealed against.

It is true that when the suit in this last mentioned case was brought the governing statute as to *res judicata* was Act X of 1877, s. 13, which is in these terms:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally determined by a Court of competent jurisdiction, in a former suit between the same parties, or the parties under whom they or any of them claim, litigating under the same title."

But their Lordships state that if the case had arisen under the law as it existed before the statute, consisting of the previous somewhat imperfect statute supplemented by the general law, their decision would have been the same, and they do not construe the Act of 1877 as having altered the law.

A suit for interest amounting to Rs. 1,600, on a bond for Rs. 12,000, was brought in the Court of an Assistant Commissioner, whose jurisdiction was limited to Rs. 5,000; the Assistant Commissioner held that the real amount for which the bond was given was Rs. 4,790, and not Rs. 12,000, and, interest on the smaller sum having been overpaid, dismissed the suit.

It was held that his judgment was not *res judicata* as to the amount for which the bond was given, inasmuch as this amount was beyond the limits of his jurisdiction.

Their Lordships approve of the statement of the law by Sir *Barnes Peacock* above quoted, and proceed to observe:—"In their Lordships' opinion it would not be proper that the decision of a Moonsiff upon (for instance) the validity of a will or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount,

(1) *Soorjomonee Dayee* v. *Saddanand Mohapatter* Law Rep. Ind. Ap. Supp. Vol. p. 221; 3. P. C. J. 285.

(2) *Krishna Behari Roy* v. *Brojeswari Chowdranee*, Law Rep. 2 Ind. Ap. 285; 3 P. C. J. 559.

(3) 8 Suth. W. R., (F. B) 175.

(4) *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*, Law Rep. 9 Ind. Ap. 197; *Ante* p. 396.

the title to which might depend upon the will or adoption; . . . by taking concurrent jurisdiction to mean concurrent as regards pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided."

If this construction of the law were not adopted, the lowest Court in *India* might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.

Assuming, therefore, that the question of title was directly raised in the rent suit, their Lordships are of opinion that the judgment in that suit is not conclusive in this.

Having regard, however, to the subject matter of the suit, to the form of the issue (which has been above set out), and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, viz., whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive.

It now becomes necessary to consider the question of fact whether at the death of *Moorlidur* the brothers were joint or separate in estate. Their Lordships agree with the observation of the High Court that the tendency of the Courts in this country to presume a tenancy in common rather than a joint tenancy has no application to Indian tenures, where the presumption is generally the reverse.

Although the judgment in the rent suit is not conclusive, still their Lordships cannot help attaching some weight to the decisions of the Moonsiff and the Subordinate Judge, both natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit, in which the Plaintiff set up the same case, was the same; it was the same also, and the case and evidence much the same, in a proceeding before a magistrate requiring the Plaintiff to enter into recognizances to keep the peace. All the native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it.

The following facts require to be stated in order to the understanding of the merits of the case. *Bishen Singh* was the father of the Plaintiff and of *Moorlidur*; the three, together with a grandson, formed a joint Hindu family. *Bishen* was the reversionary heir to the raj of *Tikari*, the estates appertaining to which had descended to two brothers, *Hetnarain* and *Modenarain*, the former of whom owned 9 annas, the latter 7 annas. Both brothers had died; *Hetnarain* leaving a widow, *Rani Inderjeet*, who adopted a son, *Ramkishen*; *Modenarain* leaving two childless widows. *Inderjeet* (called in the case "the Maharani") had granted to *Bishen* a mokurruri lease of a considerable quantity of land, which formed the greater part of the joint property of the father and his two sons. Some time in 1860 or 1861, *Bishen* left his home on a religious pilgrimage, his whereabouts was long unknown, he was vainly sought by his sons, and did not return until about 1868.

During his absence the following occurrences took place. His two sons brought a suit in his name under the alleged authority of an am-mooktarnama from him against the Maharani, her adopted son, and the widows of *Modenarain*, disputing the adoption and claiming possession of 9 annas of the property, and a declaration of right to 7 annas. That suit had been dismissed in the District Court, and again on appeal in the High Court on the ground that the am-mooktarnama was not genuine.

The Maharani had, on the mokurruri rent not being paid, seized the property, put it up for sale, and bought it herself.

It is further alleged by the Defendant, and denied by the Plaintiff, that the brothers separated in estate in 1862 or 1863 (Fasli, 1260).

It may be as well to say at once that their Lordships agree with both Courts that separation at this time (as alleged in the written statement of Defendant) is not satisfactorily proved; indeed, whatever might have been the desire of the

brothers to live and act separately, they could not effect a partition of the family property without the consent of their father; but if the father on his return was informed of their desire to separate, this may have influenced his action in the transaction which has now to be referred to.

The suit of the sons having been dismissed upon the ground that it was brought without their father's authority, he was in no way bound by the result, and might have instituted a similar suit himself. Under these circumstances he came to an arrangement with the Maharani and *Ramkishen*, which is stated by the Defendant to be as follows: –

Bishen was to admit the adoption and relinquish all claim to the 9 annas, insisting only on his claim in reversion to the 7 annas. And in consideration of this the Maharani and *Ramkishen* were to regrant the land (in the *Patna* district), the subject of the former mokurrari, together with other lands in *Gaya*, by another mokurrari. *Bishen*, however, having devoted himself to a religious life, desired to relinquish his property to his sons, whom he described as "men of this world," in equal and separate shares; but according to the inveterate practice of Hindus desired this to be done in the form of grants to fursidars, one fursidar in each grant to be the servant of and to represent one of his sons, the other fursidar the other son. His reason for this is said to have been to defeat any claim against them by one *Munshi Amir Ali*, who had advanced them money to conduct the suit which has been mentioned.

In pursuance of this arrangement *Bishen* executed two ladavi ikrarnamas, in very nearly the same terms, on the 2nd of August, 1868.

He therein states that he undertook a long pilgrimage after the death of *Hetnarain*, and proceeds, "Having gone to different tiruths I was so deeply engaged in the worship of God that there remained no knowledge of the circumstances of my native place." He alleges that on his return he found that improper use had been made of his name by his sons in their suit, repudiates that suit, and renounces all claim to the 9 annas share held by *Ramkishen*, whose adoption he admits, retaining only his claim in reversion to the 7 annas; this instrument was executed also by his sons.

Whereupon the Maharani and *Ramkishen* execute on the same day another ladavi ikrarnama, admitting his reversionary claim to 7 annas.

The mokurrari pottahs follow on the 4th of August, 1868.

That relating to *Gaya* confers on *Bunwari Rawat* and *Kewal Rawat* certain property of large extent, "from generation after generation, at the definite and consolidated annual uniform jama of Rs. 1,709 in equal shares." That relating to *Patna* is to the same effect, the grant being to *Mitan Rawat* and *Ducki Rawat*. The grants are made by the Maharani and confirmed by *Ramkishen*. The grantees are household slaves, and it is admitted on both sides that they were fursidars. It therefore becomes necessary to go behind the deeds and ascertain the true nature of the transaction.

The view of the Defendant has been stated, *viz*, that the two brothers were the real mokurraridars, and were to hold separately.

That of the Plaintiff is that they were the real mokurraridars and were to hold jointly.

The High Court are of opinion that *Bishen* was the real mokurraridar, a case set up by neither party.

The Defendant called the Maharani, the only surviving principal of the transaction except the Plaintiff, *Ramkishen* having died before the evidence was taken in this suit. But the Maharani and *Ramkishen* had both given evidence for the Defendant in the certificate and rent suits, and their depositions are on the record. They are witnesses of high station, having no interest in the cause, speaking of transactions in which they were principal parties their evidence is clear, throughout con-

sistent, and appears to their Lordships conclusive, unless it be wilfully false.

The Maharani deposes :—

"Both Babu *Run Bahadoor Singh* and Babu *Moorlidur Singh* were mokurraridars in equal shares, *i.e.*, at the time of taking the mokurrari Babu *Bishen Singh* had divided the property to both the above Babus in equal shares that the brothers might not fall out with each other, and with this view the name of a man of each of them was entered fictitiously in the mokurrari. . . . . Babu *Run Bahadoor Singh* and Babu *Moorlidur Singh* were separate, and therefore the name of a man of each of them was mentioned fictitiously."

It is true that the fursidars gave evidence on behalf of *Run Bahadoor*, the more powerful party (as he has acquired by purchase from the widows of *Modenarrin* a present interest to the amount of 7 annas in the raj), that they were slaves of *Bishen*, but, in their Lordships' opinion, this evidence cannot countervail the much stronger evidence that each was the slave of one of the brothers.

The Maharani further states, that *Bishen* had told her that the "two brothers were fighting with each other; he had made a partition between them."

Ramkishen states :—

"At the time of taking the mokurruri, Babu *Bishen Singh* took it in the name of *Kewal Rawat*, servant of *Run Bahadoor Singh*, and in the name of *Bunwari Rawat*, servant of *Moorlidur Singh*. The *Rawats* are not the real parties. Babus *Run Bahadoor Singh* and *Moorlidur Singh* were mokurruridars in equal shares..... for this reason it was taken in the names of the servants of the two persons, that no dispute should arise between the two persons."

Again : —

"Babu *Bishen Singh* took the mokurruri for Babu *Run Bahadoor* and Babu *Moorlidur*. At the consultation held on that and other subjects of jumma and the selection of mokurruri mouzahs, *Run Bahadoor* and *Moorlidur* were both present. Babu *Bishen Singh* was the person who actually took the mokurruri."

On being asked,

"How came you to know that Babu *Bishen Singh* made over the mokurruri to Babus *Run Bahadoor* and *Moorlidur*?" the witness answered,

"I know, having been told by *Bishen Singh* and *Run Bahadoor* and *Moorlidur*."

In other parts of their evidence these statements are in substance repeated.

Run Bahadoor was called as a witness, and although he in general terms denied that there was a separation between him and his brother, he gave no evidence with respect to the above transaction, at which *Ramkishen* alleged he was present, nor did he deny having said to *Ramkishen* what *Ramkishen* deposed to. The rest of his evidence may be described as mainly consisting of witnesses who deposed that the brothers lived and messed jointly, against whom a nearly equal number of witnesses for the Defendant may be set off who deposed that they lived and messed separately.

The evidence of the Maharani and *Ramkishen* is confirmed by *Hafiz Syed Ahmed Reza*, a pleader and zemindar, who appears to have long been on intimate terms with the two brothers, and gives the same version of the transaction. He says, Babu *Bishen Singh* said, "these men are of the world," therefore according to his wish, the mokurruri was granted to *Run Bahadoor* and *Moorlidur* in the fictitious names of other persons, and he speaks to the negotiations at the time of the preparation of the deed.

Soon after the completion of the transaction *Bishen Singh* retired to *Benares*, where he died.

The evidence of the Maharani and *Ramkishen*, though accepted by the sub-Judge, has been discredited by the High Court; that of *Reza*, on whom the Subordinate Judge placed much reliance, has been altogether discarded.

With respect to the Maharani and *Ramkishen* the High Court observe, "They, no doubt, have deposed to statements made by *Bishen Singh*, *Run Baha-*

door, and *Moorlidur*, admitting separation; but we think their evidence in this respect, though important, must be taken with very great reserve. They were both witnesses in the rent-suit, and it is not often that in a suit of that character people of their standing come forward to give evidence unless they have a strong feeling in the matter. Reading their evidence we find, in our opinion, a strong bias in favour of the Defendant."

Their Lordships are unable to concur in these observations.

If the Maharani and her son knew and were able to prove that *Run Bahadoor* was setting up a false case against his brother's widow, it appears to their Lordships greatly to their credit instead of their discredit that they should overcome their reluctance to give evidence in order to protect her. Bias in a witness may be inferred from his being found to misstate facts, from his telling monstrous or improbable stories, or shewing malicious temper against one of the parties. But nothing of that kind can be imputed to either of these witnesses. They appear to have answered the questions put to them straightforwardly, and their Lordships are unable to detect bias in their evidence unless it is to be inferred from the fact that the evidence tells strongly against the Plaintiff, but to infer this is to beg the question in dispute.

Another reason for discrediting the Maharani is that the Plaintiff had declared his intention, and instituted a suit, to set aside the compromise, whereby it is assumed that he had incurred her hostility.

The answer to this is, that she had given substantially the same evidence in the rent-suit, before he had declared such an intention.

With respect to *Syed Ahmed Reza*, the High Court observe:—

"The Subordinate Judge has relied on the following statement by the witness:—'At the time of the execution of the mokurruri there was a talk between *Run Bahadoor* and *Moorlidur*, with respect to the mention of the names of the benami persons, each inquired of the other which of his men would stand benamidar for him. At last the names of those nominated by each of them were entered.' But the Subordinate Judge has failed to consider this gentleman's statement in cross-examination, 'I do not recollect whether I had made a draft of the mokurruri pottah in favour of the Plaintiff and *Moorlidur*. I do not know where that deed was engrossed in stamp, or where it was signed, but several had witnessed it here. When the deed was written and read, I was not at *Tikari* (the place of execution), when the deed was presented to our signature as witnesses there was no mention made as to whose benamidars are the persons whose names are mentioned in the deed.'

"So this gentleman contradicts himself, and though practising as a vakeel, seems wilfully to have followed the too common custom of this country of attesting a deed, subsequently and at a different place to its execution."

For these reasons they place no reliance whatever on his evidence.

The High Court suppose *Reza* to have been a witness to one of the mokurruri pottahs, but this is a mistake, he was a witness only to the ladavi ikrarnamas; therefore the accusation of having witnessed a did where it was not executed, together with the contradiction in his evidence, disappear. But even if the supposed contradictory statements related to the same deed they seem by no means irreconcilable. The consultation as to the choice of benamidars must almost necessarily have been before the actual execution of the document, and the witness, speaking of a transaction many years ago, may well have meant by "the time of execution of a deed" the time when it was being prepared for execution.

Their Lordships regard it as dangerous for a Court of Appeal to reject an important and respectable witness, who has been believed by the Court who heard his evidence, on some supposed discrepancy in the record of it which did not occur to that Court, and which if his attention had been called to it he might have been able easily to explain.

Their Lordships adopt the evidence of these witnesses as credible and uncontradicted as to the circumstances attending the grant of the mokurruri pottahs, which they regard as the crucial point in the case, and are of opinion that whether the brothers had or had not separated, or attempted to separate, before, they received the mokurruri grants in severalty and were separate from that time.

The rest of the evidence is mainly in accordance with this view. With respect to the relations of the brothers, and the dealing with the property between the execution of the pottahs and the death of *Moorlidur*, in February, 1872, it is enough to say that in the opinion of their Lordships the evidence of the Defendant preponderates; proof is given of separate payments by some tenants, and separate receipts and some jumma wasil baki papers are produced by tenants shewing that they held under separate landlords.

Their Lordships cannot concur with the High Court in accusing the Defendant of "manufacturing" certain jamma wasil papers; the rent accounts not having been made up for the last years of her husband's life, were made up by her directions after his death, but there was no attempt to represent them as other than they were, nor do they appear to have been relied upon by her; the term "manufacture" is not applicable to them.

After *Moorlidur's* death there is no question that his widow remained for more than two years in possession of her late husband's share of the property undisputed by *Run Bahadoor*, till her application for a certificate in 1874, when for the first time he set up his present case. During that time *Run Bahadoor* only claimed the right to deal with his own half share; he raised money on mortgages of that half share only; he brought several actions in the name of *Ducki Rewat*, his fursidar, in respect of that share only, in the plaints to which actions it is stated that the property was held in separate moities. He let 2 annas of certain property in which he and his late brother had held 4 annas, leaving the widow to deal with the remaining 2 annas. Indeed, the High Court find, in agreement on this point with the Lower Court, that after *Moorlidur's* death, the Plaintiff and Defendant enjoyed the property separately. But the High Court explain this by the supposition that "*Run Bahadoor*, who seems to have been a somewhat easy going person, was willing that the Defendant should enjoy the 8 annas by way of maintenance."

An "easy going person," appears an expression singularly inapplicable to a man who was bound over to keep the peace towards the widow on account of continued oppression and cruelty. It is to be observed that this was not his case —that he denied the fact of her possession which has been found by both Courts against him.

Their Lordships adopt the view of the Subordinate Judge, who observes, "After the death of *Moorlidur Singh*, *Run Bahadoor Singh*, for some time considering him separate, took proceedings only in respect of a moiety."

For these reasons, their Lordships are of opinion that the direct evidence of the transaction in 1868, the form of the grant, "in equal shares," and the subsequent dealing with the property, all point to the conclusion that the brothers were separate at and before the death of *Moorlidur*, that consequently the finding on this question of the Subordinate Judge was right, and that of the High Court was wrong. Therefore, although the Defendant is not entitled to a decree on the issue of *res judicata* on which the High Court have given it her, she is entitled to a decree on the issue of separation of estate, and the decree in her favour will stand. The only order which their Lordships can humbly advise Her Majesty to make is, that the decree be affirmed, and both appeals dismissed. As the Defendant has succeeded on the merits of the case, she should have the

costs of these appeals and the costs of the appeals to the High Courts.

Solicitor for the Appellant, *Run Bahadoor Singh : T. L. Wilson.*

Solicitors for the Respondent, *Mussumat Lachoo Koer : Watkins & Lattey.*

2nd, 4th, 5th, 9th, and 10th December, 1884 ; and 14th February, 1885.

PRESENT :

Members of the *Judicial Committee* :—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

FANINDRA DEB RAIKAT (Plaintiff) ; ... ... } *Appellant,*

and

RAJESWAR DASS, alias JAGINDRA DEB RAIKAT and others (Defendants) ... ... } *Respondents.**

Custom—Adoption—Construction of gift—Burden of proof—Custom not allowing adoption, governing a family not subject to Hindu law—Invalidity of gift made to a person as being the adopted son of donor, where the adoption failed.

A family in Bengal, affecting to be Hindu, but not Hindu by descent and origin, may be governed by customs at variance with Hindu law. A family took its origin in a tribe not Hindu, and its customs differed from Hindu customs. The question having arisen whether succession in virtue of adoption was consistent with, or was contrary to, the customs of the family.

Held, first, that, with regard to the origin and history of the family, the point for inquiry was not whether the general Hindu law was, in this case, modified by a family custom forbidding adoption, but was whether, with respect to inheritance, the family was governed by Hindu law, or by customs not allowing an adopted son to inherit ; secondly, upon the evidence that this family had retained, and was governed by, customs at variance with Hindu law, and that whatever Hindu customs might have been introduced into it, the custom of succession upon adoption had not. Whether, if the family had been shown to be Hindu, out and out, save only special customs, the evidence would have been sufficient to prove a special custom was not the question.

Held, also, in reference to the burden of proof that, in a suit brought to maintain the Plaintiff's title as heir against a Defendant, who relied upon an adoption as defeating the title of the Plaintiff, the burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so ; whereas, if the family had been generally governed by Hindu law, the onus would have been on those who alleged the exclusion of the right to adopt. *Rajah Bishnath Singh* v. *Ram Charn Majmoadar* (1) referred to, as showing that even in a Hindu family there might be a custom which barred inheritance by adoption.

Held, upon the true construction of an *angikarpotro* whereby an estate was given to the donee in virtue of his being "adopted son" of the donor, that the gift did not take effect, inasmuch as the adoption was invalid.

The distinction between what is description only, and what is the reason or motive for a gift or bequest, may often be fine ; but it must be drawn from a consideration of the language and the surrounding circumstances. *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2) distinguished.

Appeal from a decree (24th June 1881) of the High Court, reversing a decree (11th November 1879) of the District Judge of *Rungpur*.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, for the Respondents.

14th February, 1885.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought to recover a large estate called *Baikunthpur*, situated on the north-east frontier of *Bengal*, in the district of *Jalpaiguri*. The largest landed estates in this district are those of *Patgram* and *Boda*, belonging to the Rajah of *Kuch Behar*, and this estate,

* 12 Cowell's Ind. Ap. 72 ; I L R 11 Cal. 463.

(1) S. D. A., 1850, p. 20.

(2) L. R, 3 I. A., 253 ; 3 P. C. J. 652.

which became the property of a branch of the *Kuch Behar* family. It is not included in any Sarkar or Mahomedan division of the country, having been only added to *Bengal* since the British assumed the government of the country. From Dr. *W. W. Hunter's* Statistical Account of *Bengal*, it appears that Rajah *Nilambhur* of *Kamatapur* (now a ruin within the present state of *Kuch Behar*) was the last independent Hindu ruler of the country, and that after his defeat and capture by *Husain Shah*, one of the Afghan kings of *Gaur*, in the beginning of the sixteenth century, anarchy prevailed for several years, and the land was overrun by wild tribes from the north-east. Among these the *Koch* came to the front, and founded the *Kuch Behar* dynasty. Of the *Kochs*, Dr. *Hunter* says, in the Statistical Account of *Darjiling*, "this aboriginal tribe first rose into power about the close of the fifteenth or the commencement of the sixteenth century under one *Hajo*, who founded the *Koch* kingdom on the ruins of the ancient Hindu kingdom of *Kamrup*. . . . . The *Koch* raj extended from 88° to 93½° east longitude, and from 25° to 27° north latitude, *Kuch Behar* being its metropolis, and its limits being co-equal with the famous yet obscure *Kamrup* of the *Tantras*. Brahmanism was introduced among the *Kochs* in the time of *Visu*, *Hajo's* grandson, who, together with his officers and all the people of condition, apostatised to Hinduism. A divine ancestry for the chief was manufactured by the Brahmans. The converts abandoned the despised name of *Koch* and took that of *Rajbansi*, literally, 'of the royal kindred.' and the name of the country was altered to *Behar*." From the account of their manners and customs given by Dr. *Hunter*, it appears that they differ from their Hindu neighbours in various respects. Of the *Baikunthpur* family, Dr. *Hunter* says that "*Sisu*, grandson in the female line of *Hajo*, is the original ancestor of the family. It is generally asserted that he was the son of *Jira*, the daughter of *Hajo*, but the family themselves allege that he, as well as *Visu* (another grandson of *Hajo*, and the first of the *Kuch Behar* Rajahs who was converted to Hinduism), was not the son of *Jira* but of her sister *Hira*, and that his father was the god *Siba*, on which account all the members of the family assume the name of *Deo*, and return no salute that is made to them by any person. *Sisu*, on the conversion of *Visu* to Hinduism, took the title of *Sib-kumar* or young *Siva*. He was appointed hereditary Raikat, or the second person of rank in the *Koch* kingdom and received the *Baikunthpur* estate as an appanage."

The plaint of the Appellant (the Plaintiff in the suit) states that *Jogendra Deb Raikat*, the possessor of the estate, died on the 10th of March, 1878, without leaving any son of his body, and "therefore, according to the immemorial family custom and practice descending from generation to generation in our *Raikat* family of *Baikunthpur* and the Shastras, I have acquired an absolute title in all the properties left by him, and I am entitled to recover possession thereof." It then refers to a title by adoption and under a will and agreement (angikar-patro) made by *Jogendra Deb*, which has been set up on behalf of *Rajeswar Dass*, who was then a minor, but has since become of age and is the Respondent, by *Rani Jagadeswari Debi*, the widow of *Jogendra Deb*. She was sued as the guardian of *Rajeswar* and executrix. This is followed by a paragraph which says,—"According to the kulachar (family custom) and custom prevailing in our Raikat family from very ancient times and descending from generation to generation, no one among the Raikats is competent to adopt or to alter the line of succession thereby, or by will or any other deed to give away the kingdom and the raj-guddi. According to the said immemorial kulachar, no female also is competent to hold property and the guddi. Consequently the said *Jogendra Deb* Raikat is not, contrary to the above kulachar and custom, empowered to receive in adoption any one competent to hold the property, or to give or alienate the rajgi and the kingdom to the said

adopted son or to any other person, either by will or agreement (angikar patra), or by any other deed. In fact, the above will and agreement (angikar-patra) are contrary to the prevailing family custom, the law, and the Hindu shastras, and are, indeed, not true." It was contended by the counsel for the Respondent, in the argument of this appeal, that, by the references in the plaint to the shastras, the Plaintiff admitted that the family was governed by the Hindu law, except where it is modified by custom. Their Lordships do not so construe the plaint. They think the meaning is to insist upon the family custom as being allowed by the shastras to govern the family. The materiality of this contention will appear when the evidence and the judgments of the lower Courts come to be noticed.

Rani Jagadeswari Debi, the then Defendant, as guardian, by her written statement, did not dispute the heirship of the Plaintiff failing the adoption and angikar-patra, but alleged that *Jogendra Deb* died after receiving *Rajeswar* in adoption, and making over to him all the property moveable and immoveable which belonged to *Jogendra*, and were in his possession, by means of an angikar-patra (agreement) of the 23rd Kartick, 1284 B.S. (7th November, 1877), and so according to the Hindu law in force and the clear purport of the angikar patra the Plaintiff had no right to the property claimed. The statement contained other matter in support of this contention, and also asserted that *Jogendra Deb*, on the 28th Cheyt, 1278 (9th of April 1872), gave permission to his wives to adopt another son if *Rajeswar* was not living at the time of his death, and therefore the Plaintiff's claim for possession ought to be dismissed.

The issues framed by the Court were :—

1. Is adoption contrary to the customs of the *Julpaiguri* family?
2. Was *Rajeswar's* adoption valid, *i.e.*, was he an only son or not?
3. Had Rajah *Jogendra* power to make away the property of the raj by will, or deed, or gift?
4. Can the power of adoption conferred by the Rajah on his widows be exercised by them, and can a son adopted by virtue of that power succeed to the property?
5. Can the widows hold the property for the adopted son?
6. Is the angikar-patra of the 22nd of Kartick, 1284, a valid document, and one which confers any right on *Rajeswar*?

At the instance of the Defendant this issue was added :—

Can the Plaintiff inherit during the lifetime of *Jogendra's* widows, and can he now sue; also can Plaintiff's claim take effect against *Sarba Deb's* self-acquired property?

Subsequently the Court added another issue, namely, if *Rajeswar* was adopted, was he adopted in 1280 or 1284 B.S.? The judge of *Rungpore* (Mr. *Beveridge*) before whom the suit came for trial, in the first instance and as on preliminary objections, decided the 4th, 5th, and 7th issues in the Plaintiff's favour, and held that he as heir-at-law was entitled to succeed at *Jogendra's* death if his title were not defeated by the adoption of *Rajeswar* or by the angikar-patra in his favour. A quantity of evidence was then produced on both sides, and on the 11th of September, 1879, the judge, in an able and well-considered judgment in which all the material evidence is noticed, decided the 1st, 2nd, 3rd, and 6th issues in the Plaintiff's favour, and gave him a decree. This was on appeal reversed by the High Court at *Calcutta*, and the suit was dismissed with costs.

Their Lordships, after hearing the counsel for the Appellant, desired the Respondent's counsel to address them first upon the questions whether, by the law or usage by which this family is governed, it was lawful for *Jogendra Deb* to adopt a son who would succeed to the estate in preference to the Plaintiff; and if it was not lawful, has the angikar-patra any effect upon the succession to the estate. Having heard these questions argued, they have

come to a conclusion which makes it unnecessary for them to hear any argument upon the second issue, namely, whether the adoption of *Rajeswar* was valid.

The first of these questions was raised by the first issue, and the Judge of *Rungpur* thought that the burden of proof on that issue was upon the Plaintiff. After some introductory matter, he says: "The Plaintiff contends that there are two more customs, namely, one prohibiting adoption;"—the other relates to the alienation of the estate. "The Defendants deny the existence of these two customs. With these remarks I proceed to decide the issue about adoption, as to which of course the burden is wholly on the Plaintiff The first mode in which the Plaintiff has endeavoured to prove the existence of the custom is by showing that there never has been an instance of adoption in the family."

The High Court also thought that the onus was on the Plaintiff to prove a custom which prohibited adoption. This appears from the following passages in their judgment:— "The claim of the Plaintiff rested on the allegation that by a kulachar or old family custom no adoption could be made by a member of the Raikat family. . . . . If, therefore, the Plaintiff could succeed in proving the custom which he set up by which adoption was prohibited in the family, he, as being admittedly the next legal heir to *Jogendra Deb* Raikat, would be entitled to a decree for the estate without further inquiry into the merits of the adoption. . . . We find ourselves quite unable to agree with the lower Court on the main questions raised in the suit, viz, as to the existence of a family custom prohibitive of adoption, and as to the insufficiency of the adoption made of the Defendant." They said they had no doubt that the family is now governed by the Hindu law.

Looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu law, or by customs which do not allow an adopted son to inherit. The onus of proving that the adoption was lawful was upon the Defendant, who relied upon it to defeat the Plaintiff's title. If the family was generally governed by Hindu law he might rely upon that, and then the onus of proving a family custom would be on the Plaintiff.

The origin of the family has been already mentioned. The estate after twelve successions was, in 1809, in the possession of *Sarba Deb*, who had succeeded his father *Jayanta*. His title was disputed by his uncle *Pratap* on the ground that, by the family usage, a brother succeeds a brother in preference to surviving sons. In 1811 *Pratap* brought a suit in the Provincial Court of *Moorshedabad* against *Sarba*, by the name of *Surrup Deb*, which was decided in 1818 by the Sudder Dewanny Adawlut in favour of the latter. The case is reported in 2 S. D. A. Reports, 250. The judgment states that the right of the Respondent (*Sarba*) to the estate was clearly established both by the family usage and by the consent of the Appellant. The High Court has referred to this case as shewing that the family was treated as one governed by Hindu law, quoting a passage at p. 251—"the Appellant, moreover, was unable to shew by whom the custom alleged by him so contrary to the Shastras was introduced into the family, at what time, and for what reasons," as the ground upon which the suit was dismissed. This passage immediately precedes the judgment, and seems to be part of the statement of the case. It may have been the contention of the Respondent, but the ground of the decision is stated to be the family usage and consent of the Appellant. In January, 1848, *Sarba* died, and Dr. *Campbell*, the then superintendent of *Darjiling*, having on the 14th of January received information of his death from his two dewans, and that it was probable that there would be a disturbance in the household among his sons, went to *Julpaiguri*, arriving there on the 15th. In his report to the Government of *Bengal*, dated the 20th

of January, 1848, which is in the evidence in this suit, he says:—

"I shall now record the information I have gained on the spot, under the most favourable circumstances for doing so of the state of the Rajah's family, &c. It may facilitate decisions regarding it, obviate litigation to the ruin of the family, and tend to early settlement of the mode of properly managing the estate, a point of very great consequence to the quiet of the frontier, and to the satisfactory performance of my own duties. The Rajah's territory forms the northern part of *Rungpore*. It has a frontier along *Bhutan* of about fifty miles, and an equal extent with *Sikim*. Of both borders I am in charge, and I have concurrent powers as magistrate in the whole of it."

* * * *

"The Rajah could not properly be called a Hindu, although ambitious of being considered within the privileged pale. His family is of the *Koch* tribe, now however designated *Rajbungsis*, and affecting to be equal to *Chhettris*, although retaining many usages and habits quite irreconcilable to their pretensions. Probably Hindu Law would not be the just medium for a decision on this succession, and I find that the election of the boy has the approval of many people here as a legitimate succession. This may have referred to some previous case in the family, but the formal installation, and the performances of the obsequies by the boy, are considered to raise his claims above all the others. Under the Hindu law I believe that all the sons would be considered illegitimate, in which case the senior Rani might secure a life tenure of the raj."

The Rajah left seven sons, and the boy referred to was *Rajrajendra Deb*, his sixth son. His title was disputed by *Makarand*, the second and favourite son of *Sarba Deb*, who brought an action under Act XIX of 1849, and was put into possession by the Civil Court of *Rungpur*. This was followed by a long litigation, in which *Rajendra* claimed the property on the ground that *Makarand* was illegitimate. It ended in favour of *Makarand*, who remained in possession till his death in 1853, when he was succeeded by *Chunder Shikhur*, the elder of his two sons. He died in 1865, and was succeeded by his brother, *Jogendra*. The report of Dr. *Campbell* appears to their Lordships to be important evidence of the position of this family, and, in their opinion, it shows that, although they affected to be Hindus, they had retained and were governed by family customs which, as regards some matters, were at variance with Hindu law. The evidence of *Makarand*, given when he was Raikat and was examined with reference to a dispute in another branch of the family, supports this view.

The question to be determined being, therefore, what was the custom of the family with respect to adoption, their Lordships will now notice the evidence upon which they have come to the conclusion, without regarding any burden of proof, that it is not lawful for the Raikat to adopt a son who would succeed to the estate. Before doing so it may be observed that in *Rajah Bishnath Singh* v. *Ram Churn Majmoadar* (1) the Sudder Court allowed that, even in a Hindu family, there might be a custom which barred inheritance by adoption, and remanded the case for further investigation on that question.

From the report in the 2 S. D. A. Reports, which has been referred to in the suit as containing a correct history of the family, it appears that, of twelve Raikats who successively had possession of the estate prior to *Sarbá Deb*, three were succeeded by a brother and one by a nephew. Two of them died leaving no sons; one had a son born after his death, and another had a son whose legitimacy was doubtful. Thus, there are two occasions on which, if it was allowed by the custom of the family, it is most probable there would have been an adoption, and one, the case of the posthumous son, where an authority would probably have been given to the widow or widows of

(1) Beng. S. D. A. (1850) 20.

the Raikat to adopt a son. There has been no adoption in this family until one which is said to have been made by *Chunder Shikhur*, who was succeeded by his brother *Jogendra*. A boy who was named *Porno Deb*, appears to have been taken in adoption by *Chunder Shikhur*, but no ceremonies were performed. The explanation given by the Plaintiff's witnesses is the *Chunder Shikhur*, who was educated at *Calcutta* under the care of the Court of Wards, did not know the family customs when he took the boy, but that he afterwards became acquainted with them. The succession of *Jogendra* is in the Plaintiff's favour, whether *Chunder Shikhur* desisted from completing the adoption or *Porno Deb* was adopted and did not claim to succeed to the estate.

The next evidence is a statement by *Sarba Deb*. Another branch of the family were the owners of the zemindari of *Panga*, and, some time before 1840, a suit was brought by *Parbat Narain Koer* against *Karindra Narain* and others in the Court of the Principal Sudder Amin of the district, to obtain possession of it. In that suit it was asserted by the Plaintiff that adoption was contrary to the custom of the *Panga* family. *Sarba Deb* was asked by the Court to submit a kyfiut (answer to questions) as to the customs in his branch of the family. The record of the suit in which the kyfiut was filed could not be found, and a copy of the kyfiut tendered by the Plaintiff was rejected by the Judge of *Rungpur* on the objection of the Defendant that it was a copy of a copy. The evidence of two witnesses of its contents was then received,—*Parbati Nath Roy*, who was at the time of its submission to the Court employed as assistant to the mokhtars of Raikat, and *Gungadhur Das Bakshi*, who then served him as a mohurrir. Their evidence was substantially the same. The former said he made a copy of the kyfiut before it was filed, to be kept in the mokhtar's serishta, which copy had been destroyed when the mokhtar's house was burnt. The latter, who called *Sarba* the Rajah of *Jalpaiguri*, said he wrote the draft at the dictation of the Rajah, and a fair copy was made and signed and sealed by the Rajah to be filed in Court. "The kyfiut was asked for to ascertain the family custom of the Rajahs of *Panga*, *Behar*, *Bijni*, and *Baikanthpur*. There were ten or twelve questions in that perwana. I do not remember them all. The first question was this: 'Can a son be adopted or not?' The answer to this question was, 'In our family the custom of adopting a son does not prevail; a daughter's son cannot become the Rajah; a woman is not an heir; the Rajah cannot in his lifetime give away the rajgi to his son or to anybody else; on the death of the Rajah the eldest of his sons born of his wedded wives succeeds to the rajgi, and in default of a son a uterine brother succeeds to it.' I remember these facts were written" *Bijni* was another branch of the family. The High Court has said the kyfiut must be dismissed from consideration. Their Lordships have carefully considered the reasons which they have given for this opinion, and find themselves unable to agree in it.

A large part of the evidence of the witnesses relates to the adoption of *Rajeswar*. This it is not necessary to consider. Their Lordships will only refer to such of the evidence about the customs of the family as they think has any weight. *Gungadhur Iswar*, the son of a daughter of the paternal uncle of *Sarbá Deb*, said he had heard from *Sarbá Deb*, and *Anunt Deb* that an adopted son does not succeed to the properties, that females cannot become heirs, and that the raj cannot be transferred by gift. *Bhabendra Deb Koer*, a great-great-grandson of *Darpa Deb*, a former Raikat, said the family custom was that an adopted son cannot inherit. He had heard of the family custom from his father's kinsman, *Anunt Debi*, and his paternal grandmother *Jasoda Debi*. The Judge says he relied upon this witness partly because he was a near relative of the family, and because he seemed to be speaking the truth; and that it was also very important to notice that he acted upon his opinions. He was

appointed by *Jogendra* his chief executor by the last codicil, dated in December, 1877, and declined to act on the ground that the adoption of *Rajeswar* was illegal. This, however, seems to have been because he thought *Rajeswar* had not been properly taken in adoption. *Hari Pershad Dass*, who married *Hareswari*, a daughter of *Sarbá Deb*, said he had heard from his father-in-law of the customs of the family; that if any one of the Rajahs of *Julpaiguri* adopted a son, that adopted son does not succeed to the raj, nor does a female become heir; the Rajahs cannot transfer by gift the raj-guddi or the raj to anybody. *Hara Pershad Dass*, who was a jumma-nuvis in the family during the whole time that *Makarand Deb* was the Raikat, and succeeded his father in the office, said he was twenty-three or twenty-four years old when *Sarbá Deb* died, and used to read and write in the serishta for four or five years prior to his death; that there is a difference between a *Rajbungsi* and other Hindus. On the death of the Rajah his eldest son, by his married wife, gets the rajgi; in default of a son by a married wife, the son by a wife married in the gandharba fashion succeeds to the rajgi; as, for instance, *Makarand Deb* got the rajgi though the eldest son *Doorga Deb* was living. *Doorga Deb* was the son of a prostitute; an adopted son does not succeed to the rajgi; a wife cannot succeed as heir-at-law; he had heard of the existence of this family custom from *Sarbá Deb Raikat*. This witness is an honorary magistrate of *Julpaiguri*. *Nobindra Deb Koer*, one of the Defendant's witnesses, a son of *Doorga Deb*, the eldest son of *Sarbá*, on cross-examination said that adoption was not made nor were the properties obtained by the adopted son; nor is the custom of adoption prevalent; if the Rajah wishes to make a gift of the raj he cannot do so; he can give something for maintenance; no female can succeed as heir. On re-examination, he said he had heard from his father that the adopted son does not succeed to the property. This evidence was not met by any on the part of the Defendant. The High Court reversed the finding of the Judge on the ground that the family is now governed by Hindu law, and it lay upon the Plaintiff to shew that adoption was prohibited by the custom of the family, which they thought he had failed to do. They also, if their Lordships rightly understand their judgment, put out of their consideration, on the ground that it was hearsay evidence, all the statements as to custom made by deceased members of the family to which the witnesses deposed. They refer to sect. 32 of the *Evidence Act*, but not to sect. 49. The latter section is applicable, and where an ancient family usage is to be proved the statements of deceased members of the family are relevant facts. Their Lordships are, therefore, unable to give to their judgment the weight which it would otherwise have deserved

To sum up this part of the case, their Lordships find that through sixteen devolutions of the estate there has been no instance of a succession by adoption, though in three instances the circumstances were such as usually move Hindus to make an adoption; that there has been one instance of an attempt at adoption, and that, whatever its exact issue may have been, it failed to carry away the succession from the collateral heir; that there is a considerable amount of family tradition against the practice; and that of counter evidence there is absolutely none. Whether, if the *Bykunthpur* family were shewn to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom, need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced.

It is now to be determined whether the angikar-patra has any effect upon the succession to the estate. The facts stated in the introductory part of it were disputed, and in their Lordships' opinion some of them were not proved, but for this purpose they may be taken as proved.

It is dated the 23rd Kartick, 1284 (11th November, 1877), and is in these terms, *Jagadindra Deb Kumar* being the name given to *Rajeswar* on adoption:—

"To *Jagadindra Deb Kumar*. This angikar-patra, executed in the year 1284 (1877) by *Jagendra Deb Raikat*, zemindar of pergunnah *Baikunthpore*, &c., inhabitant of *Awas* station and zillah *Julpaiguri*, sheweth,—

"That your father, the late *Rangu Barua*, in his lifetime and in the presence of his agnatic relations, *Nilkomul Barua* and *Nend Barua* and my kinsman *Budden Chunder Dass Rajjmata* and others, and also in the presence of the late *Kant Deb Surma*, purohit, gave you away to me for adoption both verbally and under a written deed. I accepted the gift and duly received the son (in adoption); but I have not hitherto made this fact known to any person in the hope that a son may be born to me of my loins. I have in the meantime supported you and educated you Besides, to provide against the contingency of my dying without leaving behind me any son born of my loins or taken by me in adoption, I, on Cheyt, 1278 (9th April, 1872), executed a will with permission for adoption, wherein I authorized *Srimati Rani Jagadiswari Debi* and *Srimati Rani Jagneswari Debi*, and *Srimati Rani Japeswari Debi*, to take sons in adoption, each of these Ranis to exercise this right on the death of the other. Subsequently on 10th Falgoon, 1279 (20th February, 1873), I executed a codicil to that will, and in that codicil I appointed the Ranis as principal executors, and I appointed other men assistant executors to assist the Ranis in the management and protection of the estate during the minority of any son who might be born to me or of any son who may be received in adoption either by me or by the Ranis. At present I am suffering from many diseases, and to this day no son has been born to me of my loins. The body is frail; who can say what [ill] (which God forbid) may befall me. Wherefore I have thought it proper to disclose the fact of my having taken a son in adoption, and accordingly I have received you in adoption this day publicly, agreeably to the gift made by your father, and I made you over to *Srimati Rani Jagadiswari Debi*, who is your sister by your former step-mother. I authorize you by this angikar-patra to offer oblations of water and pinda to me and my ancestors after my death by virtue of your being my adopted son. Moreover you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my dena-pawna (debts and dues), and you and your sons and grandsons shall enjoy and own them agreeably to the custom of the family. During your lifetime, and as long as son or grandson of yours is alive, the Ranis shall not be able to take any other son in adoption under the terms of the will. But should you die leaving behind you neither a son begotten of your loins nor an adopted son, and without leaving a permission for adoption (which God forbid), in that case the Ranis may take a son in adoption under the terms of the will, and shall thereby protect the estate."

It appears to have been the opinion of this Committee that such an estate as this of *Baikunthpur* might by family custom be inalienable: *Anund Lal Singh Deo* v. *Maharaja Dheraj Gurrood Narayun Deo* (1); *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (2). There is some evidence in this case of a family custom forbidding alienation by gift, and consequently by will, but their Lordships do not propose to enter into the question whether there is sufficient proof of it, as they have come to the conclusion that, as *Jogendra* had no power to adopt a son who would succeed to the estate, it did not pass to *Rajeswar* by the angikar-patra. Their Lordships feel no difficulty about *Rajeswar* being sufficiently designated as the object of the gift, although the adoption may not be valid. They think the question is whether the mention of

(1) 5 Moore, Ind. Ap. 82; 1 P. C. J. 399.

(2) Law Rep. 8 Ind. Ap. 248; *Ante* p. 290.

him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it. The words are,—"I authorize you by this angikar-patra to offer oblations of water and pinda to me and my ancestors after my death, by virtue of your being my adopted son. Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my dena-pawna (debts and dues), and you and your sons and grandsons shall enjoy them agreeably to the custom of the family." He is to make the offerings by virtue of being an adopted son, and "moreover" he is to become the proprietor. This is to be the consequence of the adoption. In fact the angikar-patra only states what would have happened without it. The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to his "wife *A.B.*," believing the person named to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator. It is difficult to suppose a case similar to the present coming before the English Courts. In *Wilkinson* v. *Joughin* (1), a testor bequeathed his real and personal estate to trustees, upon trust to permit his wife *Adelaide* to receive the net annual income thereof during her life, and after her death, if no child of his should attain twenty-one, or be married, in trust for his step-daughter *Sarah Ward* (the daughter of the supposed wife) for her absolute use. The supposed wife and the testator went through the ceremony of marriage, she having represented herself to the testator as, and he having believed her to be, a widow, her husband being then alive. It was held by the Vice-Chancellor that the bequest to her was wholly void, but the bequest to the daughter was valid. This was apparently on the ground of the intention, the Vice-Chancellor saying, "In my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description."

In *Nidhoomoni Debia* v. *Sharoda Pershad Mookerjee* (1), a childless Hindu, by his will, directed as follows:—"And as I am desirous of adopting a son, I declare that I have adopted *Koibullo Penshad*, third son of my eldest brother, *Saroda Pershad*. My wives shall perform the ceremonies according to the Shastras, and bring him up, and until that adopted son comes of age those executors shall look after and superintend all the property moveable and immoveable in my own name or benami left by me, also that adopted son. When he comes to maturity, the executors shall make over everything to him to his satisfaction." The ceremonies of adoption had been performed by one of the widows only, and the other brought a suit to recover half of the property. This Committee held that she could not do so, that there was a gift of his property by the testator to a designated person, and it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by *Koibullo* to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. The intention of the testator appears to have been the ground of decision in this case also, but both the words of the instrument and the nature of the property were very different from the instrument and property now in question. In the

(1) Law Rep. 2 Eq 319.

(1) Law Rep. 3 Ind. Ap. 253; 3 P. C. J. 652.

present case their Lordships are of opinion that it was *Jogendra's* intention to give his property to *Rajeswar* as his adopted son, capable of inheriting by virtue of the adoption, and the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate is not applicable. As the adoption was contrary to the customs of the family and gave no right to inherit, the angikarpatra had not any effect upon the property. It is, therefore, unnecessary to decide whether *Rajeswar* was an only son or whether he was duly given in adoption, about which there was the usual conflict of evidence.

In their Lordships' opinion the decree of the judge of *Rungpore* was right, and they will humbly advise Her Majesty to reverse the decree of the High Court, and to dismiss the appeal to that Court, with costs. They order the costs of this appeal to be paid by the Respondent *Jagadindra Deb Raikat.*

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents: *Barrow & Rogers.*

11th December 1884.

PRESENT:

Members of the *Judicial Committee:*— The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court At Allahabad.

RAMDIN (Plaintiff) ... *Appellant,*

and

KALKA PERSHAD (Defendant) } *Respondent.**

Act IX. of 1871, Sched. ii., Arts. 65, 132—Limitation—Remedies of Mortgagee.

Where a mortgagee sued in covenant and also to enforce his mortgage security, *held,* that under Act IX. of 1871, sched. ii., art. 65, the personal remedy was barred in three years, but that art. 132 of the same schedule provided a limitation of twelve years as against the mortgaged property.

Consolidated appeal from decrees of the High Court (Aug. 4, 1881), reversing decrees of the District Judge of *Furuckabad* (Dec. 2, 1880), which reversed decrees of the Subordinate Judge (Sept 24, 1880).

Mr. *R V. Doyne,* for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD FITZGERALD:—

This is a suit instituted by the mortgagee against the mortgagor. He seeks to enforce a mortgage not under seal dated the 25th of January, 1870, by which certain property was pledged to him for a mortgage debt; he alleges that the Defendant has failed to pay both principal and interest, and prays that the principal and interest may be enforced against the mortgaged property, and also by rendering the person of the Defendant and his other property liable. Therefore, although it is a mortgage suit, there are two distinct remedies sought, one against the mortgaged property, and the other by rendering the other property and the person of the Defendant liable. The Defendant does not dispute the mortgage. He raises no question as to the right of the Plaintiff to have the mortgaged property sold, but he says that the remedy sought against him personally, and against his other property, is barred by the operation of the *Limitation Act* of 1871.

Their Lordships turn then to see what the mortgage transaction was. It is very plain and very simple. The instrument recites the mortgage of certain property for Rs 1,300 to the present Plaintiff, that the interest should be at the rate of one per cent. per mensem, and the principal and interest to be repaid at the end of Jeth Sambat 1927. The instrument then says:—"I have received the mortgage money in full. I therefore covenant that if I fail to pay the principal with interest

* 12 Cowell's Ind. Ap. 12; I. L. R. 7 Alla. 502.

on the promised date the mortgagees will be at liberty to recover through the Court their whole money in a lump sum from me or the mortgaged property." The mortgagor thus gives the mortgagee a pledge of certain fixed immoveable property, and also gives as a further security his personal bond or covenant. A period of nearly ten years elapsed from the time at which the mortgage money with interest became payable before the suit was instituted. The question submitted for their Lordships' consideration is, whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force, as against the mortgaged property.

Their Lordships are of opinion that the judgment of the High Court is correct. The Judge of the Primary Court held that the personal demand was barred. The Judge of the District Court held the contrary—that there could be but one period of limitation, and that was a period of twelve years, applicable to the mortgage of fixed property, which carried with it and gave the same twelve years for the enforcement of the personal security. Their Lordships are of opinion that the district Judge is wrong in point of law. There are two remedies distinctly sought in the Plaintiff's petition, the one against the mortgaged property, the other against the person and against the other property of the Defendant. As to the mortgaged property there is now no question. Their Lordships are of opinion that the law of limitation which says a bond for money must be enforced within a certain date applies to the specific demand here for a personal remedy against the Defendant. The Plaintiff can have no personal remedy—his remedy against the person of the mortgagor is barred, but his right remains to enforce his demand against the mortgaged property. As far as personal demands, including simple bonds, are concerned, the language of the Act is plain and clear. Sect. 4 of the Act of 1871 directs that every suit instituted after the period prescribed therefor in the second schedule shall be dismissed. The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation is applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent, and suits by mortgagors to recover surplus from mortgagee. The six years' limit embraces suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immoveable property, though it also applies to judgments and recognizances in *India*. But the counsel for the Appellant relied upon the language of the 132nd article of the second schedule, "For money charged upon immoveable property, twelve years." His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property.

Looking at the previous language with reference to personal suits, and at the language of article 132, their Lordships think great inconveniences and inconsistencies would arise if they did not read the latter as having reference only to suits for money charged on immoveable property to raise it out of that property. That seems to their Lordships what the Legislature intended, and they are therefore of opinion that the decision of the High Court was right.

That being so, their Lordships will humbly advice Her Majesty to affirm the decree appealed from. There being no appearance for the Respondent here there will be no costs.

Their Lordships desire to add that their opinion on this appeal also applies to the separate appeal on the mortgage bond of the 10th of June, 1871.

Solicitor for Appellant: *T. L. Wilson.*

11th December, 1884.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord FitzGerald, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GUNGAPERSHAD SAHU (Plaintiff) ... } *Appellant,*

and

MAHARANI BIBI (Defendant) ... } *Respondent.**

Act XL of 1858, s. 18—Power of guardian of minor to mortgage minor's property—Rate of interest.

A guardian to whom a certificate had been granted under Act XL of 1858, (relating to minors) having obtained, under s. 18, an order of a Court authorising the raising of money by mortgage of the minor's immoveables, mortgaged accordingly. In the order so obtained, the rate of interest at which the money was to be raised was not specified. On a question whether, there being no proof of the necessity or expediency of agreeing to pay interest at a rate so high as eighteen per cent., the agreement to pay at this rate was rightly set aside by the High Court, which decreed interest at twelve per cent., *held*, that the proper construction of the order, and the one most favorable to the lender regarding the rate of interest was, that the guardian was authorized to borrow only at a reasonable rate of interest; and that consequently the decree of the High Court was right.

Appeal from a decree (20th January 1882) of the High Court, reversing a decree (21st April 1880) of the Subordinate Judge of *Tirhoot*.

Mr. *J. F. Leith*, Q. C., and Mr. *O. W. Arathoon*, appeared for the Appellant.

Mr. *H. Cowell* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The question in this case turns upon the amount recoverable on a mortgage bond which bearsdate the 25th of March, 1869. The bond was given by *Parbutti Koer*, who is the grandmother and guardian of the Respondent *Maharani Bibi*. The effect of the bond is that security is given on a certain mouzah belonging to the *Maharani Bibi* for the sum of Rs. 8,000, to be repayable in about a year's time with interest at the rate of 18 per cent. per annum. The Plaintiff has received payment of an amount equal to the principal due upon the bond with simple interest at 12 per cent. per annum, and he had received that amount of payment before he commenced the suit in which this appeal is presented. If therefore 12 per cent. is all that he is entitled to, the suit must altogether fail. If 18 per cent. is what he is entitled to, then there is still a sum due, and he ought to get a decree for that sum.

The Judge of *Tirhoot*, who heard the case originally, was of opinion that, according to the contract, the Plaintiff was entitled to 18 per cent. until the actual time of payment, but, in exercise of the power vested in the Court, he cut down the rate of interest to 3 per cent. from the date of the suit to the date of the decree, and after decree he gave no interest at all. He therefore evidently thought that the transaction was an exorbitant one, and that, where the Court had discretion, it should lower the rate of interest. Up to the date of suit he had no discretion, and he construed the bond as has been stated.

The Defendant in the suit appealed to the High Court, and that Court was of opinion that the Plaintiff was entitled to interest only at the rate of 12 per cent., and inasmuch as, calculating at that rate, he had been wholly paid off, the suit was necessarily dismissed.

The sole question now is as to the additional 6 per cent. claimed by the Plaintiff.

It has been stated that the bond was executed by the grandmother as guardian of the Defendant, who was a minor at the time. The 18th section of Act XL of 1858, says, that "no such person shall

* 12 Cowell's Ind. Ap. 47; I. L. R. 11 Cal. 379.

have power to sell or mortgage any immoveable property without an order of the Civil Court previously obtained." The guardian obtained an order of the Court on the 5th of February, 1869, on a petition in which she stated the necessity of taking a loan of Rs. 8,000, for the purpose of paying some pressing debts which were then carrying interest at 12 per cent. The order runs in these terms: "That the petitioner be permitted to take a loan of Rs. 8,000, by mortgage of mouzah *Sahu*, pergunnah *Ahalwara*." That order says nothing whatever about interest on the Rs. 8,000. It would certainly seem desirable that a Court which has thrown upon it the responsibility of authorizing loans to be raised upon the security of infants' estates should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised, especially in *India*, where the rate of interest bears so very large a proportion to the principal advanced. There may sometimes be difficulties in doing so. There may have been a difficulty in this case for aught we know. At all events the Judge did not do it. Supposing the Judge does not do it, that cannot give to the guardian the power of raising the authorized loan at any rate of interest that the guardian thinks fit. It has been said the guardian might think fit to raise a loan at the rate of 100 per cent. If that were brought to the notice of the Judge, he would probably institute a very rigorous inquiry before authorizing such a loan. On an order of this kind, which authorizes the raising of a principal sum but says nothing about the interest, their Lordships think that the proper construction or, at all events, the most favourable construction to the lender, is that it authorizes a loan at a reasonable rate of interest.

With respect to the judgment of the High Court their Lordships agree with Mr. Justice *Romesh Chunder Mitter* in his construction of the bond. It was made a question how far the bond, on the face of it, provided for the payment of interest—whether up to the date fixed for the payment of the principal, or up to the date of actual repayment? They agree with Mr. Justice *Mitter* in thinking that it provided for payment of interest up to the date of actual repayment.

Mr. Justice *Mitter* then goes on to say "the Plaintiff must shew that the transaction was beneficial to the interest of the minor," and then he examines the whole transaction, and finds that the raising of Rs.8,000 at a reasonable rate of interest was beneficial to the interests of the minor, but that the raising at the rate of 18 per cent. was not beneficial. Their Lordships think that when an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but apart from any charge of that kind their Lordships think he is entitled to rest upon the order. Therefore, as regards the principal of this loan, it is sufficient for the Plaintiff to say:—"I have got the order of the Court." But when he comes to the rate of interest he has not got the order of the Court; and if he chooses to lend his money without an order that binds the infant's estate, then it is for him to shew that the matter was one of necessity, or of clear expediency for the benefit of the infant's estate. In this case their Lordsdips fail to find any evidence shewing any such necessity or expendiency. They agree with the view taken by Mr Justice *Mitter* that there is no case made on behalf of the lender to shew that such a loan was for the benefit of the infant's estate. The result is that the Court has recourse to the ordinary rate of interest ruling in that part of the country upon loans on good security, and finding that rate to be 12 per cent. it says that 12 per cent. is the reasonable rate to charge in the present instance.

Another objection has been raised, which has nothing to do with the merits of the case, namely, that this point was not raised upon the pleadings. It certainly does not appear to have been raised on the written statement. It was put at the bar that the point was waived, but there is no trace of waiver; on the contrary, the Defendant seems to have been desirous to raise every point that occurred to her advisers to defeat the claim of the Plaintiff. It does not appear that there was any formal preliminary settlement of issues, but in the judgment it is stated what the points for consideration are; and Mr. *Leith* very fairly said that he would take those points as the issues in the suit. The second of these issues is:—"Whether *Parbatti Koer* really executed the bond in suit." That puts into issue the execution of the bond; but then it goes on—'And whether the Defendant is bound to pay off the debt." That puts in issue the validity of the bond, not only on account of non-execution by *Parbatti*, but its validity generally as against the Defendant, and therefore suggests the question whether the Defendant was bound by the acts of *Parbati Koer*? When we come to the appeal the sixth ground of appeal is somewhat more specific than that. The sixth ground is this:—"That your petitioner is in no way bound by the acts or statements of *Parbatti Koer* unless it is proved that those acts were done under necessity and for the benefit of the estate." No doubt that does not distinguish between the principal of the bond, which was covered by the order, and the interest, which was not covered by the order, but it shews that the Defendant was disputing all disputable acts of *Parbatti*. On that ground of appeal Mr. Justice *Mitter* addresses himself to the question of necessity, and decides in favour of the Defendant. Now it would be a lamentable thing if an appeal in which their Lordships are clearly of opinion that the High Court were right on the merits of the case were to be determined the other way on the ground that there was some imperfection in the pleadings. It would be lamentable in any case, and especially in *India*, where we know the pleadings are prepared with a considerable amount of looseness. If it could be suggested on the part of the Appellant that practical injustice had been done him by the want of particularity in the pleadings, and by their not having drawn a proper distinction between the principal due on the bond and the interest, however much their Lordships might lament it, they might be compelled to allow the appeal. But no such suggestion can be made. Their Lordships entirely disbelieve that more complete justice could be done in this case than has been done already.

There is another consideration. If this were really a point sprung upon the Appellant by the judgment of Mr. Justice *Mitter* for the first time, it would have been good ground to apply to the Court for a review. But no such application was made; and their Lordships would be very loth to disturb the decree of the High Court upon a technical point of this kind, where the whole matter might have been set right if the High Court had been applied to. Even if the Appellant were to succeed on this point, what could this Committee do? It could only advise Her Majesty to send back the case to be tried upon the question whether it was necessary or reasonable to raise this loan at the rate of 18 per cent. The High Court could have done that on review, and if they thought their decree really did injustice no doubt they would have done so. Their Lordships do not feel justified in disturbing the judgment of the High Court under such circumstances.

The result is that this appeal must be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Solicitor for Appellant: Mr. *T. L. Wilson.*

Solicitors for Respondent: Messers *Barrow & Rogers.*

7th February 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner, Central Provinces.

RANI BHAGOTI (Defendant,) ... } *Appellant,*

and

RANI CHANDAN (Plaintiff) ... } *Respondent.**

Arbitration—Defence of submission to arbitration and award upon the matter in suit before suit brought.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.

Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole.

The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only.

Held, that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties.

Appeal from a decree (22nd November 1880) of the Judicial Commissioner of the Central Provinces, reversing a decree (8th May 1880) of the Additional Commissioner, *Jubbalpur* and *Nerbudda* Divisions, and remanding an appeal to him for hearing on the merits.

Mr. *J. Graham* Q. C., and Mr *A. M. Bremmer* appeared for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

In this case the Plaintiff, the younger widow of one *Dhiraj Singh*, who died on the 10th of December, 1875, brought her suit to recover half of the property which had been left by *Dhiraj Singh*. The Defendant was the elder widow of the deceased. The property which was claimed in the suit consisted of twenty-four villages which are specified in the schedule to the plaint. The Defendant pleaded, first, that the matters between the parties had been referred to arbitration by an agreement in writing, and that there was an award of the arbitrators which decided that the Plaintiff was not entitled to recover half of the property. She further pleaded that the Plaintiff was unchaste before the death of her husband, and that therefore she would not be entitled to inherit the share of the property which was claimed.

In the first Court the Deputy Commissioner of *Narsinghpore*, who tried the case, framed several issues, two being whether the question of the distribution of the property of *Dhiraj Singh* had been referred to arbitration, by agreement between the parties in writing, and an award thereon been made, and whether the agreement was binding. Probably it was meant to include in this issue the question whether the award as well as the agreement was binding. Another issue was, whether the Plaintiff was unchaste before the death of her husband, and so debarred from inheriting. In his judgment he said it was doubtful, he thought, whether the Plaintiff did sign the submission to arbitration; but he did not consider that even if she did it was binding, and he gave a decree in favour of the Plaintiff for the half-share of the villages claimed.

That decision went by way of appeal to the Additional Commissioner of the *Jubbulpore* and *Nerbudda* Division, who came to the conclusion that the submission to the arbitration was signed by the Plaintiff.

* 12 Cowell's Ind. Ap 67; I L R. 11 Cal. 386

He also held that the award was valid, and reversed the order of the Lower Court and dismissed the Plaintiff's claim. He says :—"From a careful consideration of all these circumstances, I cannot agree with the Lower Court that the award of the arbitrators is invalid, or that there is any doubt as to the contract by Plaintiff to refer."

Then the case went by way of what was formerly called a special appeal, but which is now called a second appeal, to the Judicial Commissioner of the *Central Provinces*. The Judicial Commissioner, on that second appeal, had no jurisdiction to deal with any findings of fact. The facts as found by the Lower Appellate Court would have to be taken as being the real facts of the case. However, he did deal with the question whether the agreement was signed and made by the Plaintiff, and he considered that the Lower Appellate Court was fully justified in that finding. But he appears to have thought that he could go into the whole case, because he says :—"I have two questions to decide: first whether the Lower Appellate Court had evidence for the finding that the agreement was genuine? Secondly, whether it was right in upholding the award?" After finding that the agreement was signed, he went into the question whether the award was to be upheld, and decided that the arbitrators had exceeded their authority in entering into the question of the Plaintiff's chastity, and that the award was bad; and on that ground he reversed the decision of the Additional Commissioner.

The question really now before their Lordships is, whether this award is binding upon the Plaintiff? The submission was made by two agreements, one signed by Rani *Chandan*, and the other by Rani *Bhagoti*, the elder widow. The one signed by Rani *Chandan*, the Plaintiff in the suit, is in these terms: "Agreement executed by younger Rani *Chandan*, widow of *Rao Dhiraj Singh*, late malguzar of *Bilehra* and *Karabgaon*, to *Maharaj Singh* (umpire), malguzar of mouza *Nadia*; *Lala Jaget Singh* (arbitrator), malguzar of mouza *Bamhori*; *Mohanjo Chachandia* (arbitrator), malguzar of mouza *Kathangi*; *Thakur Aman Singh* (arbitrator), thekedar of mouza *Manakpur*; and *Raghunath Seth* (arbitrator), of mouza *Karabgaon*, to the effect that there is a difference between me and the elder Rani about our respective rights; that I have appointed you as arbitrators; that I shall accept what you may give as the limit of my rights." The agreement signed by the Rani *Bhagoti* is precisely similar in its purport.

There is thus a general reference to the arbitrators to decide between the two widows upon their respective rights, and particularly with respect to Rani *Chandan*, the younger, what was the limit of her rights, raising the entire question not merely whether she was entitled to maintenance, but whether there were facts which would disentitle her to succeed to any portion of the estate of her deceased husband. The arbitrators, so far as appears, were gentlemen of some position in the neighbourhood, and apparently must have been well competent to decide such a question as this between the two widows. It may also be observed that probably it was the very best tribunal to which a dispute of this kind could be referred. They make their award, and they say :—"As you, both the Ranis, have appointed us as arbitrators and umpire with your own consent to settle the matter in difference between you about your respective rights, we have this day come to your place in order to give our decision. Inquiries being set on foot, Rani *Chandan* stated that she has been living separate, from the lifetime of the deceased *Rao Sahib*; that he, *Rao Sahib*, used to provide for her maintenance to the extent of her requirements; that she is not willing to accept that allowance now; and that some separate allowance for her should be fixed by the arbitrators according to their judgment, so as to avoid the possibility of her being driven to make constant demands against the elder Rani." Then: "Question by Arbitrators.—Why did the *Rao Sahib*

keep you separate and fix a maintenance for you? Answer.—I do not know the reason." So they heard what Rani *Chandan* had to say. Then they appear to have heard what the other widow, Rani *Bhagoti*, had to say, and she stated that "Rani *Chandan* has always been living separate; that she will pay what *Rao Sahib* used to pay her (Rani *Chandan*) as maintenance; that the reason why Rani *Chandan* has been living separate is this, that her character has been entirely bad, so much as that she cannot describe it: that she (Rani *Chandan*) is a woman of small intelligence; that for these reasons the *Rao Sahib* at first intended to turn her out, but refrained from doing so to avoid a scandal, and was constrained to keep her separate and to make provisions for her as stated." Then the award says: "On hearing the statement of both the Ranis we inspected the order passed on the proceedings taken for mutation of names."

Those proceedings, it may be well to mention here, were proceedings which had been taken immediately upon the death of *Dhiraj*, and which resulted in Rani *Bhagoti* being found to have been in possession since a date in the deceased's lifetime, and an order for the mutation being made in her favour. The award then goes on: "In that order it is held as proved that the younger Rani *Chandan* has been living separate and receiving maintenance. The statement of the elder Rani was made the subject of full inquiries, and it is proved to be the whole truth and correct, *i.e.*, the old and young people of the village corroborate the elder Rani's statement word by word. The mutation proceedings terminated in Rani *Bhagoti* being put in possession of the estate, and the younger Rani being allowed a maintenance." That was correct. Thus it appears that these gentlemen did make inquiries into the allegation of Rani *Bhagoti*, and the ground which it was alleged disqualified Rani *Chandan* from inheriting any portion of her husband's property. They then go on: "This we opine is quite reasonable and just, and we, the arbitrators, hold that this maintenance is all that can be allowed, save that we consider that a money allowance of Rs. 600 per annum be allowed to the younger Rani *Chandan* for her maintenance; that she be allowed to keep her own jewels" They award her that Rs.600 per annum for maintenance.

Now, upon the face of this award, they appear to have inquired into the matters which had to be inquired into to see what the rights of the two widows were, and especially the right of Rani *Chandan*. They decided against her, and there does not appear to be any ground for saying that they misconducted themselves, or made any mistake in conducting the inquiry. The only thing apparently that can be suggested arises from the evidence which one of them, *Jagat Singh*, gave, in which, when he was cross-examined, he seems to have said, in reply to some question which is not given, "How could we give her half when the sirkar had not done so in the Dakil Kharij?"—that is, in the mutation proceedings. He may have given that as some reason in answer to a question put to him, Why did you not give her half when you were making this award? But that is not a sufficient ground for saying there was anything like misconduct on the part of this gentleman, nor is there any other ground upon which their Lordships can say that this award ought not to be held to be a binding award.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the Judicial Commissioner. Consequently the decision that the award is binding which was come to by the Lower Appellate Court will stand, and the Respondent will pay the costs of this appeal.

Solicitors for the Appellant: *Ashurst, Morris, Crisp & Co.*

13th 17th February; and 4th March, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

ABDUL WAHID KHAN (Defendant), ... } *Appellant,*

and

MUSSUMAT NURAN BIBI and others (Plaintiffs), ... } *Respondents.**

Mahomedan Law—Deed of Compromise—Construction—Estate limited to take effect in favour of a person after another's death.

It is not consistent with Mahomedan law to limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate.

The parties to a *solenamah* or compromise were, on the one side, the widow of a Mahomedan, she being in possession of villages in Oudh, which had belonged to him, and of which the summary settlement of 1858 had been made with her; and, on the other side, two brothers, alleged to be his sons. By the compromise, which was made in the course of proceedings at regular settlement, it was agreed that the widow should, during her lifetime, continue to hold possession, and remain proprietor, without power of alienation, and that after her death the two sons should possess each one-half of the property.

Held, that on the true construction of the compromise, the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her lifetime.

Appeal from a decree (24th August 1882) of the Judicial Commissioner of *Oudh*, reversing a decree (30th June 1881) of the District Judge of *Rae Bareli*.

Mr. *J. T. Woodroffe* and Mr. *H. Cowell*, for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The main question in this appeal arises upon the construction of an instrument of compromise, dated the 28th of April, 1866, consisting of two parts, one part being executed by one and the other by the other of the parties to the compromise. It was made in a suit instituted in the Court of the Extra Assistant Commissioner, Settlement Department, in the District of *Sultanpur*. In order to construe it, it is necessary to see what was the position of the parties when it was made. Between 1821 and 1825, one *Mouzzam Khan* acquired the ilaka *Audari*, consisting of seven villages, now in the *Rae Bareli*, but formerly in the *Sultanpur* district, and about the year 1849 he purchased, in the name of his sons *Abdul Rahman* and *Abdus Subhan*, the ilaka *Lewana*, consisting of eleven villages, in the district of *Partabgarh*. *Mouzzam Khan* died on the 22nd of January, 1850, leaving three widows, *Gauhar Bibi*, *Musammat Chameli*, and *Musammat Bakhtawar*, and two sons, *Abdul Rahman*, the son of *Chameli*, and *Abdus Subhan*, the son of *Bakhtawar*. It was admitted that *Gauhar Bibi* was his lawfully married wife, but it was contended on behalf of the Appellant that *Chameli* and *Bakhtawar* were never married to him, and that their sons were therefore illegitimate. *Musammat Bakhtawar* had also a daughter, *Musammat Nuran*, the Respondent, who it was contended was not *Mouzzam's* daughter, having been born only three months after her mother first entered his harem. In 1855 or 1856, before the annexation of *Oudh*, a settlement of the whole estate was made with *Gauhar Bibi*, and a kabuliat executed in her name, and from that time until her death she remained in possession of it.

* 12 Cowell's Ind. Ap. 91; I. L. R. 11 Cal. 597.

In April, 1858, shortly after Lord *Canning's* Proclamation of the 15th of March, 1858, by which all the estates in *Oudh* were confiscated to the Government, a summary settlement of the estate was made with her. No sannad was granted to her, and her name is not entered in the list of persons who were to be considered talookdars within the meaning of Act I. of 1869 (the *Oudh Estates Act*). On the 31st of January, 1866, *Abdus Subhan* brought a suit in the Court of the Extra Assistant Commissioner, Settlement Department, against *Gauhar Bibi*, to recover one half of the village of *Sarah Mahesa*, one of the villages in *Audari*. In the plaint the tenure is described as talookdary without a sannad, and *Gauhar Bibi* is named as talookdar. The ground of the claim is stated to be, that *Mouzzam Khan*, during his lifetime, caused the kabuliat of the village in suit, together with the entire talooka, to be executed in the name of the Plaintiff and *Abdul Rahman*, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263 F.; in the middle of 1263 F., when British rule was established, the entire talooka was settled with strangers for non-payment of the arrears of Government revenues; after 1266 F. (1859), on the reoccupation of the province, the settlement of the entire talooka was made with the Defendant in the absence of the Plaintiff.

The Plaintiff did not rely upon any title in the sons as heirs of their father. He relied upon the kabuliat, and the possession under it, as evidence that their father in his lifetime made them real owners of the estate, and that they were not furzidars. He would have had to prove this; there being, according to the law in *India*, no presumption in their favour from the fact of their being sons of *Mouzzam*. It does not appear in the record of the present suit what defence was made by *Gauhar Bibi*. Possibly no formal defence was made before the compromise was come to. Her case would be that in 1855 or 1856 a settlement of the estate was made with her and a kabuliat executed in her name, and she had ever since been in possession of it; and further, that in April, 1858, after the confiscation, the Government had made a summary settlement with her. The compromise was made by two petitions to the Settlement Court, one by *Abdus Subhan*, and the other by *Gauhar Bibi*. The former is in these words:—

"Whereas the Petitioner has instituted a suit in the Settlement Court against his mother, *Musammat Gauhar Bibi*, for proprietary right in half of talooka *Sarah Mahesa*, in pergana *Rokha*, in the *Sultanpur* district. Now, an amicable settlement having been made between the Petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (mau mukir) commit to writing that (my) mother, Defendant, shall during her lifetime continue as heretofore (ba dastur) to hold possession of and be mistress of the talooka, and manage the estate through agents, but she shall not, without any special emergency, alienate any property so as to deprive me of my right, and that after her death I, the declarant (mau mukir), and my step-brother, *Abdul Rahman*, shall possess and enjoy each one half of the entire ilaka, situate in the districts of *Sultanpur* and *Partabgarh*, and that so long as the Defendant may be living I shall obey her."

The petition of *Gauhar Bibi* is similar to this, with the addition, after the names of *Abdul Rhaman* and *Abdus Subhan*, of the words, "shall become successors to and proprietors of the said ilaka." Thereupon the Court, on the 28th of April, made an order dismissing the suit.

Abdus Subhan died on the 25th of February, 1868, and *Abdul Rahman* on 10th of March, 1874, leaving a daughter, *Muradi Bibi*. On the 30th of April, 1874, *Gauhar Bibi* executed a deed of gift in favour of *Muradi Bibi*, and on the 18th of October, 1875, *Gauhar Bibi* died, leaving *Muradi* in possession of the entire estate. There had been some litigation between *Mustafa Khan*, the

nephew of *Mouzzam*, and *Gauhar Bibi*, but it is not necessary to notice those suits, nor a suit brought by him against *Muradi Bibi* after *Gauhar Bibi's* death.

The suit which is the subject of this appeal was brought on the 1st of November, 1880, by *Musammat Nuran Bibi*, *Sardar Prem Singh*, and *Mahomed Taha Khan*, the latter two being said to be purchasers from *Muran Bibi* of a share of the estate, against *Abdul Wahid Khan*, the husband of *Muradi Bibi*, *Musammat Shaluka*, one of the two widows of *Abdul Rahman*, and other Defendants who were mortgagees of the estate. The claim was to recover possession of 8 annas 7 pie share of the estate by virtue of inheritance from *Abdul Rahman* and *Abdus Subhan*, and the ground of it is stated to be that, by virtue of the transfer of the property effected by *Mouzzam Khan* in his lifetime, by causing a kabuliat to be executed, both the sons remained in proprietary possession of the estate down to 1262 F, and that under the deed of compromise, *Abdus Subhan's* right to one-half of the estate and *Abdul Rahman's* to the other half having been admitted, it was settled that *Gauhar Bibi* should retain possession of the estate during her lifetime, without power of alienation, and that after her death both the sons would take the estate half and half. The Respondents, in the reasons in their case in these appeal, put the same construction upon the compromise, and in the argument their counsel contended that it was a recognition of right of inheritance in respect of what would have been the son's rights, supposing they had succeeded in the suit.

Their Lordships are of opinion that the compromise cannot be construed as admitting the right which was claimed by either of the parties. In *Abdus Subhan's* petition it is stated that *Gauhar Bibi* sued for proprietary right, and if she is to be considered as admitting the proprietary right which the sons sued for, they must be equally considered as admitting her proprietary right. These rights are inconsistent, and, as both could not have been admitted by the compromise, neither can be considered as having been. Further, *Gauhar Bibi* is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the talooka. During her life, the whole interest in the estate is to be in her. Then comes the question. What is the interest which is given by the compromise to the sons? To give the Plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognised by the Mahomedan law. The suit was tried in the first instance by the District Judge of *Rae Bareli*, a Mahomedan, who held that the interest, if any, created by the compromise must be regarded as future, and contingent upon the event of *Abdul Rahman* and *Abdus Subhan* surviving *Gauhar Bibi*. After giving his translations of the petitions, which substantially agree with those which have been quoted from the record, he says,—

"From these words in the application it is clear, to my mind, that the parties to the compromise intended that *Gauhar Bibi* should continue to be the proprietress and possessor of the estate as before, and without any limitations or restrictions which would divest her of ownership during her lifetime. The words '*badustur malik wa kabiz*,' which occur in both applications, leave no doubt upon this point."

Further on, he says,—

"But it is clear to me that her (*Gauhar Bibi*) proprietary rights were not qualified in any such manner as to divest her, wholly or partially, of the incidents of ownership. The arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris,' or 'making some stranger an heir,' and cannot be regarded as creating a present or vested interest. The words of the compromise do not bear any such construction as the Plaintiffs seek to put on

them, and if they do create any interest, such interest must be regarded as future, and contingent upon the event of *Abdul Rahman* and *Abdus Subhan* surviving *Gauhar Bibi*. Under the Mahomedan law, a mere possibility, such as the expectant right of an heir apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest, or transfer so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan law is uniform in its application to matters of bequest, inheritance or otherwise."

There was an appeal from this decision to the Judicial Commissioner, who reversed it, holding that on the death of *Gauhar Bibi* the estate became the property of the heirs of *Abdul Rahman* and *Abdus Subhan*, that *Gauhar Bibi* had not the absolute right to alienate the estate, and that her gift to *Muradi Bibi* was invalid. He said it appeared to him that the effect of the compromise was to give *Gauhar Bibi* a life interest in the estate, and on the death of *Abdul Rahman* and *Abdus Subhan* their heirs took their place and had a right to their property on *Gauhar Bibi's* death. He seems to have thought that this was in accordance with the Mahomedan law, but it is not clear that he did so.

Their Lordships do not take this view of the compromise. In *Musammut Humeeda* v. *Musammut Budlun* (1), in which judgment was given by this Committee on the 26th March, 1872, the High Court of *Calcutta* had held that, by an arrangement between the Plaintiff, a Mahomedan widow, and her son, an estate was vested in the Plaintiff for life, and after her death was to devolve on her son by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the Plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in *Abdul Rahman* and *Abdus Subhan* which passed to their heirs on their death in the lifetime of *Gauhar Bibi*.

It is unnecessary to consider the other questions raised in this appeal, and their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and to order the appeal to him to be dismissed, with costs. And the Respondents will pay the costs of this appeal.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitor for the Respondents: *T. L. Wilson.*

18th, 19th, and 20th February; and 17th March, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett, Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the District Judge of Lucknow.

PRINCE MIRZA JEHAN KADR BAHADOOR (Plaintiff) ... } *Appellant,*

and

NAWAB BADSHOO BABOO SAHIBA (Defendant)... } *Respondent.**

Confiscation and restoration of lands in Oudh in 1858, and of immoveables in Lucknow—Gift—Title.

On a claim for a share in property consisting of (*a*) immoveables in Lucknow, and (*b*) revenue-

(1) 17 Suth. W. R. 525.

* 12 Cowell's Ind. Ap. 124; I. L. R. 12 Cal. 1.

paying land in a district of Oudh, the defence was title by gift, with possession, from the former owner, a member of the family through which the Plaintiff claimed.

As to the immoveables in Lucknow, they having been included in the confiscation, which, having followed the capture of the town in 1858, was subsequently abandoned without any intention on the part of Government to make a regrant in favor of my person the result in regard to the present question was the same as if no such event had occured.

The other property, (b), came under the general confiscation of Oudh lands in 1858, and also was restored through subsequent settlement operations in which the final order, relating to the land in question, was to the effect that settlement should be made with the "heirs" of the previous owner

Held, that the above did not preclude the defence of exclusive title by gift; the order last mentioned, on its true construction, only designating all those who might take under and through the previous owner, (deceased at the time of settlement), without excluding any claimant, save those who might claim adversely to such title. The Government did not, in the settlement which followed the confiscation, make any arbitrary, or wholly new, re-distribution of estates, or proceed as if the existence of previous titles (although they had been brought to an end), was to go for nothing. The enquiry in most cases was as to who would have been entitled, had there been no confiscation. As to both classes of property the gift was maintained.

Appeal from a decree of the District Judge (February 18th, 1880), dismissing an appeal from the Civil Judge of *Lucknow* (June 18th, 1879), whereby the Appellant's suit to recover possession of certain immoveable property with mesne profits was, upon the hearing of the same after remand under Her Majesty's Order in Council (December 30th, 1878), dismissed with costs.

Mr. *Graham*, Q. C., and Mr. *Woodroffe*, for the Appellant.

Mr. *Leith*, Q. C., and Mr. *Doyne*, for the Respondent.

17th March, 1885.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

This suit relates to certain lands in *Oudh* which formerly belonged to *Mulka Kishwar*, the mother of the King who was deposed in the year 1856. She died on the 12th of February, 1860, leaving three children—her eldest son the ex-King, the second son who was commonly called the General Sahib, and the Respondent who was the Defendant below. The General Sahib died on the 28th of February, 1851, leaving one son, the Appellant, who was the Plaintiff below, and one daughter. The Defendant has for many years been in possession of the lands in question.

The Plaintiff commenced this suit on the 11th of March, 1875, claiming four-fifteenths of the property, as being his share of the share which his father took as one of *Mulka Kishwar's* heirs. The Defendant alleged that she was rightfully in possession under a deed of gift or exchange executed in her favour by *Mulka Kishwar* some time in the year 1856.

At the first hearing of the suit the Court, without going into the merits, dismissed it on the ground that it was barred by lapse of time, and the same view was taken by the Court of Appeal. It was held that time began to run from the death of *Mulka Kishwar*. The Plaintiff then appealed to her Majesty in Council, who remanded the suit to be tried on certain issues, seven in number. On this appeal a distinction was taken between one portion of the property which is situate in the city of *Lucknow*, and another portion known as the mouza *Sahrawan*, which is in the district of *Unao*. It will be convenient to deal first with the property in *Lucknow*.

As regards this property the Judicial Committee found that, though it was confiscated in 1858, the confiscation was annulled in July, 1863, without any intention on the part of the Government to make a grant in favour of any person, and therefore the case must be treated as if there had never been any confiscation at all. If then the Defendant could prove either the gift she alleged, or possession prior to the confiscation, the Plaintiff's claim would be defeated. But those questions had never been tried, and so issues were directed upon them.

The issue as to the gift was tried by Mr. *Lincoln*, the Civil Judge of *Lucknow*, who found that "the property was gifted

to Defendant by *Mulka Kishwar*. A deed was executed and lost. That gift is proved, and is valid according to law." On appeal to the District Judge, Mr *Harington*, he found thus: "Although no deed of gift was executed, the late *Mulka Kishwar* did in her lifetime make a verbal gift of the kind known in *India* as hiba biliwaz of all the property in trust in favour of the Defendant and this gift was valid in law." Those findings are impugned by the present appeal.

The first observation that occurs is that the Plaintiff seeks to overturn the concurrent judgments of two Courts on a question of fact. To meet this difficulty, it is urged that though the two Courts are agreed as to the gift, they are at variance on the vital question whether the gift was by deed or by word of mouth; that the evidence of a gift is so inseparably mixed up with the evidence of a deed, that to deny the deed is tantamount to denying the gift; that the principal witnesses were not examined in Court, and therefore the first Court had not that advantage over Courts of Appeal which makes them reluctant to disturb its findings; and that the issues are not so much upon primary facts as upon inferences from complex groups of facts.

There is so much force in these observations that their Lordships have thought it necessary to hear and consider every part of the case. But the Judges below know the language used by the parties, and they live in the locality, and understand better than their Lordships can what modes of action are probable or improbable for persons in the situation of *Mulka Kishwar* and her children. And with regard to the variance between the Courts, it is remarkable that Mr. *Harington*, while rejecting the story of the deed, should yet have felt himself constrained by the probabilities of the case and by the weight of some of the evidence to decide in favour of the gift.

It would require strong and clear proof of miscarriage to induce this Committee to decide against two such findings; whereas the utmost their Lordships can say in favour of the appeal is that the case is attended with so much obscurity that, if it were untouched by previous decisions, they would have great difficulty in deciding it. On the whole, however, their judgment is in favour of the gift, and they are clear that, if the evidence proves a gift, it proves a gift by deed. They will indicate the main lines of reasoning which lead to their conclusion.

In the first place, the Defendant has been in open and undoubted possession ever since July, 1863. It appears that formal notice of release from confiscation was served on a person who describes himself as agent of the ex-King and for the property of the General Sahib. No claim has been made by the ex-King or by the Plaintiff's sister. The Plaintiff himself does not allege ignorance or any other disadvantage which might explain why he never preferred any claim till the filing of his plaint. He only says that he was a minor when his father died in February, 1858. He had certainly reached majority in 1865, perhaps earlier In such a case every reasonable intendment must be made in favour of long possession, and of the conclusion that a claim so long delayed is not a just one.

From the month of February, 1859, up to July, 1863, the Defendant told a consistent story about the gift, and she tells the same again in this suit. It is true that in some petitions put in on her behalf prior to February, 1859, by an agent, her claim to *Mulka Kishwar's* property is rested on gift generally without mentioning a deed. This is one of the reasons why Mr. *Harington* found there was no deed. But there is no inconsistency between making a claim in respect of a gift, and afterwards, when inquiry is made, stating that the gift was by deed. Seeing that Mahomedan law does not require any deed, and the alleged deed was not forthcoming, it was not dishonest or discreditable, though it may have been unwise, to make the first claim on the more general ground. Their Lordships attribute little weight to this circumstance.

The occasion of the alleged gift was

one which was very likely to lead to some re-arrangement of family property. The exact date is nowhere stated. But it appears to have been after the annexation, and very shortly before *Mulka Kishwar* departed for *London* to plead her son's cause. She was going on what to purdanashin ladies, who had probably never been far beyond the precincts of the palace, must have seemed a terrible journey. The mother and son, who were going away, must have looked at the chance that their parting with the Defendant would be a final one, as it proved to be in fact. It does not indeed follow that because some dealing with the property was likely to take place, it should be the particular dealing alleged; and part of the story, viz., that the daughter's gift of jewels to her mother formed the consideration of the gift by the mother, seems very improbable. But there is no difficulty whatever in believing that the daughter contributed what moveables she could to put her mother in funds which she must have needed, or that the mother made over her immoveable property to the daughter, who alone of her children remained in *Oudh*.

The witnesses, who have all been orally examined and cross-examined, though not all in Court, have in essential matters told a consistent story. In some incidents they have contradicted one another, or themselves. They have not been drilled into uniformity of statement. But there is no substantial discrepancy with regard to the following allegations: that a few days before her departure *Mulka Kishwar* sealed a deed making over her immoveable property to the Defendant; that orders were given to send a copy of the deed to Colonel *Outram* the Resident; and that *Jowahir Ali*, the steward, received orders to obey the Defendant as he had been obeying *Mulka Kishwar* herself. It may be added that the Defendant, though of royal rank, was submitted to cross-examination by Mr. *Thomas* the Plaintiff's counsel, and was not shaken in the essentials of her deposition.

Moreover, their Lordships think that the evidence establishes a probability that the copy ordered for Colonel *Outram*, or some notice of the deed, was actually sent to him. The loss of the deed and of the copy are easily accounted for by the general plunder and wreck which took place when *Lucknow* was in the hands of the insurgents. It may well be supposed that such places as the palace and the office of the Chief Commissioner would be severely ransacked. Under such circumstances, and after the lapse of twenty years, the Courts below were justified in taking what evidence they could find in the official reports of those who inquired into the case many years earlier.

It seems that towards the end of the year 1858, when the Defendant first applied to be restored to *Mulka Kishwar's* property, the matter was referred to Mr. *Bickers* one of the Treasury Officers for inquiry. The date of his report is not given. Several witnesses appeared before him to prove the gift, which he calls a bequest. After mentioning this he says. "A regular deed (since lost) is alleged to have been executed, and the late *Mir Munshi* of the Chief Commissioner's office *Tufazul Hosain*, declares that he saw a copy of it in the office, and that *Nawab Afsar Bahu* was recognised as the proprietor of her mother's estate after her departure." He recommends relinquishment of the property in favour of the Defendant. This report was before Mr. *Lincoln* and was used by him as evidence in the Defendant's favour.

On the appeal Mr. *Harington* examined a number of official records not previously produced, and among them a report of Mr. *Capper*, the Deputy Commissioner of *Lucknow*, before whom the question had come. It is dated the 9th of February, 1863, and so far as appears it was founded on examination of papers, not on any further hearing of witnesses. He mentions that the claimants produce witnesses to the deed and to notice having been given to the Chief Commissioner. He then says that no official sanction was given to any acts of the ex King or his relatives at annexation, and adds, "The evidence only

amounts to this, that a letter was sent to Colonel *Outram*, and that without replying he ordered it to be dakhil duftured, and there can be no doubt that this was not an official registry of the transaction." Referring to Mr. *Bickers'* report as having been contained in Captain *Perkins'* docket of the 15th of June, 1862, he says it is opposed to his previous ones and is inaccurate. But he does not say in what points it is inaccurate, and in one respect he says it is valuable. As regards the property now in suit, he recommends that the confiscation should be withdrawn, and that claimants should be left to make good their claims. As to other property then claimed for the Defendant, he holds that *Mulka Kishwar* had no power to dispose of it. It does not appear to their Lordships that the inference to be drawn from the specific statement in Mr. *Bickers'* report is at all displaced by Mr. *Capper*. The latter officer, while stating that there was evidence of the deed and of notice to Colonel *Outram*, contents himself with replying that the Government never recognised it. And that appears to have been quite sufficient for the purpose in hand, because the Government had complete dominion over the property by virtue of the confiscation.

In fact the Government did not on this occasion come to any decision on the question of the deed. As to part of the property then claimed by the Defendant they decided that *Mulka Kishwar* had no transferable title, and that on her death it reverted to the State. As to other part, the property now in suit, they decided to abandon the confiscation. From the documents now in the record, it seems that the Government substantially followed Mr. *Capper's* recommendations, while declining to give any opinion as to the alleged deed of gift.

Mr. *Harington* founds his opinion against the deed on two grounds. First, the non-mention of it in the Defendant's applications prior to February, 1859, which has been before observed on. Secondly, that the government officers had decided against its existence. It has just been shewn that as regards the *Lucknow* property there was no such decision. But the Defendant also claimed under the gift the sum of five lacs of Government paper belonging to her mother. The decision of the Government was against her. The claim seems to have been disposed of very quickly, certainly before Mr. *Bickers'* report was made. Nothing whatever appears as to the grounds of decision; but it may be noticed that though Mr. *Bickers* mentions the decision, he could not have considered that it governed the claim to the *Lucknow* property, because as to that property he thinks it open to him to advise, and does advise, a decision in favour of the Defendant. Nor do either Mr. *Capper* or the government treat the decision upon the five lacs as applying to the *Lucknow* property. All that can certainly be said is that, if the Government decided upon any ground applicable to the present case, they must have decided not only against the deed, but against the gift, in which Mr. *Harington* differs from them.

The gift being established, the Defendant's possession is only material if possession was necessary to sustain such a gift as is here proved. On this it is sufficient to say that, if possession was necessary, both Judges have found the fact in favour of the Defendant, and there is no reason to question their decision.

As regards the *Sahrawan* property some different considerations arise. The view taken by this Committee in 1878 was that, as the effect of Lord *Canning's* proclamation was to put an end to all previous titles, the title of either party must depend on some subsequent grant or proceeding of the Government, which again must have been within twelve years of the suit. In the *Lucknow* case, where there was no settlement to be made, this Committee considered that the Government had withdrawn themselves without making any order in favour of any definite person, and therefore the former title, whatever it might be, was let in. In the *Sahrawan* case, where a settlement was necessary,

they found an order of the Chief Commissioner in favour of "the heirs of *Mulka Kishwar*." That is the distinction taken between the two properties.

But the case had been imperfectly tried, and the materials for a complete judgment were wanting. The Committee had before them the extracts from the wajib-ul-arz which tended to shew that the settlement was actually made with the Defendant. But no kabulyat was forthcoming. Upon this they doubted whether the order of the Chief Commissioner was ever carried into effect. They desired to know whether there was any evidence that by the indefinite term "heirs of *Mulka Kishwar*" the Chief Commissioner intended to include the Plaintiff; and to know with whom the settlement was executed, and, if with the Defendant, whether she took it adversely to the other heirs or as a trustee. In effect the Committee decided that according to the evidence before them the root of the title was in the order of the 25th of October, 1863; that therefore no question of limitation could arise; and that the only question was whether the Plaintiff had been let in, or could come in, under the terms of that order. For the purpose of deciding that question, they directed issues calculated to elicit the whole of the facts.

On the second and third issues Mr. *Lincoln* finds that settlement was made with the Defendant solely and exclusively, and that no kabulyat was executed. Mr. *Harington* on the contrary finds that the settlement was made not with the Defendant but with the heirs of *Mulka Kishwar*, and that a kabulyat was executed in the Defendant's name as lumberdar. Such a flat contradiction on two simple matters of fact is somewhat startling, and has caused a good deal of perplexity. There are two documents in the record which were before Mr. *Lincoln*, and which, if they were the final documents, would warrant his finding as to the settlement.

One is in Record II., and is to the same effect as the extract from the wajib-ul-arz given in Record I. It is taken from the settlement volume, and is called "Statement of Khawut of village *Sahrawan*." Under the head "Details of Shares of the Sharers," the Defendant is entered as having twenty biswas, or the entirety of the village.

The other document is a copy of a rubkar given in Record II., and was not in Record I. at all. It purports to be a "Proceeding of the Settlement Court, presided over by *Munshi Niamat Ali Khan*, Settlement Extra Assistant Commissioner, held on the 21st of July, 1865."

It runs thus:—

"In the matter of appointment of lumberdar of village *Sahrawan*, *Janki Parshad*, agent of *Nawab Afsar Bahu Begum*, lumberdar of *Sahrawan*, presented himself to-day, and a fard-é-raz a mandi (record of assent) was drawn up. As *Nawab Afsar Bahu Begum*, lumberdar, is the sole proprietor of this village, and it is a zemindari village, and the Government revenue assessed thereon amounts to Rs. 2,973, it is ordered that *Nawab Afsar Bahu Begum Sahiba*, the sole proprietor, be appointed lumberdar, and parwanah be issued for information of *Sadr Munserim* and tehsildar.

"A copy of this proceeding to be forwarded to the Deputy Commissioner for his information.

"Case to be consigned to records."

And it appears to have been put up with the Settlement Judicial Volume.

Mr. *Harington* does not take any notice of these documents, but only says that the volume of proceedings produced before Mr. *Lincoln* was the wrong volume, and of course did not contain the documents wanted. He called for the Final or Kishwar Volume, and treats the rubkar of the 20th of September, 1865, which is found there, as being the authentic and conclusive record. As regards the kabulyat it appears clear that none was found in the Judicial Settlement Volume, but that there was one duly entered in the final volume. As regards the khewat and the rubkar of the 21st of July, 1865, it is quite unexplained how such instruments have got

into the Judicial Settlement Volume, and are unnoticed in the final volume.

Perhaps the difficulty which here seems great is not great to those who know the system of bookkeeping in the *Oudh* Settlement Office. However that may be, their Lordships think it right to act on the statement of Mr. *Harington*, which appears to be accepted as correct by the Judicial Commissioner, that the entry of the 20th of September, 1865, in the final volume represents the final settlement, and that, though the Defendant was to be lumberdar, it was made in favour of the heirs of *Mulka Kishwar* in the exact terms of Sir *C. Wingfield's* order of October, 1863.

It remains, then, to inquire who may claim under this order. On issue 4 the two Courts have again given contrary opinions. Mr. *Lincoln* holds that the Chief Commissioner meant the heirs of *Mulka Kishwar*, whoever they may have been, and that the order had no reference to the Plaintiff or any one else in particular. Mr. *Harington* holds that the Chief Commissioner intended to include the Plaintiff to his own portion of the share which his father would have been entitled to had he been then alive. But there is no further evidence of the intention, and the reasoning of both Courts proceeds on the order of October, 1863, and the antecedent circumstances Both Courts find that the gift of 1858 excludes the Plaintiff.

The language of Sir *C. Wingfield* is that the decree shall run in the name of the heirs of *Mulka Kishwar*, and he adds that the Defendant and her other children can claim a share in the property. If these expressions are to be literally construed, it is clear that the Plaintiff can make no claim, for he is neither heir nor child of *Mulka Kishwar*. Their Lordships agree in the view that the instrument is not one which ought to be construed as if it were using exact terms of art. But if the strict meaning of the terms is departed from, the question arises whether the departure must not be carried to a greater length than is just sufficient to let in the claims of the Plaintiff. That question must be determined on a view of the circumstances under which Sir *C. Wingfield* made his order.

The course of decision in the Settlement Courts is recited in the rubkar of the 20th of September, and was as follows. Four parties claimed the settlement,—the old zemindars, *Kishen Sahai*, a person who had spent money on the village, the Defendant as representing *Mulkh Kishwar*, and one *Fatima Khanum* representing *Agha Ahmed*. Both the latter claimed as mortgagees, and the question between them was whether the mortgage really belonged to *Agha Ahmed* or to *Mulka Kishwar*. On the 2nd of January, 1863, Mr. *Mackonochie* decided in favour of the old zemindars, dismissing the other claims. On appeal from this decision "the late Settlement Officer" (his name does not appear) made a decree, dated the 12th of March, 1863, in favour of *Fatima Khanum*. A second appeal was then carried to the Settlement Commissioner, Mr. *Currie*, who made his decree of the 3rd of August, 1863, in favour of the Defendant. A third appeal was carried to the Chief Commissioner, who made his decree of the 25th of October, 1863, which this Committee took as the root of title.

The first observation on these proceedings is that the Settlement Courts were clearly inquiring into the old titles as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. *Lincoln* suggests, whether in 1863 that effect was realized to the minds of the Government officers, as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they inquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three Lower Settlement Courts had been engaged

with regard to *Sahrawan* when the case came before Sir *C. Wingfield* as the highest Court of Appeal.

The only issue then raised was between the representative of *Mulka Kishwar* on the one part, and persons claiming adversely to *Mulka Kishwar* on other parts. There was no contest between different persons claiming under *Mulka Kishwar*. The only representative of that lady was the Defendant, and it is somewhat significant that in the proceedings she is said to claim as heir, though it is clear that she was claiming under the gift. Mr. *Currie*, differing from the Courts below, had come to the conclusion that *Mulka Kishwar* was the true owner, and he incautiously worded his decree in favour of the only claimant under *Mulka Kishwar*. Sir *C. Wingfield* approved the substance of his decision, and, so far as regards all the parties before the Court, affirmed it, but, having regard to parties not before the Court, he modified its language so as to avoid prejudice to others who might claim to represent *Mulka Kishwar*.

It is true that the ground assigned for the modification is that in another case it had been shewn that there was no proof of the alleged gift to the Defendant. The other case is doubtless the *Lucknow* case, which was before Sir *C. Wingfield* in the previous July. His recollection of that case served his present purpose, that is, it warned him not to prejudice the pending question in favour of the Defendant, as Mr. *Currie's* decree would do; but he must have spoken from memory, and his memory was not quite accurate for all purposes. There was evidence of the gift, though whether it amounted to proof or not the Government never decided. They left that question to be decided at law.

Their Lordships think that the same course has been taken in the *Sahrawan* case. The intention of Sir. *C. Wingfield* was simply to decide the case before him. On an inquiry into the old title he finds, as between *Mulka Kishwar* and the other parties, that she is entitled. But she is dead, and the decree cannot run in her name, so he uses a comprehensive expression, which is in common use, and which is used elsewhere in this very proceedings, to designate those who take a dead man's property. Their Lordships see no trace of any intention on his part to use exact terms of art, or to decide in favour of one person or another as between claimants under *Mulka Kishwar*, or to prejudice the litigation which he contemplated between such claimants, or to do anything but exclude those whose claims were wholly adverse to *Mulka Kishwar*. If he had been told a month afterwards that the deed of gift had been discovered, or that a court of law had (as has now happened) decided that the gift was established, he would probably not have found it necessary to rehear the case, or to do anything more than adjudicate between the claimants under *Mulka Kishwar*. It would have been just the same if a will of *Mulka Kishwar* had been produced, or if she had made a grant of the village to some entirely different person, or if some of the heirs themselves had made an alienation. Sir *C. Wingfield* could not possibly tell what interests might be set up when the "heirs of *Mulka Kishwar*" were the only parties in the field, and were called on to claim as against one another. He left all whom it concerned to fight that out. If we suppose him to have meant more than this, we should be attributing to him an intention to do the very thing he was correcting in his subordinate, viz., to decide in the dark, and to prejudice claims which had never been tried.

It has before been pointed out that the difference between the two properties in dispute consists in the circumstance that in the one case a settlement was to be made, and in the other none. It was quite necessary to have the additional materials now afforded as regards *Sahrawan*; but, having got them, their Lordships find that, so far as regards the form of orders made by the Government, little difference is left between this property and the other. In the *Lucknow* case the order of the 4th of July 1863, is: "The

heirs of *Jania Ali* will be informed that they have no claim against Government, and should settle the dispute among themselves just as they like." And the parwana issued the same day directs the Darogah "to inform all the heirs to the Queen Dowager that the Government have reserved no claim whatever . . . and that they may mutually settle among themselves as they like." Yet in the *Lucknow* case the question of gift or no gift being decided in favour of the donee, the property falls to the donee.

The same result must follow in *Sahrawan*. The Plaintiff wholly fails, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Appellant: *Watkins & Lattey.*

Solicitor for Respondent: *T. L. Wilson.*

24th and 25th February, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Madras.

THE RAJAH OF PITTAPUR (Defendant) ... } *Appellant,*

and

SRI RAJAH VENKATA MAHIPATI SURYA and another (Plaintiffs) ... ... } *Respondents.**

Act VIII of 1859, sect. 7—Separate Causes of Action.

Sect. 7 of Act VIII. of 1859 does not say that every suit shall include every cause of action, but that it shall include the whole of the claim arising out of the cause of action.

Where therefore a Plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession, and afterwards sued to recover from the same Defendant moveable property in consequence of its wrongful detention:—

Held, that the causes of action were distinct, and that sect. 7 did not apply.

Moonshee Busloor Ruheen v. *Shumsoonnissa Begum* (1) followed.

Appeal from a decree of the High Court, (March 19. 1880) modifying a decree of the District Judge of *Godavari* (Feb. 26. 1876), having in the interval remanded certain issues for trial.

Leith Q.C., and *Doyne*, for the Appellant.

Mayne, and *Johnstone*, for the Respondents were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Upon the several questions of fact which were raised in this suit there are two concurrent findings. As to one portion of the claim there is the finding of the Court which tried the case in the first instance; and as to the other portion there is the finding of the Court which tried the case upon remand. The High Court concurred with those respective findings. It is contended, however, that the High Court threw the onus of proof upon the Defendant, whereas it ought not to have been so thrown. But the Court did not throw the onus upon the Defendant as a matter of law but merely in drawing their own conclusions from the evidence upon matters of fact.

Their Lordships see no reason to think that the High Court erred in point of law or in point of fact in arriving at conclusions similar to those which had been come to by the Courts below.

The only remaining question then is whether, by reason of the non-claim in respect of the personal property in 1872, when the action was brought in respect of the estate called *Viravaram*, the Plaintiffs were by sect. 7, Act VIII. of 1859, precluded in 1875 from bringing this action in respect of the personal property.

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* 12 Cowell's Ind. Ap. 116; I. L. R. 8 Mad. 520.

(1) 11 Moore's Ind. Ap. Ca 553; 2 P. C. J. 259.

Their Lordships are of opinion that the claim in rsepect of the personalty was not a claim falling within sect. 7 of Act VIII. of 1859. That section does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action," —meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the Defendants having improperly turned the Plaintiffs out of possession of *Viravaram*. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action.

The case which Mr. *Doyne* cited from the 11th *Moore's* Indian Appeals, p. 553, decides "That the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit." Their Lordships are of opinion that the claim in respect of the personalty was founded on a cause of action distinct from that which was the foundation of the former suit.

For the above reasons their Lordships are of opinion that the Plaintiff was not barred by sect. 7 from maintaining his present suit, and they will, therefore, humbly advise her Majesty to affirm the judgment of the High Court, and to dismiss this appeal The Appellant must pay the costs of this appeal.

Solicitors for the Appellant: *Cobtold & Woolley*

Solicitors for the Respondents: *Burton, Yeates, Hart & Burton.*

5th and 6th March, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SOOKHMOY CHUNDER DASS and another (Defendants) ... } *Appellants,*

and

SRIMATI MONOHURRI DASI (Plaintiff) ... } *Respondent.**

Hindu Law—Will—Construction of will—Perpetuity—Void disposition of profits only of an estate during an indefinite period—Accumulations—Account as among members of family.

The Hindu law does not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, and for the maintenance of religious services, but not to dispose of the estate itself.

The testator directed that his estate should remain intact, providing for religious services to be kept up by his family from the profits of the estate, his will being that "his heirs, sons, sons' sons, great grandsons, and so on in succession should be entitled to enjoy such profits." There were clauses for the accumulation of the profits of a certain portion of the estate, and forbiding alienation.

Held, that according to the true construction of the will taken altogether, the testator's intention was not to pass the estate. This was confirmed by the clauses against alienation, and for the accumulation, as long as the family should remain joint, of a certain share of the profits; another portion being assigned for the religious services. This was not a case in which a testator, having expressed an intention that his estate should pass, had added a clause against alienation, in which case the latter clause would have been merely void.

Held, accordingly, that this bequest was invalid.

An account of the profits of the estate, from the date of the death of the testator, having been

* 12 Cowell's Ind. Ap 103; I. L R. 11 Cal. 684.

ordered by the decree of the Court below, in favour of the inheritor of a share at whose instance the bequest was held invalid; *held*, that this did not mean that inquiry should be made into the different payments by the manager for the time being, or monies taken out by the members of the family, but that it should be ascertained to what portion of the savings of the family, or of the accumulations made, such sharer would be entitled; and that this order was accordingly correct.

Appeal from a decree (21st June 1881) of the High Court (1) reversing a decree (24th September 1878) of the Subordinate Judge of *Dacca*.

Mr. *T. H. Cowie* and Mr. *R. V. Doyne*, for the Appellant.

Mr. *J. F. Leith*, Q. C., and Mr *J. T. Woodroffe*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought to recover a part of the estate of one *Krishna Pershad Dass*, who died on the 24th of May, 1853. Upon his death he left a third wife, the Defendant *Srimati Pria Dasi*, *Sookhmoy Chunder Dass*, his eldest son by a former wife the present Appellant, and three minor sons, *Hurry Churn*, *Gour Hurry*, and *Anund Hurri*. Another son was born shortly after his death, but as this son only lived for a few days it is not necessary to take any further notice of him. It is only material with regard to the shares into which the estate would be divided. *Anund Hurri*, one of the sons, married the present Plaintiff, and died in 1873 without leaving children, leaving the Plaintiff his heir-at-law. Thereupon the Plaintiff brought the suit, seeking to recover the share of the estate of *Krishna Pershed Dass*, her father-in-law, which she alleged had belonged to her husband, *Anund Hurri*. The question as to whether she is entitled to recover or not depends upon whether *Krishna Pershad Dass* left a valid will of his property. If he did, she would not be entitled to recover in the way she claimed. The property would be subject to the will, and she would take such rights, if any, as the will would give her.

The District Judge who tried the suit gave a decree in favour of the Plaintiff; that she was entitled to recover the share claimed, and that she was also entitled to the account which she asked for in her plaint The High Court have confirmed that decree.

The first material paragraph in the will (taking the translation which was adopted by the High Court) is the sixth, in which the testator says:—"My estate shall remain intact, and from the profits thereof there shall be performed the worship, the periodical festivals and ceremonies, of my ancestral deities, idols and chakras according to my turn, as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zemindaries, talooks, and other immoveable properties, and my business of various descriptions, and the capital stock thereof, shall always remain intact as at present, and my heirs, sons, sons' sons, and great grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immoveable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If any one succeeds in doing so, or will do so, it shall be disallowed by the authorities."

The question is, What was the intention of the testator in this provision of his will? He says distinctly, "my estate shall remain intact," and then he proceeds to say, as regards the enjoyment of the property, the estate remaining intact, my heirs, sons, &c., "shall be entitled to enjoy the profits thereof." These words appear to their Lordships to indicate that he was not going to give away the estate, but that all he intended was to give the enjoyment of the profits to the persons metioned in the will. His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment

(1) I. L. R. 7 Calc., 269.

of the profits of it, which would not be allowed by Hindu law. It is true, if the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the will? and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will.

When we come to the subsequent clauses, they further confirm this view of his intention. Having said that the profits are to be enjoyed, he, in the subsequent paragraphs, provides for what he considers and intends to be the mode of the enjoyment; and it is very material to notice that in the eighth paragraph he assigns a six annas portion for the family worship of the idols, and also for the maintenance of the family whilst they continue joint, leaving a 10 annas share which, as long as the family remained joint, would not be, as he supposed, expended at all. What he does with that is to provide that it shall simply accumulate. He does not dispose of it in any way, but as long as the family remains joint it accumulates; again confirming the view that his intention was that the estate itself should not be disposed of.

Then he goes on to provide for the way in which the profits shall be enjoyed in the event of disagreement among the members of the family and their separating; but the whole of these provisions appear to their Lordships to be consistent with and to support the view that the intention was that the estate itself should not be disposed of, and that there was no gift of the estate, but simply a a gift with reference to the enjoyment of the profits.

The whole question really resolves itself into what was the intention of the testator to be gathered from the will. Their Lordships think that this was his intention, and that is the construction which must be put upon the will. This is the view which has been taken by both the lower Courts. The Subordinate Judge, a Hindu gentleman quite acquainted with the customs of Hindu families, considered that that was the intention, and that being contrary to Hindu law, the will was an invalid will, and that the Plaintiff was entitled to recover the share of the property which would belong to her husband, supposing the property not to be disposed of by the will.

There remains another question, and that is with regard to the account which has been ordered. The Subordinate Judge says, in reference to the 16th issue, which was the issue raised as to the accounts:—"I have to observe that it is not denied that no portion of the profits of the estate which have accrued to the estate since the death of *Krishna Hurri*, and which have remained in the hands of the manager, the Defendant No. 1, was given to *Anund Hurri*, and that no account was ever rendered to him. Under such a circumstance I am clearly of opinion that the Plaintiff, as the heiress of her husband, is entitled to an adjustment of accounts of the profits and proceeds of the estate from the date of her father-in-law's death to that of her husband's death, and from the date of her husband's death to the date of the suit, and to the amount of money which will be found due to her share under this adjustment of accounts. The account shall be taken in the execution case."

This is the same account as was ordered to be taken in a similar case of *Sooryeemony Dossee* v. *Dinobundhoo Mullick* (1). It is not intended that the different payments by the manager, or moneys taken out by the members of the family, should be inquired into, but it is to ascertain what portion of the savings of the

(1) 9 Moore's Ind. Ap. Ca. 123.

family, or the accumulations which have been made, the Plaintiff would be entitled to. It has been suggested that there may be settled accounts, and that there ought to be some provision to prevent the opening of settled accounts. The Subordinate Judge says very distinctly that no accounts have been rendered to *Anund Hurri*, and in the face of such a finding as that their Lordships think it would not be proper to insert in the decree any such provision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, the Appellants paying the costs thereof.

Solicitor for the Appellants: *T. L. Wilson.*

Solicitors for the Respondent: *Watkins & Lattey.*

11th and 12th March, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAI RAGUNATH BALI (Plaintiff) ... } *Appellant,*

and

RAI MAHARAJ BALI (Defendant) ... } *Respondent.**

Limitation Act (XV of 1877,) Sch. II, Art. 127—Exclusion from joint property.

A collateral member of a Hindu family, alleging it to be joint, claimed his share of ancestral property in Oudh, part of which formed a taluk inherited, for a considerable time past, by the eldest son, who taking the whole of it had given maintenance to the other members. This taking was entered in the first and second of the lists made under the provisions of the Oudh Estates Act I of 1869, and as to it there was no ground of claim. But with respect to the savings, accumulations, and investments made from the income and proceeds of the taluk before the confiscation and restoration of Oudh lands in 1858, the contention was that each member was entitled to his share, and that, by the presumption in respect of a joint family, the burden was on the talukdar to prove that there were no savings, or accumulations, made otherwise than out of the talook, and before the confiscation.

Held, that, if it were assumed that the family was for some purposes undivided, still this was not the case of an ordinary undivided Hindu family, and that, in such a case as this, the presumption must depend on somewhat special circumstances.

However, this case must be decided on the distinct ground that, as the claimant had been excluded from his share, if he had one, for more than twelve years, he knowing of this exclusion, the law of limitation enacted in Act XV of 1877, Sch II, Act 127, was applicable, and the claim was barred by time.

Appeal from a decree (25th April 1882) of the Judicial Commissioner of *Oudh*, affirming a decree (18th August 1881) of the District Judge of *Lucknow*.

Mr. *J. D. Mayne*, for the Appellant.

Mr. *J. Graham*, Q C., and Mr. *J. H. A. Branson*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case *Rai Raghu Nath Bali* sued *Rai Maharaj Bali* for the purpose of recovering the half of a talook in *Oudh*, together with other property which is specified in the plaint, of various descriptions, some real property, some personal property, and some "Muafi villages." The relationship of the parties is sufficiently stated in a short pedigree to be found at the beginning of the judgment of the Subordinate Judge. It appears that *Sital Parshad* had three sons, *Suraj Bali*, *Anund Bali*, and *Partab Bali*. *Anund Bali* died without issue. *Partab Bali* had two sons, *Sheoraj* and the Plaintiff, *Sheoraj* having died some years before the suit was instituted. The other son of *Sital*, *Suraj Bali*, had a son, *Abhram Bali*, who died in 1880, leaving the Defendant his heir and successor.

* 12 Cowell's Ind. Ap. 112; I. L. R 11 Cal. 777.

The talook in question is one which for a very considerable time has descended to the eldest son, who has taken the whole of it, and has given maintenance to other members of the family. In 1858 a summary settlement of this talook was made with *Abhram Bali*, the father of the Defendant, and in 1860 *Abhram* received a sanad in pursuance of that summary settlement, whereby the talook was granted to him and to his heirs on the principle of primogeniture, and his name was subsequently inserted in the first and second list of talookdars in the *Oudh Estates Act* of 1869. This being so, no question has been raised on the part of the Appellant as to the right to the talook, except on the suggestion of a trust—the proof of which has entirely failed.

The other descriptions of property remain to be dealt with. First, with respect to the Maufi villages, it appears that there was a grant of them to *Partab*, the father of the Plaintiff, and *Sheoraj*, his eldest brother, for their lives. Those lives having determined, the property reverted to the Government, and was granted to the Defendant. With respect to them, also, no question arises.

We have only, therefore, to deal with accumulations which have been made by the Plaintiff or his father, or his ancestors. With respect to them it is admitted that any savings made from the proceeds of the talook since the summary settlement of 1858 would belong to the Defendant. The question, therefore, is still further reduced to savings and investments which have been made at an earlier time, or from proceeds other than those of the talook. As to them the Plaintiff contends that the family being joint, he is entitled to his share. A very able and ingenious argument has been addressed to their Lordships on the part of Mr. *Mayne* for the purpose of shewing that the family was joint. The Subordinate Judge has found that they were not joint; but in the view which their Lordships take of the case it is not necessary to decide this question.

It has been further contended by Mr. *Mayne* that the burden is thrown upon the Defendant to prove that there were no savings or accumulations other than out of the proceeds of the talook, or before 1858 But it appears to their Lordships also unnecessary to determine this question. They observe, however, that this is not the case of an ordinary undivided Hindu family, if it be assumed that the family was for some purposes undivided, and that the presumptions must here depend upon somewhat special circumstances.

Their Lordships are of opinion that there is a ground, and a very distinct one, upon which the cause must be decided. It has been distinctly found by the District Judge,—(and that finding has been adopted, though not in express terms, by the Judicial Commissioner of *Oudh*, who has affirmed the judgment, though without giving any lengthened reasons for his decision),—"With respect to all the rest of the property other than the Muafi villages, I am of opinion that it is not only not proved that Plaintiff's branch had joint possession, but that the exclusive possession by *Abhram Bali* and Defendant on their own behalf alone is established." If this finding is right, the *Limitation Act* of 1877, c. 127, sched. II, applies, the term of twelve years, according to that Act, running from the time when the exclusion of the Plaintiff was known to him. It appears to their Lordships that this finding of the Judge is altogether supported by the evidence, and that the Plaintiff's exclusion must have been known to him at latest in 1858 or 1860. It has indeed been contended that there was some joint possession on behalf of the Plaintiff, on the grounds, 1st, that he lived in the family house, though not in the same apartments with his cousin; 2ndly, that he obtained an allowance of some Rs. 90 either per mensem or per annum,—it does not clearly appear which. The first of these grounds does not appear to their Lordships to establish joint possession; the second goes some way to negative it.

The Plaintiff has been excluded from his share, if he had one, of the family property, for more than twelve years,

and he must have known of this exclusion. If so, the *Statute of Limitations* has run against him.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed, and the Appellant must pay the costs.

Solicitors for the Appellant: *Young, Jackson, & Beard.*

Solicitors for the Respondent: *Watkins & Lattey.*

12th and 13th March, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court at Madras.

THE ZEMINDAR OF PALCONDAH (Plaintiff) ... } *Appellant,*

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Defendant) ... } *Respondent.**

Limitation—Act XV. of 1877, sect. 10.

Held, that Act XV. of 1877, sect. 10, does not apply to the Government in possession of an estate in their own right under a claim of forfeiture arising from the conviction of the last holder, and not as trustee for a specific purpose.

Appeal from a decree of the High Court (March 31, 1882) in its original jurisdiction.

Davey, Q. C., and *Branson*, for the Appellant.

Macnaghten, Q. C., and *Mayne*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD BLACKBURN:—

The present case, when understood, seems to be reduced to a very short point indeed. When the old zemindar, the father of the present Plaintiff, died, he left three infant sons and some infant daughters. There was a dispute as to which of those three infant sons, by different mothers, was the heir to the zemindary. It is not necessary for their Lordships to express any opinion as to which was the right heir. Upon the father's death the resident magistrate went hastily to the spot in order to preserve the peace. He immediately reported what was the state of things that he found there, and that is the report which we have just got. That was in October, 1228, and, at that time, nothing further was done than the magistrate going there to protect the peace and reporting. He afterwards went further than that. In May, having made inquiries and found that there were plausible grounds for claims on each side, and that the general feeling of the country was in favour of *Kurmarazu*, the eldest of these boys, who was not born in wedlock, but who had been adopted by the principal wife, and who there were plausible grounds for saying really was the heir (their Lordships say no more than that there were plausible grounds for so saying), he recommended that he should be recognised as the heir to the zemindary. The Court of Wards Regulation Act, Regulation V. of 1804, sect. 6, provides as follows:—"The proceedings of the Court of Wards shall, in the first instance, be founded on the reports of the Collectors respectively to the end that no delay may occur in providing for the due security and management of the property of persons incapacitated by minority, sex, or natural infirmity; but Collectors making such reports upon insufficient authority, whereby inheritors of property shall be deprived of the possession and management of the said property on their own behalf, shall be liable to prosecution." Before anything was done upon his report, he proceeded to appoint guardians of the persons of each of these infants, not merely of the persons of the Plaintiff and other sons, but also of the persons of the female children of the

* 12 Cowell's Ind. Ap. 120; I. L. R. 8 Mad 525.

deceased zemindar. These, however, were mere personal guardians, and, in appointing them, nothing was done touching this estate at all. On the 17th of July, 1829, the Secretary to the Government writes to the Board of Revenue acknowledging the reports. He says:—"2. Upon the understanding that *Kurmarazu*, the person recognised by the Collector as the heir and successor to the zemindary, is so acknowledged by all parties concerned in the succession, the Right Honourable the Governnor in Council resolves to recognise him as zemindar of *Palcondah*; and as he is incapacitated by minority from administering his own affairs, authorizes you to take the estate under your charge as Court of Wards, and to exercise the powers conferred by Regulation V. of 1804." That is the first act of the Government upon the matter. What the Government has there done is this. They state that upon the reports of the Collector, they will recognise *Kurmarazu*, and they authorize the Collector to take the estate under his charge, under the Regulation. Upon that the Court of Wards, undoubtedly, would become guardians of *Kurmarazu*, and, as such guardians, no doubt they took possession of the estate. It appears from a document which is not printed, but which Mr. *Davey* read, that when *Kurmarazu* came of full age the property was given over to him, and he was proclaimed as zemindar. On the assumption, upon which it must not by any means be understood that their Lordships have formed an opinion, because they have not the materials, that *Kurmarazu* was a usurper and the Plaintiff was entitled, the Court of Wards seem to have acted *bonâ fide* and upon very sufficient grounds, and, at the most, if the individuals acting as the Court of Wards were guilty of misconduct, that would not in any way affect the Government. *Kurmarazu* was then put into possession. Their Lordships see nothing which would have prevented the Plaintiff, when he came of full age, bringing an action against *Kurmarazu*, saying, "I am the true heir, and you are the usurper," and trying to recover the estate. Their Lordships know nothing what case he could have made, but there is nothing that would have hindered his doing so at that time. Whilst *Kurmarazu* was thus in possession of the property—for it seems clear that he was so—he was tried for high treason and rebellion, and convicted and sentenced to death.

That brings us to the next consideration, which perhaps hardly arises. It is under Regulation VII. of 1808, sect. 3:—"It is hereby further declared that any person born or residing under the protection of the British Government within the territories aforesaid, and consequently owing allegiance to the said Government, who, in violation of the obligation of such allegiance, shall be guilty of any of the crimes specified in the preceding section"—which includes treason—"and who shall be convicted thereof by the sentence of a court-martial during the establishment of martial law, shall be liable to immediate punishment of death, and shall suffer the same accordingly by being hanged by the neck until he is dead. All persons who shall in such cases be adjudged by a court-martial to be guilty of any of the crimes specified in this regulation shall also forfeit to the British Government all property and effects, real and personal, which they shall have possessed within its territories at the time when the crime of which they may be convicted shall have been committed." *Kurmarazu*, therefore, at that time, being so convicted under the court-martial, forfeited all the right which he had to the zemindary. If the Plaintiff had come forward at that time and said that he was the right heir, and that *Kurmarazu* was but a usurper, their Lordships do not see that the forfeiture of *Kurmarazu* would have affected the rights of the Plaintiff to recover that land. As to that their Lordships say nothing, except that probably it would not. But at that time the Government came into possession, claiming by way of forfeiture from *Kurmarazu*, who had certainly been in possession in the manner

which has been described. From the time the Plaintiff came of full age, which is stated to have been in 1837, far more than the period mentioned in the *Statute of Limitations* has run. Now, the contention, and the only contention, is this:—The *Statute of Limitations*, Act XV. of 1877, sect. 10, the only section cited, says, "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." It is contended that, under the circumstances already stated, the Government coming into possession under a claim of forfeiture from *Kurmarazu*, who had been let into possession by the Court of Wards, (we will for the present purpose assume by mistake.) are a person in whom the property had become vested in trust for a specific purpose, and that this action is brought against such a person for the purpose of following, in his or their hands, such property It does seem to their Lordships not possible to make it clearer that that section does not apply to this case than by simply stating what that section is and what the case is. That is the only point on which the appeal has been brought, and it is the only point which it is necessary to decide.

Their Lordships therefore have not the slightest hesitation in advising her Majesty that this appeal should be dismissed. The Appellant must pay the costs.

Solicitors for the Appellant: *Keen, Rogers, & Co.*

Solicitor for the Respondent: *H. Treasure.*

13th, 18th March; and 13th June 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

TOOLSHI PERSHAD SINGH and others (Defendants) ... } *Appellants,*

and

RAJAH RAM NARAIN SINGH (Plaintiff) ... } *Respondent.**

Construction—"Istimrari mokurruri"—Ba farzandan—Naslan bad naslan—Conveyance of Hereditary Right.

The words "istimrari mokurruri" in a pottah do not *per se* import an estate of inheritance.

But the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, may shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual.

The words "ba farzandan" or "naslan bad naslan" are not essential to convey an hereditary right.

Appeal from a decree of the High Court (July 31, 1882) affirming a decree of the Subordinate Judge of *Bhagulpore* (Jan. 4, 1881)

Mr. *Graham*, Q. C., and *Doyne*, for the Appellants.

Mr. *Cowie* Q. C., and *Woodroffe*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Respondent (the Plaintiff in the suit) is the grandson of *Rajah Nirbhoy Singh*, who was the owner of the zemindary of *Gidhour*, an ancient impartible estate, which descended according to the law of primogeniture. The Appellants (the Defendants) are the sons of *Kumar Sarnam Singh*, who married *Srimati*

* 12 Cowell's Ind Ap. 205; I. L. R. 12 Cal. 117.

Nawah Koeri, one of the daughters of *Nirbhoy Singh*. In 1852 *Nirbhoy Singh* died, leaving one son, *Rajah Mohender Narain Singh*, who succeeded to the estate, and having had five daughters, two of whom died before him. *Nawah Koeri* died in 1844. *Rajah Mohender Narain Singh* died in 1869, leaving four sons, of whom the Plaintiff, *Ram Narain*, is the eldest, and two daughters. *Ram Narain* succeeded to the zemindary.

The only question in the suit is what is the construction of a pottah, granted on the 29th of August, 1850, by *Nirbhoy Singh* to his son-in-law, *Kumar Sarnam Singh*, of certain mouzahs which were part of the zemindary of *Gidhowr*. *Sarnam Singh* died on the 10th of June, 1878, and on the 29th of March, 1880, the Plaintiff filed his plaint to recover possession of the mouzahs, in which he alleged that the pottah was granted in lieu of a former pottah, dated the 11th Jysack 1254 Fusli (11th of April, 1847), which was granted in lieu of the first pottah, dated the 11th Cheyt 1239 Fusli (27th of March, 1832); that the first pottah was granted at a smaller jumma than that specified in the second, and was granted on account of paternal affection and kindness to *Sarnam Singh*, the husband of his daughter, for the assistance, maintenance, and support of his daughter and her husband; and that the pottah was to remain in force only during the lifetime of the grantee. The Defendants, in their written statement, alleged that *Sarnam Singh* was a member of a family of the *Rajpoot* caste, and *Nirbhoy Singh* was inferior to him in family and caste, and that on account of his marriage with *Nawah Koeri*, and of his living at *Gidhowr* with his wife and children, *Nirbhoy Singh* on the 11th Cheyt 1239 Fusli granted to him an istimrari mokurruri tenure, i.e. for perpetuity, at an annual jumma of Rs.201. They denied that the grant was for his lifetime, and submitted that it was for perpetuity to be enjoyed generation after generation. The pottahs of 1847 and 1850 are in the proceedings, but that of 1832 is not. By that of 1847 the annual jumma was raised from Rs.201 to Rs.651, for a reason which is there stated. That of 1850 was made to settle some dispute as to a word in that of 1847. It is not necessary to state the terms of either of these pottahs. They both contain the words "istimrari mokurruri," the meaning of which is disputed, and it appears from the recital in that of 1847 that the original pottah contained those words.

The case was heard in the first instance by the Subordinate Judge of *Bhagulpore*, who in his judgment, after stating that the issue was whether the pottah of 1850 to *Kumar Sanjam Singh*, the ancestor of the Defendants, was for life or for perpetuity to be enjoyed generation after generation, proceeded to refer to the decisions of the Sudder Dewany Adawlut, which are noted in the margin of the judgment. One of these was in 1848, another in 1853, and another in 1860. He says that it was held in these cases that in mokurruri deeds merely the use of the words "istimrari mokurruari," without any such words as "ba farzandan" (with children), or "naslan bad naslan" (generation after generation), or any similar words having the same meaning, will not signify perpetual tenure to be enjoyed by heirs; on the contrary, it will mean life interest. He then refers to two decisions of the High Court at *Calcutta*, which was established in 1862, when the Sudder Dewany Adawlut was abolished. The former of these was in 1869, and is reported in 3 Bengal Law Rep. 226. The latter was in 1877, and, not having been reported, an attested copy of the judgment is in the record of this appeal. These decisions are opposed to those of the Sudder Dewany Adawlut, the High Court holding that the words "istimrari mokurruri," without any others, must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee. With reference to these decisions, the Subordinate Judge seems to be of opinion that in 1850 the parties to the pottah must have known the meaning of the words "istimrari mokurruri" to be the same as was then held by the Sudder

Dewany Adawlut, i.e. for life, and as the pottah contained only those words, without any word to denote that it was for perpetuity to be enjoyed generation after generation, it was taken as a mokurruri for life. He then refers minutely to the documentary evidence. This consisted of mokurruris granted by *Nirbhoy Singh* to his three brothers, his brother-in-law, who married his only sister, and his five sons-in-law and two other relatives, and also of mokurruris granted by *Mohender Narain*. It is not necessary to refer to this evidence, as it can only proved a custom of the family of *Nirbhoy Singh*, and what was understood in his family to be the meaning of "istimrari mokurruri" when used without any other words. The effect of it is stated by the Subordinate Judge to be that when a pottah was granted to one of the male members of the family who would become heirs according to the Shastra, in addition to the words "istimrari mokurruri," the words "with children," or other words having similar meaning, were inserted; and when it was granted to a son-in-law or other relative, no other words but "istimrari mokurruri" were used. The Subordinate Judge concluded by finding that the pottah in this case created "a life mokurruri, and not a perpetual mokurruri to be enjoyed generation after generation," and made a decree in favour of the Plaintiff.

The Defendants appealed to the High Court at *Calcutta*. That Court in its judgment, after distinguishing the cases relied upon for the Defendants (and, their Lordships think, rightly), says that in the later years of the Sudder Dewany Adawlut it was repeatedly held that an istimrari lease conveyed no hereditary right, unless expressly given by such words as "bil farzandan" or "naslan bad naslan," but there have been cases in the High Court in which the words "mokurruri istimrari" were held to convey a hereditary right. It then refers to two cases before this Committee, and says, "It is therefore fully established at the present day that the words contained in the Defendants' pottah do not *per se* convey to them an estate of inheritance." And after referring to the evidence of the custom of the family, the Court dismissed the appeal.

It is necessary now to consider the decisions which have been referred to. The earliest reported case appears to be *Tulsee Narain Sahee* v. *Modnurain Singh* (1). There a mokurruri istimrari pottah had been executed in favour of two brothers, who were both dead, and the principal Appellant was the heir of both. He claimed to succeed to the possession of the lands, and the suit was brought to try the question. The Judge of the Sudder Dewany Adawlut said:—

"The principal Sudder Ameen, admitting the pottah to be genuine, has decided against the Appellants on the second plea of the Respondent, that the heir cannot claim what the deed guaranteed only to the individuals named in it. The decision is founded on the commonly understood purport of deeds so worded as shewn by precedents referred to in the judgment. It has been repeatedly ruled by the Courts generally that the permanence (istimrar) expressed in these pottahs has reference only to the term of existence of the grantee, and that to render them hereditary the addition of 'ba farzandan' (including children or descendants), or 'naslan bad nasl' (from generation to generation), is necessary. My own knowledge confirms the correctness of this, and upon this and the following precedents of the Court, amongst the many which doubtless might be produced, I affirm the decision appealed against."

Three precedents are then mentioned; one of the 27th of May, 1817, another of the 2nd of April, 1827, and a third of the 28th of September, 1835.

The next reported case is *Ameeroonnissa Begum* v. *Hetnarain Singh* (2). It is described as a suit to resume an istimrari mokurruri lease, on the grounds that the lease was not hereditary, and that, the original lessee being dead, his

(1) S. D. A. Rep. 1848, p. 752.

(2) S. D. A. Rep. 1853, p. 648.

heirs had no right to retain the tenure, and it came before three Judges of the Sudder Dewany Adawlut. The judgment refers to the decisions of the 20th of September, 1835, and the 2nd of April, 1872, and says (p. 654) :—

"The Appellant urges that the term 'mokurruri' applies to the fixed amount of jumma, and 'istimrari' to the right of succession in perpetuity, or to the duration of the tenure. But such is not the interpretation of the term 'istimrari' according to local custom, as shewn by the decisions quoted, though the strict meaning of the word in lexicography certainly is 'perpetuation.'"

Another decision was on the 22nd of May, 1860, by three Judges of the Sudder Dewany Adawlut, two of whom became Judges of the High Court. An attested copy of the judgment is in the record. The suit related to the pottah granted by *Nirbhoy Singh* to his brother-in-law, *Kumar Dewan Singh*, and was brought against his son by *Mohendra Narain Singh*. It is said in the judgment that the Plaintiff set forth that his father, *Nirbhoy Singh*, on the 21st Kartick, 1213 F., gave to *Kumar Dewan Singh*, the father of the Defendant, a perpetual lease (mowrussi istimrari) of the villages *Jogi* and *Nirbund*, and on the death of the grantee he claimed to resume possession. The Defendant answered that the deed under which he held was, as stated by the Plaintiff, one of the 21st Kartick, 1213, for a jumma of Rs.21, but that so far from being restricted to the life of the first grantee, it had in express words the terms "to sons and generation after generation, and descendants after descendants." The Principal Sudder Ameen held that the document put forth by the Defendant was not the genuine lease, and decreed for the Plaintiff. The judgment of the Sudder Dewany Adawlut, after deciding that the deed put in by the Defendant was not the real lease, says :—

"Lastly, it is urged that the plaint admits that a mowrussi istimrari lease was given to Defendant's father on the 21st of Kartick, 1213, and that as these terms are equivalent to hereditary and perpetual terms the lease must descend from father to son. But it has been definitely ruled in the case of *Ameerunnissa* (1) that an istimrari lease does not convey any hereditary right unless such terms as 'ba farzandan' or 'naslan bad naslin' are contained in the body of the deed, and this precedent has always been followed."

The word "mowrussi" must be used by mistake for "mokurruri," as there was evidence in the present suit that the grant by *Nirbhoy Singh* was an istimrari mokurruri, and the Principal Sudder Ameen in his judgment describes the claim as for recovery of possession by setting aside "the istimrari mokurruri sunnud."

The first decision of the High Court on this matter is in *Mussummat Lakhu Kowar* v. *Roy Hari Krishna Singh* (2). The suit was brought by the successor of the grantor of a mokurruri istimrari pottah against the widow of the grantee and others, the Plaintiff alleging that it was only a life tenure, and the Defendants that it was an hereditary tenure in perpetuity. The Sudder Ameen dismissed the suit on the ground that istimrari meant perpetuity and nothing else. On appeal to the Additional Judge of *Tirhoot* this decision was reversed, and the Defendant appealed to the High Court. The decision of the Sudder Court in 1853 was relied upon for the Respondent, but the Court said it was a very peculiar one, and proceeded to a considerable extent, at least, on evidence which tended to qualify the wording of the pottah, and to shew that it was not intended to convey an hereditary title. They reversed the decision of the Additional Judge on the ground appearing in the following passage of the judgment which was delivered by one Judge, the other concurring :—

"Then as to the meaning of the words themselves. It cannot, I imagine, be for a moment contended that the words

(1) S. D. A. Rep. 1853, p. 648.

(2) 3 Beng. L. R. 226.

mokurruri istimrari do not in their lexicographical sense mean 'something that is fixed for ever.' No doubt there is a custom which adds to these words 'generation after generation,' but this is by no means an universal custom, and the extra words are etymologically redundant. Moreover, if the pottah were merely for the life of the grantee, what could be easier than to say so, and what was the object of using words that could be applied in their ordinary sense only to hereditary rights? I should say that when a grantee holds under a pottah worded in this way he has, at least, made out the very strongest *primâ facie* case, and that the *onus* of shewing that by the custom of the district pottahs conferring hereditary title always contained and were obliged to contain the words 'ba farzandan,' 'nashin bayd nashin,' or similar phrases, would be heavily upon the person seeking to set aside the lease."

The decisions of the Sudder Court previous to 1853 were not referred to. The ground of them appears to have been that the words, when used in a pottah, had a customary meaning. This is distinctly said in the case in 1853, p. 654. If this had been noticed it might have been thought that the customary meaning of the words, rather than the lexicographical, ought to be regarded, and the former would be their ordinary sense when used in a pottah.

In the other case in the High Court in 1877, this decision seems to have been treated as having settled the question. The Court say:—

"Having regard to the ordinary meaning of the words 'mokurruri istimrari,' and to the construction which this Court has put upon them in the case of *Mussammat Lukkhi Koer* v. *Roi Hurri Krishna Singh* (1), it appears to us that an 'istimrari mokurruri' pottah containing no words of inheritance on the one hand, nor any words that the lessee is only to have an estate for life, on the other must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee."

In *Rajah Leelanund Singh* v. *Thakoor Munoorunjun Singh* (2), where the question was, whether certain ghatwali tenures created before the permanent settlement, could be determined by a zemindar dispensing with the ghatwali services, this Committee said:—"The words 'mokurruri istimrari' are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted, or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary." The doubt thus stated is not removed by the lexicographical meaning of the words.

After this review of the decisions, their Lordships think it is established that the words "istimrari mokurruri" in a pottah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual. It was held by this Committee, in a case where the instrument was called "the mokurruri ijara pottah" (3), that this was the question. Such an intention was not shewn in this case, and in the argument before their Lordships the Appellant relied solely upon the terms of the pottah. As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case, and they will humbly advise Her Majesty to affirm the decree of the

(1) 3 Beng. L. R. 227.

(2) Law Rep. Ind. App. Supp. Vol. p. 181; 3 P. C. J. 238.

(3) Law Rep. 9 Ind. App. 33; *Ante* p. 325.

High Court, and to dismiss the appeal. The costs of it will be paid by the Appellant.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitor for the Respondent: *T. L. Wilson.*

9th June, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BHUBANESWARI DEBI (Plaintiff) ... } *Appellant,*

and

NILCOMUL LAHIRI (Defendant) ... } *Respondent.**

Hindu law, Adoption—Adoption as regards succession to estate of a collateral relation vested in an heir before the adoption—Fraud on the part of such heir delaying adoption.

According to Hindu Law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral.

Of three brothers deceased, the one who died first left one son; the second dying left a widow, who took her estate for life in her husband's property; and the third left a widow to whom he gave by will a power to adopt.

On the death of the widow of the second deceased, the son of the first inherited his uncle's share in the family estate, and by fraudulent acts caused delay in the exercise of the power to adopt by the widow of the third. Afterwards a boy, who had not been born in the lifetime of the widow who took for life as above stated, was adopted under the said power.

Held, that the adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him, under any circumstances, to have been made an adoptive heir to the uncle.

Appeal by special leave from a decree of the High Court (25th March 1880) (1) reversing a decree of the Subordinate Judge of *Rungpur* (30th April 1879).

Mr. *J. Rigby* Q. C., and Mr. *R. V. Doyne* for the Appellant.

Mr. *J. T. Woodroffe* for the Respondent.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Bhubaneswari Debi, as the mother and guardian of *Jotindra Mohun Lahiri*, sues to recover, on behalf of her son, half the estate of *Rammohun*. *Rammohun* died leaving two brothers and a widow, *Chandmoni*. He left no son, and consequently the widow succeeded and took the widow's estate, and until her death no one could be designated as his reversionary heir. She died on the 15th of June, 1867. *Shibnath*, one of the brothers of *Rammohun*, died on the 28th of May, 1861, in the lifetime of *Chandmoni*, having given power to his widow to adopt a son. He consequently did not succeed to any portion of the estate of his brother. *Kalimohun*, the other brother of *Rammohun* (we have not got the precise date of his death), died before *Chandmoni*, leaving a son, *Nilkomul*, who was the Defendant in the suit. If the widow of *Shibnath* had adopted a son during the liftime of *Chandmoni*, that son would have been entitled to a half share of the estate of *Rammohun* as one of the reversionary heirs of equal decree with *Nilkomul*, who was also a nephew. But the allegation is, that in consequence of *Nilkomul's* fraud in setting up a forged will, the widow of *Shibnath* was unable to get anyone to give her a son in adoption, and could not adopt until after the death of *Chandmoni*. In consequence of her not having adopted a son in the lifetime of *Chandmoni*,

* 12 Cowell's Ind. Ap. 137; I. L. R. 12 Cal. 18.

(1) I. L. R., 7 Calc., 178.

Nilkomul the Defendant became entitled to the whole of the property of his uncle, unless his fraud entitles the boy who was subsequently adopted by the widow of *Shibnath*, to come in as the heir of one moiety of the estate.

It appears that the widow from time to time tried to get different persons to give her a son in adoption, and that they refused upon the ground of the forged will which had been set up by the Defendant; and that consequently she could not get anyone to give her a son in adoption.

After the death of *Chandmoni* she did adopt the present Plaintiff; but it appears clearly upon the evidence in the record that the Plaintiff was not in existence at the time of the death of *Chandmoni*.

The widow never could, by adoption, if there had been no fraud, have made the present Plaintiff a reversionary heir of half the estate of *Rammohun*, because he was not in existence at the time of *Chandmoni's* death. According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral. It appears from the evidence of the natural father of the present Plaintiff that the widow applied to him in 1277—that is in the year 1870—to give her his son in adoption, and that at that time he gave to her in adoption his second son.

That was about four years after the death of *Chandmoni*, and then the father says in his cross-examination:—"When in 1277 she made her first attempt, the age of my second son"—that is the present Plaintiff—"was about two months." He was consequently only about two months old in 1870 or 1871, the widow having died in June, 1867. The boy never could, in the course of nature, have become the heir of *Rammohun's* estate. Under these circumstances the High Court came to a right conclusion in dismissing the Plaintiff's suit.

A question then arises whether, under the circumstances which have been detailed in the evidence, the fraud which has been brought home to the Defendant, and the forgery to which the High Court alluded, this is a case in which in their discretion their Lordships ought to give the Respondent the costs of the appeal.

Their Lordships are of opinion that the Respondent ought not to have those costs.

They will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and they make no order as to the costs of this appeal.

Solicitors for Appellant: *Wrentmore & Swinhoe.*

Solicitor for Respondent: *T. L. Wilson.*

9th, 10th, 11th, and 27th June, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

CONSOLIDATED APPEALS.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SRIMATI KAMINI SOONDARI CHOWDHRANI (Defendant) ... } *Appellant,*

and

KALI PROSUNNO GHOSE and another (Plaintiffs) ... ... } *Respondents.**

Remand—Powers of Appellate Court—Property in different districts—Decrees of District Courts, Powers of Appellate Court to amend—Act VIII of 1859, s. 12—Procedure—Unconscionable Bargain—Interest.

Neither under s 12 of Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter.

Of two mortgages, between the same parties, the first comprised four villages, of which three

* 12 Cowell's Ind. Ap. 215; I. L. R. 12 Cal. 225.

were in district A, and a fourth property was in district B. The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *viz.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the Plaintiff's right as purchaser of one of the properties; and in the suit in district B, for payment of the debt on the second mortgage. Both suits were dismissed.

The High Court, hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court of first instance in district A, to have the proportionate value of the properties determined, with a view to the apportionment of the liabilities of the parties by way of contribution.

As the Defendant who succeeded in both suits in the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no such consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly, unauthorized. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question into a suit of a description differing totally from that of either of them, as originally decreed; and this without the consent of the parties.

Fraud apart, a loan to a *purdanashin* woman from her own *mukhtear* at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the contract for such rate of interest will not be enforced. *Beynon* v. *Cook* (1) referred to and followed.

Two consolidated appeals from two decrees (20th July 1878 and 27th June 1881) of the High Court, by the first of which a decree (1st March 1877) of the Subordinate Judge of the *Nuddea* district was affirmed. By the other decree of the High Court, a decree (29th February 1876) of the First Subordinate Judge of the district of the 24-Pergunnahs was reversed.

Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *T. H. Cowie* Q. C., and Mr. *R. V. Doyne*, for the Respondent *Kali Prosunno Ghose*.

(1) L. R. 10 Ch. Ap., 389.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER :—

These appeals are brought from two judgments of the High Court of *Calcutta*; the first interlocutory, dated the 20th of July, 1878, the second final, dated the 27th of June, 1881, in a suit in which the Respondents were the Plaintiffs, and the Appellant the Defendant.

The circumstances which gave rise to the suit, as far as they are material, are as follows:—*Mussumat Kamini* (by this short name it may be convenient to designate her) a purdanashin lady, executed a kut-kobala of the moiety of five mouzahs, the largest and most valuable of which was named *Alumpur*, to which she was entitled as widow of *Ram Chunder Pal Chowdhry*, to secure the repayment, within one month of Rs. 12,000, with interest at the rate of 4 per cent. per mensem until repayment, in favour of *Grish Chunder Bandopadhya*, who was the benamidar of *Hari Churn Bhose*, her mooktar.

One of these mouzahs, being subject to a prior mortgage, has been put out of the question; thus the mouzahs mortgaged may be treated as four.

On the 9th of May, 1872, the same lady executed another kut-kobala in favour of the same person, whereby the said four mouzahs, together with three others, were hypothecated to secure the repayment, in April, 1873, of Rs. 24,000, with compound interest at 2·4 per mensem (27 per annum), calculated at quarterly rests.

On the 29th of June, 1873, a notice of foreclosure was served under the first mortgage.

On the 23rd of March, 1874, *Kali Prosunno Ghose* (the first Respondent) purchased on sale for arrears of revenue the interest of *Mussumat Kamini* in mouzah *Alumpur*. It may be here observed that, on the adequacy of the price given by him (Rs.70,000) being questioned by the revenue authorities, he represented, by petition, that the mouzah

was subject to incumbrances to the amount of Rs.105,000, which he would be liable to discharge.

On the 3rd of June, 1874, *Grish Chunder* assigned for Rs.83,910 10*a*. 9*p*. all his interest under the two kut-kobalas to the second Respondent upon trust to prevent the merger of his rights under them, and to keep them alive for the benefit of the first Respondent, and empowered him to continue and prosecute the pending foreclosure proceedings, and the name of the first Respondent was substituted for that of *Grish Chunder* in the foreclosure proceedings.

On the 24th of April, 1875, being more than twelve months after the notice of foreclosure had been given by *Grish Chunder*, the Respondents filed their plaint in the present suit in the Court of the Subordinate Judge of the 24-Pergunnahs.

That plaint, which relates only to the first mortgage, after stating the facts above recited, prays for an order giving to Plaintiff No. 1 (*Kali Prosunno Ghose*) a proprietary right based upon foreclosure in the three mouzahs other than *Alumpur*, and with respect to *Alumpur* for a declaratory decree confirming his possession of it, on a right derived from foreclosure of mortgage.

The Defendant, by her written statement, alleged (among other things) that the mortgage had been obtained from her by fraud, denied the right of the Plaintiffs to foreclose the mortgage, and asserted that if he had any claim it was to bring a contribution suit. While this suit was pending, on the 7th of February, 1876, the Plaintiffs brought another suit in the Court of the Subordinate Judge of *Nuddea*, in which the three additional mouzahs mortgaged by the second kut-kobala are situated, against the Defendant, to recover the principal and interest under that kut-kobala. We have not the plaint in this suit in the record, but it must be taken that the claim was against the Defendant personally.

The Subordinate Judge of the 24-Pergunnahs, finding against the allegation of fraud, dismissed the first suit on the ground that by the Plaintiffs' purchase of *Alumpur*, coupled with the assignment which he took of the rights of the mortgagee, the whole mortgage debt became extinguished, a ground of decision manifestly wrong, and properly reversed by the High Court.

The second action was dismissed by the Judge of *Nuddea*, mainly on the ground that the second kut-kobala did not give a personal remedy against the Defendant.

This judgment was affirmed by the High Court. The former judgment was varied in a manner which will be hereafter described.

It is convenient here to consider what were the rights of the parties, and what were the judgments which the Lower Courts ought to have pronounced.

The object of the Plaintiffs in bringing the separate suits in different jurisdictions seems to have been to foreclose the four mouzahs, including *Alumpur*, under the first mortgage only, whereby *Kali Prosunno Ghose* would obtain the mouzahs in respect of a comparatively small debt, and freed from any liability to contribute to the payment of the second mortgage, and he would obtain an absolute estate in *Alumpur*, subject to an incumbrance amounting, not to Rs.105,000 as he had represented to the Board of Inland Revenue, but probably to something less than Rs.20,000.

He relied on the second mortgage for procuring the whole sum thereby secured by a personal remedy against Defendant, *i.e.* against the mortgaged property and any other she might have.

In their Lordships' opinion the Plaintiffs had no right to claim *Alumpur*, or the three other mouzahs, by foreclosure.

The Defendant could not have redeemed the three other mouzahs without their liability under the second mortgage being taken into account, nor could the Plaintiffs foreclose them under the first mortgage only, thus depriving the second mortgage of their contribution. With respect to *Alumpur*, he, having purchased the equity of redemption, was bound to contribute to the payment of both the

mortgages in the proportion of the value of *Alumpur* to the other properties, and he could not free himself from this obligation by foreclosing *Alumpur* under the first mortgage only. Their Lordships are therefore of opinion that his suit was rightly dismissed, though not for the reason given by the Subordinate Judge.

The judgment dismissing the second suit having been affirmed, and no cross appeal having been presented, it cannot now be questioned.

The Appellant, therefore, had a right to judgment in both suits.

This being so, we now come to the manner in which the High Court dealt with the case, in the single desire, their Lordships doubt not, to do what they deemed complete justice between the parties.

Having affirmed the decree of dismissal in the second suit, whereby it was ended, they in some sense revive it, and turn both suits into a contribution suit, which they send by way of remand to the Court of the 24-Pergunnahs. They observe:—

"We think, therefore, that, under the circumstances, the proper decree in both suits will be,—

"1st. That the first suit be dismissed, except as regards *Alumpur*; and that the Plaintiff's right to *Alumpur* be decreed, the Plaintiff No. 1 and the Defendant being subjected to the following conditions:—

"2nd. That, as between the Plaintiff No. 1 and the Defendant, the properties mortgaged by both deeds (except *Chapra*) be valued by the Lower Court.

"3rd. That the debt secured by the first mortgage be borne by the Plaintiff No. 1 and the Defendant, in the proportion of the aggregate values of the properties *Kachiaria*, *Atghara*, and *Dariapur* to the value of *Alumpur*.

"4th. That the debt secured by the second mortgage be borne by the Plaintiff No 1 and the Defendant, in the proportion of the aggregate values of all the properties mortgaged by that deed (except *Chapra*) to the value of *Alumpur*.

"5th. That the Defendant be at liberty to redeem all the properties except *Alumpur*, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to *Alumpur*, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except *Alumpur*) shall have been taken in due course by the Plaintiff.

"6th. That until the mortgaged debts and interest shall be fully satisfied the said mortgaged properties in the hands of the Defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay.

"7th. That each of the parties do bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the Plaintiff No. 1."

To this judgment it is objected,—

1st. That the High Court, in their appellate capacity, had no power to confer on the Court of the 24-Pergunnahs jurisdiction to deal with a suit in the *Nuddea* district relating to property situated in *Nuddea*.

2nd. That to change the two suits into one contribution suit was beyond their power.

The case of property the subject of suit being situated in two jurisdictions is thus provided for in Act VIII. of 1859, the Act governing the procedure in this action. Sect. 12 is in these terms:—

"If the property be situate within the limits of different districts, the suit may be brought in any Court otherwise competent to try it within the jurisdiction of which the land or other immoveable property in suit is situate, but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed in the same."

This section, in their Lordships' judgment, is not applicable to the circums-

tances of this case. Neither suit comprised the whole property, nor did either District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The Plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions.

Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in *Nuddea* relating to lands in *Nuddea*.

It may be observed that the Court of the 24-Pergunnahs dealt with *Alumpur*, which is in *Nuddea*, and that the Court of *Nuddea* dealt with the three mouzahs twice mortgaged, which were in the 24-Pergunnahs. The Defendant, who succeeded in both suits, raised no question upon this, and each of the district Courts must be taken to have tried the whole suit before it by consent. But the order of the High Court now appealed against can in no sense be deemed to have been made by consent.

With respect to the second objection, their Lordships, while fully recognising the advantages to the administration of justice of the wide powers of amendment and modification of decrees, and of framing new issues, conferred upon the High Court by sects. 350, 351, 352, 353, 354, and being by no means disposed to narrow their plain meaning by judicial construction, are nevertheless of opinion that to change (as has been done in this case) two suits, one of which had been dismissed on appeal, into one suit of a totally different description from either of them, and this without consent, exceeds the powers conferred by the Act.

It follows that the judgment of the 20th of July, 1878, must be reversed. If so, all that followed on that judgment, the remand, and subsequent judgment of 1881 will fall to the ground, and the judgment of the District Courts, respectively dismissing both suits will be affirmed. The Defendant should have her costs in the High Court as well as in the lower Courts, and the costs of this appeal. Their Lordships will humbly advise Her Majesty to this effect.

This view of the case makes it unnecessary to determine a question which has been argued at the bar, *viz.*, whether the Defendant can be relieved from the exorbitant rates of interest stipulated for in the mortgages; but as unfortunately further litigation with respect to the mortgages seems not improbable, their Lordships think it may be useful to intimate the view that they are disposed to take of this question.

The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction.

But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against.

The doctrine of equity on this subject was laid down by the Master of the Rolls in *Beynon* v. *Cook* (1), and his judgment was affirmed by the Court of Appeal.

Rhys Beynon was a reversioner or remainder man, *Cook* was a money-lender who took from him a promissory note for £100, for which he was charged £15 discount for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed, "The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges."

This equitable doctrine appears to have

(1) Law Rep. 10 Ch. 391.

a strong application to the facts of this case, where we have the borrower, a purdanashin lady; the lender, her own mookhtar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances.

Solicitors for the Appellant: *Lambert, Petch & Shakespear.*

Solicitors for *Kali Prosunno Ghose: Barrow & Rogers.*

11th, 12th and 27th June, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

THE OFFICIAL TRUSTEE OF BENGAL (Plaintiff) } *Appellant,*

and

KRISHNA CHUNDER MOOZOOMDAR and others (Defendants) ... } *Respondents.**

Appellate Court, Powers of—Power to vary decree as made in the lower Court—Decree confined to rights in issue between parties—Section 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the Plaintiff was, or the Defendants were, entitled to zemindari rights in certain mehals, a decree was made affirming the title of the Plaintiff, the evidence in support of the Defendants' case being discredited, and the latter were declared by the decree to be the "Plaintiff's under tenure holders of the said mehals." This was modified on appeal by the declaration that "the Defendants are putnidars of the same mouzahs."

Held, that it was unnecessary on this appeal to consider whether the Appellate Court was right in its conclusion that the Defendants were putnidars; because, upon the case which had been set up for the Defendants, and upon the issues framed and tried in the lower Court, the Appellate Court could not properly make such a declaration: the Defendants could not be in a better position than they would have been in had they claimed to be putnidars, in which case an issue as to that title would have been framed and tried.

Section 565 of Act X of 1877 (1) does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.

Appeal from a decree (17th May 1883) of the High Court, varying in certain particulars a decree (30th July 1881) of the Subordinate Judge of the *Pubna* district.

Mr. *E. Macnaghten*, Q. C.. and Mr. *J. T. Woodroffe*, for the Appellant.

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Appellant brought a suit in the Court of the Subordinate Judge of *Pubna* against the Defendants, alleging that the whole of fifteen mouzahs named in the schedule to the plaint was the zemindari right of the late *N. P. Pogose*, and that having obtained possession with the aid of the High Court, the Appellant, as the official trustee appointed under the orders of the High Court, was entitled to and possessed of the same. And he prayed the Court to set aside an order of the Deputy Collector of *Pubna*, dated the 31st of December, 1878, and a subsequent order of the Collector, dated the 27th of March, 1879, for registration of the Defendants' names with reference to the mouzahs, and to pass a decree for registration of his name, after cancelling the registration of the Defendants' names, in zemindari right. He also asked the Court to set aside, as fabricated and fraudulent, two false kobalas, which purported to have been executed on the 8th and 15th Cheyt, 1207.

The suit was occasioned by the pro-

* 12 Cowell's Ind. Ap. 166; I. L. R. 12 Cal. 239.

(1) This section is identical with s. 565 of Act XIV of 1882.

ceedings of the Defendants under Act VII. of 1876, who applied for the registration of their names as proprietors of certain specific portions of the estate composed of these mouzahs, and produced in support of the application the kobalas referred to. The Appellant objected, and asserted that they were dependent talookdars, and consequently were not entitled to have their names registered, but the Deputy Collector overruled the objections, and ordered the names to be registered as applied for. This order was on an appeal affirmed by the Officiating Collector of *Pubna*. The Defendants in their written statements relied upon the kobalas, and claimed to be co-sharers in the zemindari. Issues were framed, of which it is now necessary to notice only three. They were:—"8th. Whether the Defendants' kobala deeds are genuine or collusive; if so, whether they are liable to be set aside. 9th. Whether the Plaintiff is in possession of the disputed mehals as zemindar or not. 10th. Whether the Defendants are jimmadar under-tenure holders or zemindars of the disputed mehals." The last issue seems to have been put in this form in consequence of a statement in the plaint that the Defendants had acquired from the Plaintiff's predecessor ordinary subordinate jimmadari rights, but the question raised by it was whether the Defendants were zemindars. The Subordinate Judge decided that both the kobalas were forged, and said that they seemed to him to have been forged by the Defendants for the purpose of establishing their zemindari rights over the disputed mehals, which they held as under-tenure holders under the Plaintiff and his predecessors. He made a decree in these terms:—"That this suit be decreed, with costs, after establishment of the Plaintiff's zemindari right to the disputed mehals; that the Defendants be declared to be the Plaintiff's under-tenure holders of the said mehals; that the false kobalas and the Collector's order for registration of name be set aside; that the Plaintiff is entitled to register, his name to the disputed mehal in place of the names of the Defendants in the collectorate register."

The Defendants appealed to the High Court, and, among other grounds of appeal, said the Court below ought to have held on the evidence that the Defendants were part owners of the zemindari, and not mere under-tenure holders, and that, at any rate, it ought not to have made a decree in favour of the Plaintiff, leaving the *status* and rights of the Defendants wholly undefined. The High Court agreed with the Subordinate Court, that the kobalas were not genuine, and that the Plaintiff was entitled to be registered as zemindar; but they went on to say, "The learned Advocate General wishes us simply to declare that the Plaintiff is entitled to be registered as zemindar of the property in question, to the exclusion of the Defendants, and invites us to say nothing as to the *status* of the latter. But we are certainly not disposed, in any view of the Plaintiff's case, to leave the Defendants at his mercy, or to leave him the power of treating them in any future suit as the holders of ordinary subordinate jimmadari rights in these mouzahs, as he has described them in his plaint, or as undefined under-tenure holders, as the lower Court has pronounced them to be. On the contrary, we are of opinion that, even should we feel bound to hold that the Defendants' rights in these mouzahs fall short of absolute proprietorship, as to which technical proof seems alone to be wanting, their *status* is shewn, even by the evidence adduced by the Plaintiff, to be at the very least as high as that of putnidars, and one which cannot now be disturbed." The decree was, "It is ordered and decreed that the decree of the lower Court be set aside, and in lieu thereof it is ordered and decreed that the Plaintiff is entitled to have his name registered as zemindar in lieu of the names of the Defendants, under Act VII. (B.C.) of 1876, in the collectorate of the district of *Pubna*, in respect of the mouzahs mentioned below, and that the Defendants are putnidars of the same mouzahs." And each party was ordered

to pay his own costs in that Court and in the Court below.

The Plaintiff has appealed to Her Majesty in Council against the declaration that the Defendants are putnidars. The High Court founded this declaration upon certain statements in the documentary evidence which had been put in by the Plaintiff. Their Lordships do not think it necessary to consider whether they were right in their conclusion that the Defendants were putnidars, because they are of opinion that upon the case which had been set up in the defence, and the issues which had been framed and tried by the lower Court, the High Court could not properly make such a declaration. The Defendants had not claimed to be putnidars, but had set up a false claim to be zemindars, and had attempted to prove it by forged deeds, and they ought certainly not to be in a better position than they would have been in if they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the lower Court. The proceedings in this suit were regulated by Act X of 1877, and their Lordships do not find any provision there which would authorize the Appellate Court to do what has been done in this case. Section 565, which enables the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court. Their Lordships are therefore of opinion that the decree of the High Court should be varied by striking out the declaration that the Defendants are putnidars of the mouzahs and the order as to costs, and ordering that the Defendants do bear the costs of the suit in the High Court and the lower Court. They will humbly advise Her Majesty accordingly, and the Respondents will pay the costs of this appeal.

Solicitors for the Appellants: *Lawford, Waterhouse, and Lawford.*

Solicitors for the Respondents: *Watkins and Lattey.*

16th, 17th and 18th June, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of the Judicial Commissioner of Oudh.

SRI KISHEN and others (Defendants) ... } *Appellants,*

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Plaintiff) } *Respondent.**

Guarantee, Contract of—Construction of contract guaranteeing conduct of person employed as agent of the guarantor—Liability for loss resulting from such agent's misconduct towards his employer.

Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, *Held*, that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khazanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, appointed as his agent. The latter became a party to frauds by putting off upon the public forged stamps, in addition to the genuine once issued from the Treasury, into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued, made the proceeds appear to correspond in his accounts with the value of the stamps issued to him; but, under cover of the above payment, he misappropriated certain genuine stamps.

Held, that although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps, and the false accounts rendered; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting.

Appeal from a decree (2nd May 1883) of the Judicial Commissioner of *Oudh*,

* 12 Cowell's Ind. Ap. 142; I. L. R. 12 Cal. 143.

modifying a decree (29th May 1882) of the District Judge of *Lucknow*.

Mr. *J. G. W. Sykes* for the Appellant *Mohun Lal*.

Mr. *J. D. Mayne* and Mr. *C. C. Macrae* for the Respondent, *the Secretary of State for India in Council*.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ARTHUR HOBHOUSE:—

The basis of this suit is an agreement which was entered into on the 11th June, 1869, between *Mohan Lal* and the Government of India—the Secretary of State in Council represents the Government—on the occasion of *Mohan Lal* being appointed Sudder Treasurer in the District of *Lucknow*. The material words on which the claim is founded are these:—"Should any loss or deficiency arise from non-production of accounts, or by misconduct, or negligence of myself, of my temporary substitute, or of agents appointed by me, or on my nomination." Then:—"I hold myself responsible to make good such loss." What has happened is this. There have been extensive forgeries of stamps by subordinate officers of the Treasury of *Lucknow*. Against *Mohan Lal* himself there is no charge; he is perfectly innocent. But it is sought to make him liable by reason of the misconduct of his subordinates, and particularly of *Hinga Lal*, who was first the accountant, and then the darogah of stamps in the Treasury of *Lucknow*. The course of proceeding by those who committed the forgeries seems to have been as follows: *Hinga Lal* received out of the Treasury stamps for sale, according as he indented upon the Treasury for them. He did not sell them himself, or ought not to have sold them himself, direct to the purchasers, but distributed them to certain persons who were licensed vendors of stamps, who dealt directly with the public, received the money from the public, and whose duty it was to pay that money over to the Treasury. In some cases it appears that the purchasers paid direct to the Treasury, but either from the purchasers or from the vendors the Treasury ought to get the whole value of the stamps issued by it to *Hinga Lal*. It seems that there were daily accounts stated between the Treasury and the vendors, but between the Treasury and *Hinga Lal* the accounts were stated monthly, and, of course, at the end of every month it was necessary to shew that the money received by the Treasury was the exact value of the stamps which had been issued, excepting such as were not then sold and were accounted for as not sold. *Hinga Lal* colluded with the licensed vendors. They caused stamps to be forged either by making entirely new ones, or by altering some genuine stamps to larger amounts. The vendors sold those forged stamps, and they paid the whole of the proceeds into the Treasury. Then *Hinga Lal*, having got real stamps from the Treasury, took for himself and his accomplices so many as were exactly equivalent to the payments made into the Treasury. He accounted every month, so adjusting his accounts as to make the proceeds paid into the Treasury for the forged stamps by the licensed vendors exactly square with the value of the stamps issued by the Treasury to him, excepting so far as the same remained unsold. This seems a very curious and circuitous method of committing a crime, and it is not clear to their Lordships why it was followed—probably because they are not familiar with the working of the Treasury; but the Courts below, who are familiar with these local matters, are of opinion that, without that circuitous process, it was impossible that the fraud could have remained for any length of time undetected. In point of fact it went on for several years, certainly for five years, but the exact period of time is not material. Then it was discovered, and the forgers were convicted and punished.

Now a claim is brought against *Mohan Lal* which is stated in the sixth paragraph of the plaint, on the two grounds of the misappropriation of the stamps by *Hinga Lal*, and of the misconduct of *Hinga Lal* by falsifying his accounts

and so causing loss to the Government. The plaint states that the stamps misappropriated by *Hinga Lal* amounted in value to Rs.18,000, or more.

In order to recover upon that agreement the Plaintiff must shew that there is a loss or deficiency arising by the misconduct of an agent appointed by *Mohan Lal*, or on his nomination.

Upon that issue several defences are offered. First it is said that *Hinga Lal* was not the agent of *Mohan Lal*. *Hinga Lal* was employed in the Treasury from the year 1859 onwards, and it is admitted on the part of the Appellant that up to the year 1873 *Hinga Lal* was the agent of *Mohan Lal*: he was appointed by him, was paid by him, and, it may be assumed, was dismissible by him. But in the year 1873 the Government appointed *Hinga Lal* to a definite office, that of accountant in the Treasury, and instead of *Mohan Lal* paying him, thenceforward the Government paid him. It is contended that the change so altered *Hinga Lal's* position, that it made him the agent of the Government instead of the agent of *Mohan Lal*. The question is not of agency generally, but whether *Hinga Lal* was an agent within the purview of this agreement? Both Courts below have found that he was, and as far as regards the issue whether *Mohan Lal* nominated *Hinga Lal*, their finding ought to be taken as conclusive under the usual rule, that being a pure matter of fact. Whether *Hinga Lal* was agent within the purview of this agreement is a matter of law. Their Lordships are of opinion that the Courts below have come to a right conclusion upon the evidence, and that, although it is not proved beyond possibility of doubt, it is sufficiently proved, in the first place, that *Mohan Lal* nominated him, and, in the second place, that the change which took place was not such as practically to alter the relations between *Mohan Lal* and *Hinga Lal*, considering them as principal and subordinate. In point of fact there is reason to believe from *Mohan Lal's* own letter which he wrote on the occasion, that no such alteration could have been in his contemplation. It was he who applied for the change, and he applied for it on the ground that his work had increased, and his security was onerous to him, and he begged that he might be relieved from the payment of the staff, including *Hinga Lal*, and also that his salary might be increased so as, he says, to be up to the standard of the security filed by him. The salary was increased, and, as he made no further application, we may fairly assume that he considered it adequate to the security that he gave.

Taking *Hinga Lal* to be the agent of *Mohan Lal* within this agreement, has there been misconduct on his part within the agreement? Of course there has been the very grossest and most glaring misconduct, because he has committed forgery, but the suit is not founded on the forgery, and probably no suit could be founded on the forgery, because the misconduct contemplated by this agreement must be some misconduct connected with the business of the agency, and forgery is in no way connected with the business of the agency. For instance, if *Hinga Lal*, after receiving the stamps issued out of the Treasury to him, had absconded with them that afternoon, that would have been misconduct chiefly connected with his business as agent of *Mohan Lal*, and such a case would have fallen within the agreement.

There is no doubt that on this part of the case a good deal of difficulty has been introduced from the circumstance that what may be called the root of the misconduct was the forgery, which would not directly afford ground for suit. But in two respects there is misconduct which is directly connected with the agency of *Hinga Lal*, that is to say, the misappropriation of the stamps which he represented to have been sold, and the false accounts which he rendered month by month, and in which he represented those stamps to have been sold by the vendors.

Then comes the question whether, there being misconduct within the meaning of the agreement, the loss or deficiency has arisen in consequence of that mis-

conduct? As respects the misappropriation there is, no doubt, the difficulty that has just been mentioned of the forgery being calculated to cause loss in the first instance, and of its being necessary to disentangle the two things. It seems to have been very much argued in the Court below, and the point has been mooted here, not by the Appellant's counsel, but by this Board, and very carefully and ably argued at the bar by the Respondent's counsel, whether it was possible to attribute the loss to misappropriation of the stamps, and after much doubt their Lordships are of opinion that the Court below have rightly connected the loss with the misappropriation; that, supposing the accounts to be now taken between the Government on the one side, and the Treasurer of *Lucknow* on the other side, the Treasurer cannot claim to be allowed in account those moneys which were produced by the forged stamps, and which were used by *Hinga Lal* to cover his conversion to his own use of the genuine stamps that were issued to him.

The case on that point is strengthened very much by the false accounts. *Hinga Lal* represented in his monthly accounts that the whole of the genuine stamps which he represented as sold had been sold by the licensed vendors. In point of fact either they never were sold by the licensed vendors, or they had not at that time been sold, and, if his accounts had told the truth upon those points, then the forgery must have been discovered at once, and it is impossible that during a series of years the Government could have lost the money that it did lose by the forgeries.

That being so, the only other question is as to the amount to be recovered, and on that point there is a difference between the two Courts. With respect to the sum of Rs.11,700 the two Courts agree. But there is a further sum, making in the whole Rs.18,100, the amount claimed, which the Judicial Commissioner has allowed, so far varying the decree of the Court below.

It is not necessary now to go into the evidence upon that point, because it is clearly shewn in the judgment of the Judicial Commissioner that the reason for the District Judge giving judgment only for the lesser amount was that he made a slip in construing the evidence. He had thought that there was a contradiction in the evidence, because one passage of it shews the larger amount of stamps allowed by the Judicial Commissioner to have been sold, while in another a lesser amount is stated. There is, however, no contradiction, because the two statements refer to two different periods of time, and the claim made in this suit embraces the longer period. Therefore the Judicial Commissioner was perfectly right in allowing the larger amount.

That being so, their Lordships are of opinion that the appeal of *Mohan Lal* should be dismissed with costs.

With respect to the cross appeal their Lordships think that the decree ought not to be varied in respect of the costs before the Judicial Commissioner, and that the cross appeal should be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.

Solicitor for the Appellants: *W. Buttle.*

Solicitor for the Secretary of State: *H. Treasure.*

19th June, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North-Western Provinces.

ALEXANDER MITCHELL (Defendant) ... } *Appellant,*

and

MATHURA DAS and others (Plaintiffs).. } *Respondents.**

Act III of 1877, (Registration Act), ss. 17, 49.—Effect of a registered instrument confirming a prior one of the same purport not registered.

An instrument purporting to assign a right in immoveables of more than the value of Rs 100 (s. 17, sub-section *b* of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act.

Appeal from a decree (16th January, 1882) of the High Court (1), reversing a decree (9th September, 1880) of the District Judge of *Cawnpore*.

Mr. *R. V. Doyne* and Mr. *Woodroffe*, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decision of the High Court in this case was erroneous, and that it ought to be reversed.

It appears that an action was brought on the 14th of June, 1880, praying:—"That a decree for establishment of right, as provided by sect. 283 of Act X of 1877, be passed, with the order that the disputed property is the property of *W. Mitchell*, judgment debtor, and is liable to be sold by auction in execution of the Plaintiff's decree." On the 11th of June, 1879, the Plaintiffs obtained a decree under an arbitration award against *William Mitchell*. In the execution of that decree a screw-house, which was in the possession of *William Mitchell*, was attached. Upon that attachment being made *Alexander Mitchell*, the father of the Defendant *William*, objected, and claimed that the property was not the property of *William*, but was the property of him, *Alexander*. The matter was investigated by the Court out of which the execution issued, in accordance with the provisions of the Code of Civil Procedure; and having received evidence in the case, the Court decided that the property belonged to *Alexander* and not to *William*, and released it from execution. That order was not appealable; but the Plaintiff, the then execution creditor, being dissatisfied with the order, the present suit was commenced, in accordance with the provisions of the Code of Civil Procedure, to have it declared that the property was the property of the son, and liable to be seized in execution; it was in substance to reverse the order of the Court out of which the execution issued.

The way in which the father endeavoured to make out his title was this. He said that on the 25th of September, 1873, he purchased the property from Messrs *Nicol Fleming & Co.* It appears that the deed of conveyance which he attempted to put in evidence to prove that Messrs. *Nicol Fleming & Co.* conveyed the property to him had not been registered. By the *Registration Act*—Act III. of 1877, sect. 49—it is enacted that "No document required by sect. 17 to be registered,"—and the document of 1873 was a document of that nature—

* 12 Cowell's Ind. Ap. 150; I. L. R. 8 Alla. 6.

(1) I. L. R., 4 Alla. 206.

"shall, unless it be registered, be received as evidence of any transaction affecting such property, or conferring such power." The deed, therefore, not having been duly registered, was not admissible in evidence. But *Alexander Mitchell* produced a subsequent deed, namely, a deed which was executed on the 31st of December, 1878. It refers to the deed of 1873, which is set out in a schedule as part of the deed of 1878. The memorandum of registration was written, not on the first sheet of the deed of 1878, but at the end of the deed which was annexed as a schedule to, and was consequently part of the deed of 1878. The deed of 1878 not only confirmed the deed of 1873, but it went on to state that the parties to the deed did, and each of them did, "according to their and his respective estates and interests, grant, convey, assign, and confirm unto the said *Alexander Mitchell* his heirs, executors, administrators, and assigns, the piece or parcel of land"—which is the subject-matter of the dispute in this case. So that the deed of 1878 was an actual conveyance from Messrs. *Nicol Fleming & Co.* to *Alexander Mitchell*. *Nicol Fleming & Co.* were proved to have purchased it from *Gavin Sibbald Jones*, who had mortgaged it to a person of the name of *Churcher*. There is no doubt that the property having been the property of *Nicol Fleming & Co.*, passed by that deed from *Nicol Fleming & Co.* to *Alexander Mitchell*, but it was alleged in the plaint that that deed was fraudulent and void. The fourth paragraph of the plaint says:—"The said property belongs exclusively to *W. Mitchell*, and he is in proprietary possession thereof: the sale deed is quite fictitious, collusive, and invalid, and executed without receipt of consideration money." It is not attempted to impute any fraud to *Nicol Fleming & Co.* They received the consideration money of Rs.12,406, and conveyed the estate. The fraud attempted to be made out is that the conveyance was to *Alexander Mitchell*, instead of the son, *William Mitchell*. The question is, who paid the consideration money for the conveyance? Was it *William Mitchell*, or *Alexander Mitchell?* There is no evidence to shew that *William Mitchell* had the means of purchasing the property. He had been acting merely as assistant of *Nicol Fleming & Co.* in conducting the mill for them before the sale, and he continued to occupy the premises afterwards.

It was proved that the consideration money for the conveyance was paid by *Alexander Mitchell*. It was not paid by *William Mitchell* in *Cawnpore*, but to *Nicol Fleming & Co.* in *England* by *Alexander Mitchell*, who lived in *Scotland*.

There was no evidence whatever to shew that *William Mitchell* was the real purchaser, or that *Alexander* was merely benami for him, and their Lordships think that the decision of the first Judge, that the property was *Alexander Mitchell's* and not *William Mitchell's*, was correct.

It has been urged by Mr. *Woodroffe*, and very properly urged, that it required some strong evidence to overturn the decision of the Judge of the execution Court, who, upon hearing the evidence, came to the conclusion that the property was *Alexander Mitchell's*, and he asked, Was there any sufficient evidence that it was the property of *William* given before the Judge of the first Court, who decided in accordance with the view of the Court of execution? There appears to be no evidence. The evidence, on the contrary, shews that the money was paid by *Alexander*.

The Judges of the High Court place some reliance upon the fact that the first deed was not registered in 1873. They say:—"Having established this lengthened possession on the part of their judgment-debtor, the Plaintiffs reasonably enough contend that they have made out a *primâ facie* case, which it lies upon the Defendants to rebut. We think that this is the correct view of the position, and that it rests with *Alexander Mitchell* to prove his title. This he seeks to do in a fashion which is, to say the least of

it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th September, 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st of December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence." That document was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence, and that deed, referring to the deed of 1873, was proved to have been executed, and their Lordships consider that it was duly registered. "Now it is obvious"—the Judges say—"that the true document of his title is the conveyance of 1873; but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March, 1879, it was presented to the Collector for registration. Now even supposing registration had been formally and properly completed, we should have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed." Their Lordships do not understand what is the mischief to which the Judges allude. The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances unless those previous conveyances were registered. The Registration Act, as regards real property, was not intended to be a clause similar to that which is in the Bankrupt and Insolvent Acts, by which persons who are allowed to be in the order and disposition of goods, with the consent of the real owners, are, as against creditors, to be considered the real owners.

Their Lordships therefore think that the second deed of conveyance, being registered, was a valid conveyance of the property from Messrs. *Nicol Fleming & Co.* to *Alexander Mitchell*, and that it passed that property to *Alexander*, unless there was fraud either between those who conveyed the property to *Alexander*, or between *Alexander* and his son, in taking the conveyance to *Alexander* as the person who had really purchased the property, instead of to the son, who was in possession of the property, and who it is said paid the purchase-money. Their Lordships see no evidence at all to shew that there was any fraud of that kind, or between *Alexander* and his son, in having the confirmation deed of 1878 executed to the father.

With reference to the persons who paid the money, it was stated by the brother of *William* that the father had advanced the money for the purpose of promoting the interests of his son. There was some evidence given of rent having been paid by *William Mitchell* to his father for this property. It certainly was not very clearly proved that the rent was regularly paid. It was said there were letters shewing that the different payments had been made, but those letters were not produced. There certainly was one letter produced in which Messrs. *Nicol Fleming & Co.* admitted to have received a sum of Rs.2,000 from *William*, in order to make a remittance to the father of £150. But the Judges put it in this way:—"Not a single entry under the head of 'rent' in the account books of the firm of *Mitchell & Co.* is forthcoming, nor is a letter or receipt produced from *Alexander Mitchell* acknowledging any one of the payments which are alleged

to have been made on account of rent. That moneys may have from time to time been remitted from *Mitchell* to his father, by way of interest on the advances made to start him in business, is likely enough; but be this as it may, there is not a particle of satisfactory proof to shew that rent was ever paid by *William Mitchell* to his father in respect to the screw-house." Whether the rent was ever paid by *William Mitchell* to his father is not the question. The question is, who paid the consideration money for the conveyance from Messrs. *Nicol Fleming & Co.* to *Alexander?* Their Lordships think that the evidence clearly shews that the consideration was paid by the father, and that he took the conveyance to himself. There was no evidence to shew that the father lent the money to his son, and that the son was the real purchaser. Even if the father lent the money to the son it is natural that he should take the conveyance to himself as a security for the repayment of the loan.

Under these circumstances their Lordships are of opinion that the *primâ facie* case which was made out by shewing that *William Mitchell* was in possession, has been rebutted by the evidence shewing that the father paid the consideration money for the conveyance to himself, and that the property was conveyed to him. Their Lordships therefore think that the decision of the Judge of the execution Court, that the property was the property of *Alexander*, and not the property of *William*, was correct, and that this suit must fail in asking to have that judgment reversed. The Court of first instance, in the suit which is now under consideration, concurred with the decision of the Judge of execution.

Their Lordships think the decision of the first Judge was correct, and that the High Court were in error in reversing that decision.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to order that the suit be dismissed with the costs in the High Court. The costs of this appeal must be paid by the Respondents.

Solicitors for the Appellant: *Sanderson & Holland.*

19th, 20th June, and 11th July, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

TEKAIT RAM CHUNDER SINGH (Plaintiff) ... } *Appellant,*

and

SRIMATI MADHO KUMARI and others (Defendants) ... ... } *Respondents.**

Res-judicata—Civil Procedure Code Act X of 1877, s. 13—Matters directly and substantially in issue in a suit—Limitation—Adverse possession.

Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties: *Held*, that the contest of title was conclusive between them under s. 13 of Act X of 1877.

In a suit brought by a ghatwal to resume, as determinable at will, an under-tenure granted by one of his ancestors of land, part of the ghatwali mehal, it was alleged for the defence that the under-tenure was permanent.

A prior judgment upon conflicting claims made by the ghatwal and the under-tenure holders to receive the abovementioned compensation money, which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, being founded on the under-tenure-holders having been in possession of it by the mere sufferance of the ghatwal, who could put an end to it at any time: *Held*, that the question whether the latter had a permanent tenure, having been directly and substantially in issue in the former suit, could not be contested in another.

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*12 Cowell's Ind Ap., 188; 1 L. R. 12 Cal., 484.

Limitation having been set up in bar of the suit, *Held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the ghatwal; and proceedings, either between the ghatwal or between under tenure holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another.

There being nothing else to render the possession adverse, limitation only commenced at the date of the abovementioned claim to the compensation money which was made less than twelve years before the present suit was brought; and accordingly the suit was not barred.

Appeal from a decree (27th July 1882) of the High Court (1), reversing a decree (26th November 1880) of the Subordinate Judge of *Deogurh*.

Mr. *C. W. Arathoon*, for the Appellant.

Mr. *J Graham*, Q C, and Mr. *J. T. Woodroffe*, for the Respondents.

11th July, 1885.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD MONKSWELL:—

Tekait Ram Chunder Singh, ghatwal of a large estate named *Pathrole*, brings the action to eject from *Lalgurh*, a subordinate tenure within its ambit the Defendants, who are widows of the last holder of it, *Bunwari Singh*, and are under the protection of the Court of Wards. He claims the right to resume that tenure at will, and further asserts that his right to this resumption has been conclusively decided in a previous suit between the same parties. The Defendants claim to hold a ghatwali tenure, from which they could not be dispossessed, on the payment of a fixed rent; they deny that the question had been decided as alleged, and set up the plea of limitation. The Subordinate Judge found for the Defendants on the plea of *res judicata* and for the Plaintiff on the plea of limitation, and gave the Plaintiff a decree on the ground that the tenure was resumable at will.

(1) *Madho Koeri* v *Thekait Ram Chunder Singh*, I. L. R, 9 Cal, 411.

The High Court reversed this judgment, finding for the Defendants on the plea of limitation only. From that judgment the present appeal is preferred.

The following facts appertain to the history of the tenure.

One *Digbijoy Singh* was the ghatwal of *Pathrole* about the beginning of this century.

The property held by the Defendants called *Turuf Lalgurh* was granted by him to one of his younger sons, *Kanhia Singh*, for maintenance in or before 1804: for receipts of rent are put in, one in 1805 for rent due in 1804.

In 1800 or 1801 a settlement for ten years seems to have been made with *Digbijoy*, another settlement at the expiration of that for three years, and another in 1813-14 for ten years, which became permanent by the operation of Regulation 29 of 1814. We hear little or nothing more about it till 1853, when a proceeding took place before the Judge of *Birbhoom*, which arose in this way. Some creditors who had obtained decrees sought to execute them against the owners of ghatwalis, among them *Bharat Chunder Sing*, grandfather of the Plaintiff, ghatwal of *Pathrole*, and *Kanhia Singh*, ghatwal (as he described himself) of talook *Lalgurh*. The ghatwals contested the right of judgment creditors to seize their estates in execution, whereupon an order was made for the release of the estates from attachment, which was confirmed on appeal to the Sudder Dewani Adawlut in May, 1853 The Court gave judgment in these terms:—

"The Court are of opinion that, under the law, the ghatwali tenures of *Birbhoom* being not the private property of the ghatwals, but lands assigned by the State in remuneration for specific police services, are not alienable, nor attachable for personal debts."

In a similar proceeding in 1857 a decision to the same effect was arrived at, and a notice was sent to *Bharat Singh* that the grant to *Kanhia* had not given *Kanhia* any right in mouzah *Lalgurh*, but as far as we know *Bharat* took no action on this, nor does any assertion or

counter-assertion of rights appear to have taken place between the holders of *Pathrole* and the owners *Lalgurh*, till the time which will be hereafter referred to. It further appears that the owners of *Lalgurh* have been treated as bound to perform, and, indeed, have performed the police duties incident to their tenure; this is recognised by a perwana from *Barat* to *Bunwari* in 1855, and by a further perwana from the Assistant Commissioner of the *Sonthal* pergunnahs in 1873.

The first question in the case to be determined is, whether the contest of title between the parties is *res judicata* under Act X. of 1877, sect. 13, which is in these terms:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they or any of them claim, litigating in the same title."

The Plaintiff's father died in 1865, leaving him a minor. During his minority, which ended in 1873, the rent of *Lalgurh* was paid by *Bunwari* to the Court of Wards on his behalf, and no question of title or conflicting right arose. On his attaining majority some time in 1873 he brought a suit against *Bunwari*, claiming against him the whole of the compensation money which had been paid into Court by the *East India Railway Company* in respect of land in *Lalgurh*, which had been taken by the company, *Bunwari* claiming a share in that money.

Pending the suit *Bunwari* died, his widows were substituted for him, and the Subordinate Judge decided in their favour, giving them a considerable part of the compensation money.

On appeal to the High Court this judgment was reversed.

The contention of the respective parties, and the ground of the judgment, are so clearly stated by Mr. Justice *Romesh Chunder Mitter*, that their Lordships think it well to give the following extracts from his judgment:—

"This suit was instituted on behalf of *Ram Chunder Singh*, minor, who has now attained his majority, for obtaining Rs. 15,125. 11*a*. 6*p*., deposited in the Government Treasury of *Deoghur*, being the compensation money for 17656. 9*c*. 14*ch*. of land appertaining to the ghatwali talook *Pathrole*, taken for the construction of a railway. The allegation of the Plaintiff is that he is entitled to the whole of this compensation money, and, the Defendants having unjustly claimed the same, it has been detained in the Treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court. . . . .

"The Defendant *Bunwari Lal* alleged in his written statement that he holds sub-tenure in the Plaintiff's ghatwali mehal, charged with a fixed annual rent of Rs. 104; that a portion of the lands taken falls within his sub-tenures, the compensation money in respect of which was therefore due exclusively to him." . .

Then after disposing of certain claims by other parties, the learned Judge continued:—

"Then we come to the claim put forward by *Bunwari Lal*. It is evident that he held a subordinate tenure within the Plaintiff's ghatwali mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that this tenure was created by an ancestor of the Plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the Plaintiff that it is not sufficient to shew that *Bunwari Lal* during his lifetime was in possession, and his legal representatives are still in possession of this subordinate tenure, but that it must be established that *Bunwari Lal* was, and the widows are still, in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These Defendants, it appears to me, are not entitled to any share in the compensation money, if it can be shewn that they are allowed to remain in possession of the

subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the Plaintiff, it follows that the arrangement made by his ancestor to provide for the maintenance of a junior branch of the family is not binding upon him. He is fully competent to resume possession of these lands (*vide* 6 Beng L. R. 652).

"*Bunwari Lal*, therefore, not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation money, the whole of which, therefore, should be paid to the Plaintiff.

"But the Plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwali mehal during his life, without power of alienation. The compensation money in deposit is only a money equivalent to a portion of that mehal."

From this judgment there was no appeal. Their Lordships are of opinion that the very question in this cause, viz., whether the Defendants held a permanent tenure, or whether the Plaintiff was entitled to resume it at pleasure, was directly and substantially in issue between the parties, and has been finally decided between them.

Their Lordships are relieved, therefore, from deciding what the rights of the respective parties realy were, a question which, if it had been open, might have been attended with difficulty.

The question of limitation remains. The provison in art. 144 of the second schedule of Act XV. of 1877, which gives twelve years as the period of limitation from the time "when the possession of the Defendant becomes adverse to the Plaintiff," appears the only provision applicable to the case.

Their Lordships understand the judgment of the High Court to be, in effect, based on these considerations.

The tenure set up by the Defendants, being of a permanent character, was adverse for a long period of time to the claim of the Plaintiff and his ancestors, which was to resume the tenure at will; that it was not the less adverse on account of the payment of rent, which was an incident of the tenure; that the statute began to run against the Plaintiff on the death of his father in 1865, when his title accrued, although he was not recognised by the Government as ghatwal till his majority; that as he did not bring this suit till five or six years after he became of age, he was barred by the statute. Their Lordships are unable to assent to this view.

It can scarcely be contended that immediately on the creation of the sub-tenure the possession of it became adverse when there was no dispute or conflicting claim. If not so, when did the possession become adverse? It has been contended that it became adverse in 1853, when notice was given by the Court to *Bharat Chunder* that the grant to *Bunwari* conferred no title against him, and that he could eject *Bunwari* at pleasure. But the proceeding was wholly between creditors and ghatwals holding tenures, or under tenures. There were no proceedings hostile or otherwise between the ghatwals and the sub-tenure holders, each of whom was content to go on as before without any definition or assertion of right by either party. The same state of things continued after the death of *Khargdhari Singh*, the Plaintiff's father, when the rent was paid to the Court of Wards on behalf of the Plaintiff during his minority.

In their Lordships' opinion no adverse possession, within the meaning of the statute, is proved to have existed until the institution of the suit in 1873, when the claims of both parties were undoubtedly adverse, and the statute began to run only from that time. If so, the Plaintiff is not barred by limitation.

On these grounds their Lordships are of opinion that the judgment of the High Court must be reversed, and judgment given for the Plaintiff, and they will humbly advise her Majesty to this effect.

The Respondent must pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitor for Respondents: *H. Treasure.*

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23 and 24 June 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court for the North—Western Provinces.

MOULVI MUHAMMAD ABDUL MAJID (Defendant) ... } *Appellant,*

and

MUSSUMAT FATIMA BIBI (Plaintiff) ... } *Respondent.**

Muhommadan law—Will—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation.

Words such as "always" and "for ever," used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will, made by a Muhammadan, gave shares in his property to his surviving widow, son, and grand-children, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates .... All the matters of management in connection with this estate should necessarilly and obligatorily rest 'always' and 'for ever' in his hands" It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers There were other provisions to the same effect, in regard to the management by his son, who retained it till his death The Defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will: *held* that, on its true construction, the Plaintiff, a sharer under it, was entitled to the full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.

Appeal from a decree (6th January, 1882) of the High Court affirming a decree (18th June, 1880) of the Subordinate Judge of *Jaunpur.* The question now arising was as to the right construction of the words in an instrument which, although all its dispositions were not altogether testamentary, was termed a will throughout the case.

Mr. *T. H. Cowie*, Q C, and Mr. *R. V. Doyne*, for the Appellant.

Mr. *Graham*, Q. C., and Mr. *J. D. Mayne*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in this appeal arises out of a disposition of his property made by one *Imam Baksh.* The disposition, which was not strictly a will, because it was made in his lifetime and he reserved to himself some benefit under it, was made on the 19th of August, 1860, and he died about a year afterwards. At the time he made it the state of the family was this. He had two wives. By the first he had a daughter, *Mussumat Fatima Bibi*, who had had a son, *Hafiz Syud-ud-din*, then dead. He had had another daughter, *Mussumat Makki Bibi*, who had died, leaving two children, *Muhammad Ibrahim* and *Mariam Bibi.* By the second wife he had a son, *Moulvi Muhammad Haidar Hussain*, who died in July, 1875, leaving his eldest son, the present Appellant and the Defendant in the suit, and other children. The contention between the Appellant and the Respondent arose after his death. It was this, as stated in the plaint of the Respondent which was filed on the 5th of May, 1879. In that, she states the disposition of the property by her father, *Imam Baksh*, and that the management of the whole property was entrusted to *Haidar Hussain*,

* 12 Cowell's Ind. Ap, 159; I. L R 8 Alla 39.

and after the death of *Imam Baksh*, she, the Plaintiff, confirmed him as manager, and that she had not disputed any of the rights of *Haidar Hussain*. Then, after stating that he was in possession of the property and acted as manager, and stating his death, she says that, after his death, the Defendant, without the consent and permission of the Plaintiff, improperly took possession of the property constituting her share, and asked the Revenue Court to enter his name in the place of that of *Haidar Hussain*, and that she gave notice to the Revenue Court of her dissent from that. She then goes on to say, "That the Defendant, notwithstanding his want of right, not only arbitrarily declares himself to be the manager of the whole property, but considers and represents himself to be the permanent owner of the whole property, and by his own authority, and with the view of injuring the Plaintiff, has committed and omitted to do acts calculated to cause great loss to her; and she prays that a decree may be passed in her favour, declaring her right, permanent proprietary title and possession to her share in the property detailed below," and "that complete possession of her share may be awarded to her: that the Defendant's possession and management may be removed."

The Defendant, in his written statement, sets up this claim: "From the death of *Moulvi Muhammad Haidar Hussain* the whole property mentioned in the will and the agreement legally devolved upon and came into the possession of the Defendant under the express conditions and directions of the said documents, and with reference to inferences drawn from them. According to the terms of the will, the rules of Mahomedan law, and the principles of justice, the Defendant alone is entitled and competent to retain possession (subject to the conditions of the will) in order to carry out its provisions, which are to be carried out in perpetuity and for ever, and not for a limited period." It may here be noticed that the Defendant is not the only heir of *Muhammad Haidar Hussain*, there are other persons who are also his heirs. The contention is that although the Defendant is only one of the heirs he alone is entitled and competent to retain possession.

This being the contention of the parties, the provisions in the document may now be looked at, to see how far the Defendant's contention is supported by its provisions, and how far the right of the Plaintiff to recover in this suit is established. *Imam Baksh* begins by saying, "I had two wives married according to the Mahomedan law, one, *Mussammat Hingan Bibi*, who is at present alive, and by whom I had two daughters, one, *Mussammat Fatima Bibi*, who is alive, and her son, *Hafiz Syud-ud-din Muhammad Syud Bukht*, now deceased, was adopted by me as my son, and the other, *Mussammat Makki Bibi*, who died, leaving one son, *Muhammad Ibrahim*, and a daughter, *Mariam Bibi*, minors. My second married wife died, and *Moulvi Muhammad Haidar Hussain*, a son by her, is alive. Therefore, according to the Mahomedan law, *Mussammat Fatima Bibi*, my daughter, and *Moulvi Muhammad Haidar Hussain*, the children of my loins, are my legal heirs" He then goes on to provide that the whole income of four annas share of his villages and estates shall be devoted to charity and works of beneficence, and the remaining 12 annas of the villages and estates and the whole of his other property shall be divided into four "sehams" (shares), and gives one share to *Hafiz Syud-ud-din Muhammad Syud Bukht*, one to *Fatima Bibi*, one to *Moulvi Muhammad Haidar Hussain*, and one to *Muhammad Ibrahim* and *Mariam Bibi*, and says:—"During my, the declarant's lifetime, they shall continue to receive the profits of those 'sehams' (shares); the one 'seham' of *Hafiz Syud-ud-din Muhammad Syud Bukht* will be received by his mother, *Fatima Bibi*. She will be the owner of her own one 'seham' and of one 'seham' of *Hafiz Syud-ud-din Muhammad Syud Bukht*, in all of two 'sehams.' She is at liberty to give them to anyone she may like among her own children. It will be necessary

and incumbent on all the said heirs to perform all the necessary and obligatory terms of this document, which they have of their own will consented to observe, and they will not have the power to dissent from it on any plea of law or Mahomedan law." The assent which is here stated is shewn by their putting their names to the document after the signature of *Imam Baksh*. Then in the third clause he provides for what is to be done with the four annas share which was devoted to charity. He says:—"He, *Moulvi Muhammad Haidar Hussain*, shall always be the manager of this four anna share; none of the heirs shall have the right to interfere in any way in the aforesaid four anna share. It shall be incumbent on *Moulvi Muhammad Haidar Hussain* to keep the entire management in his own hands." A little lower down he says, "After *Moulvi Muhammad Haidar Hussain*, whoever from the descendants is just, virtuous, and capable of performing this duty, shall be the superintendent and manager of that four anna share. In short my, the declarant's, object is this—that the managership and superintendentship should always continue with *Moulvi Muhammad Haidar Hussain*, and after him, as specified above, whoever among the descendants is capable of performing this work." The word "descendants" there means among his own descendants—not limited to the descendants of *Muhammad Haidar Hussain*; and as far as this provision goes it would seem to point to some selection being made from amongst his descendants in order to have a person who should have the management of the charity property. Then we come, under the fifth clause, to the provision which he makes with regard to the remainder of his property. In the fourth clause he had said what there seems to be no doubt was his wish:—"The aforesaid heirs should continue in harmony, and eat and reside together, so that being united the estate may continue to improve and the name always be preserved." In the fifth he says, "*Moulvi Muhammad Haidar Hussain* shall continue in possession and occupancy of the full sixteen annas of all the estates, villages, lands lying at different places, and moveable and immoveable property (collections from the villages). All the matters of management in connection with this estate should necessarily and obligatorily rest always and for ever in the hands of *Moulvi Muhammad Haidar Hussain*." Here we have the words, "always and for ever." But these words, according to several decisions of this Board do not *per see* extend the interest beyond the life of the person who is named. *Per see* they are satisfied by limiting the interest which is there given to the life of *Muhammad Haidar Hussain*. The Subordinate Judge has made observations upon the meaning of these words which are quite supported by the authorities. So far, then, there is nothing in the words used by the testator to indicate an intention that the possession and management were to go to any one of his descendants after the death of *Muhammad Haidar Hussain*. He then gives directions as to the recording of the name, and goes on to say:—"No heir and no stranger shall at my time or period have, on any ground, or in any way, power to object to or oppose any of the matters above mentioned, or to take possession or to make any arrangements of his own regarding the estates. In all these matters all persons shall be entirely powerless;" shewing there an intention to keep the property in the hands of his family if possible, and that no strangers should at any time come in and have any part of it. This is still further shewn by the sixth paragraph. But before that he directs that *Haidar Hussain* is to make collections of the profits, and says that he is to pay the profits of two out of the four shares to *Fatima Bibi*, "and the profits of one seham he may take himself, and the profits of one share, that of *Muhammad Ibrahim* and *Mariam Bibi* after deducting the expenses, he is to keep in deposit with himself," according to the provisions of a subsequent clause. This part clearly shews that what he intended was that during the life of *Haidar Hussain* he was to give

to the parties their shares of the profits. But there is no direction that this should be done by any other person after the death of *Haidar Hussain*. The direction is applicable to *Haidar Hussain* only, who is directed himself to pay the profits. Then he says:—"My, the declarant's, real object is that all my estates may always remain in possession of my descendants as specified above"—repeating the intention previously shewn—"and no interference of any stranger on any account may be permitted therein, and my property should not be allowed to pass into the hands of any stranger. Hence I enjoin on *Musammat Fatima Bibi, Maulvi Muhammad Haidar Hussain, Muhammad Ibrahim, Mariam Bibi*, and also their descendants, generation after generation in perpetuity, that when any of them is disposed to transfer his share by sale, mortgage, or lease, &c., then he must first offer to transfer to all of his sharers in property; and so long as the sharers are willing to take it he must by no means transfer to others." There, it may be observed, he does not speak of profits. He had spoken previously of the shares and profits; but here he seems to be speaking of shares in the property, and the shares of the different persons, amongst others of *Fatima Bibi*, and he directs that they shall not transfer their shares of the property to strangers. Certainly that does not indicate an intention that the property should not be vested after the death of *Haidar Hussain* in the persons to whom he had given the shares. Then he says:—"The stranger will not have any power to take any possession or occupancy of the transferred property beyond receiving the profits which will be handed to him;" and "The purchaser also, beyond receiving the profits, shall have no power or right of possession or occupancy over the property sold; nor by the auction shall the right of possession and management be disturbed of *Maulvi Muhammad Haidar Hussain*, or whoever may be his representative." Mr. *Cowie* rightly admitted that by "representative" here is meant, not a successor of *Haidar Hussain* in the right of *Haidar Hussain* in any way, but a person who might, during *Haidar Hussain's* life, be his agent; thus again indicating that he was making a provision rather for what was to be done during the life of *Haidar Hussain* than for what was to be done afterwards.

These are the provisions of the will, and it is difficult to see in them any provision by the settlor which would confer upon the present Defendant the right which he now claims to have. There is nothing to shew that the heirs of *Haidar Hussain* were to take his place in the succession and management, and, even if there were, there would be this difficulty, that, if it went by right of succession to the heirs of *Haidar Hussain*, they would all, and not the present Defendant alone, come in. Thus expressions clearly denoting that the management is to be in a single hand would, by a strained application of them to a period beyond the life of *Haidar Hussain*, be used to vest the management in a number of hands.

It has been contended by Mr. *Doyne* that there ought to be, and that there might be, a selection, by some sort of family council, of one of the heirs of *Haidar Hussain*, who should succeed him in the management, and, in default of any appointment by a kind of family council, that it might be made by the Court. We find in this document no provision of the kind, nothing to indicate that it was the intention of the settlor that there should be any selection; and it seems to their Lordships, whatever might have been the wish of the settlor to keep the property in the family, impossible to say that he has so framed this instrument as to carry out such an intention or to effectuate such a wish beyond the life of *Haidar Hussain*. The right of *Fatima Bibi* to her shares in the property is clear upon the terms of this instrument, unless the Defendant could shew that there were provisions in it which would control that part of it, and limit her for ever (for that seems to be the contention) simply to an enjoyment of the profits, and not to have any

other interest in the property. There are words which indicate an intention that she should take an interest in the property with an attempt, no doubt, to control her in the disposition of it, and to prevent her parting with it to strangers.

It is unnecessary to allude to what is said in the judgments of the Subordinate Court and the High Court. Their Lordships are of opinion that the conclusion they came to was a correct conclusion, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The costs of it will be paid by the Appellant.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondents: *Barrow & Rogers.*

1st July 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MADAN MOHAN LAL and others (Plaintiffs) ... ... } *Appellants,*

and

LALA SHEOSANKER SAHAI (Defendant) ... } *Respondent.**

Civil Procedure Code, Act X of 1877, s. 43—Spliting claims.

A decree for damages in a suit instituted on 2nd June 1879 (27th Joist 1286 F) on a breach of contract for not having given possession of land according to the terms of a zar-i-peshgi potta, awarded the profits of the land for 1283 F, which would have been received by the Plaintiff had the contract been performed.

The decree-holder then brought the present suit (14th June 1880 or 21st Joist 1287 F.), for damages on the breach of the same contract, claiming the profits accrued during 1284, 1285 and 1286 F. (1876-77 to 1878-79).

Held, that the High Court had rightly decided that, in regard to Act X of 1877, s. 43, the Plaintiff could not recover so much of the profits as had already accrued at the date of the institution of the prior suit, inasmuch as the claim in respect of such profits might have been included therein, *viz*, the profits for the two years 1284 and 1285 F., which had expired when that suit was brought.

Appeal from a decree (14th April 1882) of the High Court, partly confirming and partly reversing a decree (3rd September 1880) of the Subordinate Judge of *Tirhoot.*

The main question here was as to the application of s. 43 of the Code of Civil Procedure, Act X of 1877, that section having been held applicable by the High Court (1).

The suit was brought by the father of the Appellants, *Hridi Narain*, who died pending this appeal, for Rs. 20,998, for damages on account of the withholding possession of land by the Defendants who, making a pottah for a term to secure a zar-i-peshgi advance, had agreed to deliver possession and had failed so to do.

By the pottah (30th Sawan 1282, corresponding to August 17th, 1875) the Defendant made a lease of mouzah *Badsam*, with its appurtenances, for a term of eleven years, from the beginning of 1283 F. to the close of 1293 F., at an annual *jumma* of Rs. 3,714 having taken the sum of Rs. 30,000 as zar-i-peshgi, charged with interest at 1 per cent. per mensem. The lessee was to take possession of the leased land from 1283 F., and, after paying the Government revenue and other charges, to pay himself annually the sum of Rs. 3,600 (estimated to be what would remain over), being the interest on the zar-i-peshgi, retaining whatever balance there might be. Among other agreements the lessor agreed that, if he failed to perform his part, the lessee might recover the amount with interest from his property.

The Plaintiff did not obtain possession

* I. L. R. 12 Cal. 482.

(1) *Sheo Sunker Sahoy* v. *Hridio Narain*, I. L. R., 9 Calc., 143.

of the property untill August 1876; and then only under a decree in a suit which he brought for it.

On the 2nd June 1879 (22nd Jeyt 1286) the Plaintiff sued *Lala Sheosanker Sahai* for damages, according to the terms of the zar-i-peshgi pottah, such damages being estimated by the profits for the year 1283 F., for which he obtained a decree on 16th July 1879. Again, on the 18th June 1880, the Plaintiff sued the present Respondent for damages sustained owing to his having been kept out of possession during the years 1284, 1285, and 1286 F.; this being the suit out of which this appeal arose.

Lala Sheosanker Sahai, among other defences, objected that part of the claim was barred under ss. 42 and 43 of Act X of 1877.

The Subordinate Judge held that the omission to include a claim for damages for the years 1284 and 1285 in the former suit did not preclude the Plaintiff from now making the claim. He adopted the method of calculation of the previous decision of 16th July 1879, and decreed accordingly.

The Defendant appealed on the ground that the suit should be held to be barred under ss. 42 and 43 of Act X of 1877. There was a cross appeal on the ground that certain other terms of the lease, entitling the Plaintiff to damages, should have been made the basis of a decree.

The High Court (MITTER and MACLEAN, JJ.) held the defence to be good so far as the claim to the profits for 1284 and 1285 F. was concerned, but confirmed the decree for the profits of 1286 F.

The cross appeal was dismissed. The High Court held that the parties were bound by the former decision; but that s. 43 barred the suit, so far as it related to damages, which, having been already sustained at the time when the prior suit was brought, might have been included therein. The judgment of the Court is reported in I. L. R, 9 Calc., 143.

From this decree the Plaintiff, *Hridi Narain Sahu*, obtaining special leave, appealed.

On his death, the present Appellants, as heirs of their father, obtained substitution of their names for his on the record.

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon*, appeared for the Appellants.

Mr. *J. Graham*, Q. C., and Mr. *H. Cowell*, for the Respondent.

For the Appellants it was argued that the claim for damages, as measured by the profits of the years 1284 and 1285 F. was not, as regards so much of the damages as had been incurred in that period, barred by the provisions of the Code.

Their Lordships, however, without calling on counsel for the Respondents, intimated that the judgment of the High Court was correct as regarded the matters in question.

Solicitor for Appellants: Mr. *T. L. Wilson*.

Solicitors for Respondent: Messrs. *Barrow and Rogers*.

2nd July, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, The Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Robert Porrett Collier, the Right Hon'ble Sir Richard Couch, and the Right Hon'ble Sir Arthur Hobhouse.

On Appeal from the Court of Judicial Commissioner, Central Provinces.

THAKUR SANGRAM SINGH (Plaintiff) } *Appellant,*

and

MUSSUMAT RAJAN BAI and another (Defendants) } *Respondents.**

Evidence Act. I of 1872, s. 32, sub-s. 5—Statement as to the existence of relationship—Special means of knowledge.

The judgment of an Appellate Court, reversing that of a Court of first instance, on a question as to the existence of relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person, since deceased, who was employed therein as *mukhtar* by certain members of the family. This judgment was reversed on a second appeal by the Court above on the ground that the statement was inadmissible, not coming within the meaning of Act I of 1872. s 32, sub-s. 5, as that of a person having special means of knowledge on the question.

Held, that the statement was inadmissible, as it appeared that his only means of knowledge were from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns.

Held, also, that the Court of second appeal had rightly declined to send the case back for evidence to be taken as to whether he had, or had not, other means of knowledge.

Appeal from a decree (19th September 1882) of the Judicial Commissioner, reversing a decree (30th March 1882) of the Additional Commissioner *Jabalpur*, and restoring a decree (14th March 1882) of the Deputy Commissioner, *Jabalpur* district.

Mr. *J. Graham*, Q.C., and Mr. *Robert Hornell*, for the Appellant.

Mr. *C. W. Arathoon*, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR ROBERT PORRETT COLLIER:—

In this case an action was brought by *Sangram Singh* to recover possession of a mouzah called *Bargaon* against a lady of the name of *Rajan Bai*, and her son, *Rajan Bai* being a niece of *Parmode Singh*, who was its last possessor; and the Plaintiff sought to recover this mouzah by proving his descent through six generations from one *Sada Rai*, from whom *Parmode* had been descended through some five generations.

Without determining whether or not if the Plaintiff had proved his pedigree he would be entitled to succeed, their Lordships address themselves to the question whether he has proved it. He endeavoured to prove it in this way. Some oral evidence was called which may be dismissed with the observation that it went to the effect that he had performed the funeral rites of burning the body of *Parmode*, but would be very far from establishing such a title as he seeks to set up. His main evidence consisted of certain depositions of deceased persons which he contended were admissible in evidence. Those depositions had been taken in a proceeding which had been instituted in 1863 between the two widows of *Parmode Singh* on the one side, and one *Deo Singh*, a claimant, on the other, with reference to the settlement of this mouzah *Bargaon*, and they seem to have been taken with a view to the making up of what are called the *wajib-ul-arz*, or village papers. The first of these is a deposition of one *Hurbilas*, who was a mooktar of these ladies.

The first question which arises is whether the evidence of the mooktar was admissible for the purpose for which it was put in. It is said to have been admissible under Act I of 1872, sect. 32. "Statements written or verbal of relevant facts made by a person who is dead

* 12 Cowell's Ind. Ap. 183; I. L. R. 12 Cal. 219.

or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases." And one of the cases put in sub-sect. 5 is:—"When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

It has been objected that this mooktar had no special means of knowledge, and therefore that he does not come within the description of persons mentioned in this section. It nowhere appears that he had any other knowledge than as mooktar acting for these ladies. He is not shewn to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Therefore in their Lordships' opinion he does not come within the description of a person having special means of knowledge. But further, it appears from his deposition that he is making a statement of the case on the part of his clients rather than professing to speak from his own knowledge of facts. He begins his deposition in this way:—"They (his clients) mean to shew that the taluka of mouzah *Bargaon* was acquired by their ancestor *Sada Rai*, and has now devolved on *Mussumat Ladli Thakurani* and *Sawai Thakurani* by reason of descent according to the genealogical tree," and so on. It appears to their Lordships, therefore, on the two grounds, first, that he was not shewn to have special knowledge, and, secondly, that he did not pretend to speak from his knowledge at all, that this deposition was not admissible

There remain the depositions of the ladies, which are very short and which perhaps it may be convenient to read. First, there is that of *Mussumat Sawai Thakurani*, who was the younger widow of *Parmode*. She says: "*Musst. Ladli* and *Musst. Latto* are the proper heirs to the property after my death. *Delan Shah* comes after them on their death." *Mussumat Ladli* was the eldest widow, and it would seem that at this time she was not able to give evidence by reason of failure of her faculties. *Mussumat Latto*, with whom a settlement had been made by the Government (it does not clearly appear why), was the widow of a nephew of *Parmode Singh*, called *Abhman Singh*. *Mussumat Sawai* is asked, "Who are *Delan Shah* and *Beni Singh*?" and she says: "The genealogical tree given by *Mussumat Ladli* will shew their lineage. *Delan Shah* is the legitimate son, and *Beni Singh* the offspring of a concubine." It would also appear that *Mussumat Ladli* had at one time made some statement, which is not put in. Then the lady is asked: "*Mussumat Ladli* in her statement declares *Deo Singh* as the heir to the property, and the genealogical tree also shews that he bears a close relation to you; how is it then that you do not like to declare him so?" She answers: "The reason of this is, that when my husband, *Parmode Singh*, died, this *Deo Singh* put me to a great trouble. He tried to have the dakhil kharij made in his own name, but it was justly and rightly made in the name of *Mussumat Ladli*. Similarly at the time when an inquiry of proprietary rights was going on, he skilfully induced *Mussumat Ladli* to quarrel with me. Again he does not like me, and so as a matter of course I do not like him. I am pleased with *Delan Shah*, because he is of my family and is always ready to obey me. (Question) *Beni Singh* also appears from the genealogical tree to be closely related to you: what do you say about him? (Answer) "I do not like even to hear his name." This lady appears to think that *Deo Singh* had a better title than the Plaintiff, but she made no mention of *Deo Singh*, because she did not like him, and she mentioned the son of the Plaintiff because she did like him.

The deposition of the next lady is as follows: She is asked: "The proprietary rights of the *Bargaon* talook, per-

gunnah *Bilshei* have been conferred on you by the Government for life. Now it is asked of you who will succeed to your property after your death?" She answers, "*Musst. Sawai Thakurani*, my mother-in-law, is the heir of the estate after my death. When she dies *Delan Shah*, whom she has declared to be her heir, may succeed her. I quite agree with her in the statement she has made. I have no objection to make against it."

Their Lordships agree with the Judicial Commissioner that the evidence of these two ladies is worthless. Therefore if the evidence of *Harbilas* is struck out the Plaintiff has made no case.

The case came in the first instance before the Deputy Commissioner, who dismissed the Plaintiff's claim, thinking the evidence of *Harbilas* was inadmissible, and if admissible not proving the Plaintiff's case. It subsequently went before the Additional Commissioner, who found in favour of the Plaintiff, he being of opinion that the evidence of *Harbilas* was admissible on the ground that he had special knowledge, and he undoubtedly seems to have acted mainly on that evidence. Indeed there was no other evidence on which he could be presumed to act. The case came thirdly before the Judicial Commissioner, and the Acting Judicial Commissioner reversed the judgment of the Additional Commissioner mainly upon the ground that the Additional Commissioner was wrong in accepting the evidence of *Harbilas*, it not having been shewn that *Harbilas* had any special means of knowledge. The Acting Judicial Commissioner, their Lordships think rightly, assumed the judgment of the Additional Commissioner to have been given mainly, if not entirely, upon the ground of his believing the evidence of *Harbilas*, and treating it as admissible. The Judicial Commissioner being of opinion that that evidence was not admissible, reversed the judgment, and accordingly the judgment of the original Court stands confirmed. It may be observed that a question was raised before the Judicial Commissioner as to whether directions should be given for the case to be sent back and evidence to be taken on the subject of the special knowledge of *Harbilas*, but the Judicial Commissioner, in their Lordships' opinion, rightly, declined to give any such directions.

For these reasons their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that this appeal should be dismissed. They will accordingly humbly advise Her Majesty to that effect. The Appellant should pay the costs of this appeal.

Solicitors for the Appellant: *Marriman Pike, & Marriman.*

Solicitor for the Respondents; *T. L. Wilson.*

8th July 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

AKHOY CHUNDER BAGCHI and others (Plaintiffs) } *Appellants,*

and

KALAPAHAR HAJI and another (Defendants) } *Respondents.**

Hindu Law—Adoption—Construction of authority to adopt—attempt by two widows to adopt each a son simultaneously.

Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed "You .... the elder widow, may adopt three sons successively, and you .... the younger widow may adopt three sons successively." *Held*, that, this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions.

Held, also, that, supposing that the husband

* 12 Cowell's Ind. Ap. 198; I. L. R. 12 Cal. 406.

had intended to give such an authority, the law did not allow two simultaneous adoptions.

The opinion of W. H. Macnaghten (1) on the subject referred to and approved.

Appeal from a decree (18th May 1882) of the High Court affirming a decree of the Judge of *Rungpore* (18th December 1880), which reversed a decree (6th July 1880) of the Munsiff of *Gaibanda*, and dismissed the suit with costs.

Mr. *J. D. Mayne*, for the Appellant.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe*, for the Respondent, were not called upon.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought for the rent of some property which was part of an estate formerly belonging to one *Kali Krishna Lahiri*. He died in 1851, having had two wives, the elder, *Shama Soondori Debi*, and the younger, *Brahmamoyi Debi*. By *Shama Soondori Debi* he had one son, *Koilas Chunder Lahiri*, who died in 1856. After the death of *Koilas Chunder Lahiri* the two widows simultaneously, as has been found by the Lower Appellate Court, adopted sons. *Shama Soondori* adopted one *Suresh Chunder*, and *Brahmamoyi* adopted *Jogesh Chunder*. That adoption took place in 1859 on the 5th of June. *Suresh Chunder* died in 1866, and *Jogesh Chunder* in 1867. Some seven or eight years after the death of *Jogesh Chunder*, each of the two widows made another adoption, which are found by the Lower Appellate Court to have been simultaneous, and no question will arise whether one was at any moment of time before the other. These adoption were made on the 30th of July, 1875.

The suit was brought by *Gyanendra*, the son who was adopted by the younger widow on that occasion, against a tenant of some of the land, and against *Shama Soondori Debi*. *Norendra*, the son who was adopted by *Shama Soondori Debi*, is not a party to the suit. The claim for rent is founded upon a lease which was executed on the 12th of February, 1870, by both the widows reserving a certain rent, and there is no question now as to whether the amount for which the decree was passed is correct or not.

The only question raised in the case is whether upon what has taken place *Gyanendra* is entitled to recover half of the rent reserved by the lease; and it may be material to see, before the facts are adverted to, how the case is stated in the plaint. It says:—"The late *Brahmamoyi Debi*, mother of the said minor *Gyanendra Chunder Lahiri*, being, in right of her husband and deceased adopted son, entitled to and being jointly and in equal shares with Defendant No. 2,"—that is *Shama Soondori*—"possessed of pergunnah *Muktipore* and others mehal No. 187 of the Collectorate towzi of zillah *Rungpore*, being the ancestral zemindari which the said minor is entitled to and possessed of, died on the 2nd of Falgoon, 1285, leaving her surviving the said minor taken in adoption by her as the sole heir of her and her late husband and son, and as the proprietor of the property." The case seems to be put upon the ground that after what had taken place, *Brahmamoyi Debi* was entitled to half of the estate, and that her adopted son succeeded to that half.

Now, according to the pedigree, upon the death of *Koilas Chunder Lahiri*, *Shama Soondori* would succeed to the property as his heir; but it is contended that the widows having the authority to adopt, the adoption of *Norendro* and *Gyanendro*, if it were valid, would divest the estate from *Shama Soondori Debi* and also from *Brahmamoyi Debi* if she took an interest in it, and would make the adopted sons entitled to the estate in equal shares. So that the case really depends upon the validity of the adoptions which were made by the two widows on the 30th of July, 1875.

Now as to those adoptions two ques-

(1) Principal and Precedents of Hindu law, Vol. II. Chap. VI of adoption; note to case XIX.

tions arise. The first is whether the authority which was given to the widows by the husband authorized such an adoption as they made; and, secondly, whether, supposing he gave such an authority, it is one which the Hindu law allows. The document itself was not produced, but the contents were deposed to by two witnesses. One of them, *Kashi Chunder*, said it was as follows:—"You, *Shama Soondori*, the elder widow, may adopt three sons successively, and you, *Brahmamoyi*, the younger widow, may adopt three sons successively, and that (or those)"—the word being capable of being translated both in the singular and the plural—"adopted son (or sons) will be entitled to offer pind," &c. Another witness deposed to there being the words introduced "and on that being exhausted;" but the Lower Appellate Court seems to have thought it doubtful whether reliance could be placed upon the memory and impartiality of that witness, and the construction of the document must be taken upon the words stated by *Kashi Chunder*.

It appears to their Lordships that these words might be reasonably construed as giving to the widows, not a power to adopt simultaneously, but first to the elder widow power to adopt three sons successively, and then a similar power to the younger widow. The words are capable possibly of another construction, but certainly rather the more natural construction would be that it was a power to adopt successively. It may be observed that if it gave to the younger widow a power to make an adoption simultaneously with an adoption by the elder widow, the elder widow would not be able to adopt three sons successively, because there would be interposed an adoption of a son by the younger widow. That seems to be a reason for not putting such a construction upon the words.

Another reason for putting the construction upon it which their Lordships think is the right one, is what appears to be the state of the law on the subject of simultaneous adoptions at the time when this authority was given, because if it should even appear that the law was in such a state that it was extremely doubtful whether simultaneous adoptions could be made, or that from the state of the law it was not likely that there was a practice of that kind, that would be a reason for construing this document as not intended to give a power of simultaneous adoption. In construing it their Lordships would consider that the persons giving the authority intended his widows to do that which the law allowed, and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus.

Their Lordships are, therefore, of opinion upon that part of the case that this document did not give to the two widows an authority to make such an adoption as was made by them in July, 1875, when they professed to adopt the two sons *Norendra* and *Gyanendra*.

But then there is the other question whether, if the authority did allow them to adopt in this manner, it could be done lawfully according to Hindu law. It had been cleary settled by this Committee in the case of *Rungama* v. *Atchama* (1), that a man having an adopted son could not during the life of that adopted son adopt a second son. The authorities were very fully gone into; and although there appeared to be a conflict of opinions amongst the pundits upon the subject, that was decided by this Committee. That case, no doubt, is distinguishable from the present. A simultaneous adoption in some respects would differ from the adoption of a son when there was already one son in existence, and the reason given for not allowing such an adoption is that there are different texts which seem to direct that that power of adoption is only to be exercised where the person adopting has not a son, either a natural-born or an adopted. But much of the reasoning upon which that case was decided applies to the case of a simultaneous adoption. The observation which appears to their Lordships to be the

(1) 4 Moore's I. A. Ca. 3.

strongest against such an adoption as this being allowed by the Hindu law, is that no authority and no text has been, or apparently can be produced, shewing that the Hindu law allows it. It is true that the texts with regard to adoptions are but few, but still they are sufficient to lead to the conclusion that if it was intended that such a power as this should be given to a man with regard to adoption, there would be something in the different authorities in favour of it. That it was not intended by Hindu law may be inferred from the provisions which are made for the case of a son being born after a man has made an adoption. It is laid down by *Macnaghten* that if a son is born after a son has been adopted, the property is to be divided between the adopted son and the natural-born son in certain proportions, giving, in the case of there being only one adopted son and one natural-born son, to the adopted son a third, according to the law of *Bengal*, and a fourth according to the doctrine of other schools. Then he goes on to speak of the cases where there are more than one natural-born son, and he states the law for the distribution of the property in such cases. But no reference is made in any of the cases to there being more than one adopted son; and as the power of a Hindu either to adopt himself, or to give to his widows the power to do so in his place, depends upon the law, it seems to their Lordships that it is incumbent upon the party who seeks to avail himself of a simultaneous adoption to produce some authority to that effect. The entire absence of any authority in favour of such an adoption is an argument that the Hindu law did not recognise it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some authorities would have been found on the subject.

There is a great absence of decisions upon the question; in fact their Lordships have only been referred to one case in which the question of the validity of a simultaneous adoption has been considered, and that is a case in the High Court of *Calcutta*, reported in *Bourke's* Reports at page 189. There it was held by the learned Judge who tried the case that an adoption of this description was invalid, and in a subsequent case the same learned Judge acted upon the opinion which he had thus given.

So far, then, with respect to there being any authority about it. But there is a note in a recent book published by *Shama Charan Sarkar*, the author of the Vyavastha Darpana. It is called the Vyavastha Chandrika, and in Vol. ii., page 118, of the Precedents, there is this note:—"It may on the whole be safely concluded that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons or the affiliation of one by a person who has a son (either his own issue or adopted) living, is now illegal according to the concurrent testimony of the most approved authorities." This is the note of Mr. *Macnaghten*, Hindu law, Vol. ii, p. 201; but it is given without any comment or indication of dissent. Their Lordships do not refer to this book as being any authority as to what the law is. The author, a Hindu gentleman who is well conversant with the Hindu law, and who must also be well conversant with the customs of Hindus with regard to adoption, appears to consider a simultaneous adoption to be illegal; he does not suggest that what is stated is in any way contrary to the habits of Hindus, or in conflict with their usages. But independently of this, and without placing any reliance upon this book as an authority, they are of opinion that by the Hindu law an adoption of this description was not allowed. Therefore, on both grounds, that the power given by the husband did not authorize the widows to make such an adoption as this, and also that the law did not allow it, even supposing the husband had intended to give such an authority, their Lordships are of opinion that the Plaintiff has failed to make out his title to recover any portion of the rent which he has sued for.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be affirmed and the appeal dismissed, and the Appellant will pay the cost of the appeal.

Solicitors for the Appellants: *Oehme & Summerhays.*

Solicitors for the Respondents: *Watkins & Lattey.*

24th, 30th June, 1st July, and 18th December, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MUSSAMUT NANOMI BABUASIN and others (Plaintiffs) } *Appellants,*

and

MODUN MOHUN and others (Defendants) } *Respondents.**

Mitakshara and Mithila Law—Execution Sale—Rights of Coparceners—Joint Family Debt.

In an execution sale it appeared that the debt was a joint family debt incurred by *G.*, the head of a joint Mithila family, and that the property sold was the share of the whole family in a certain mouzah:—

Held, that *Deendyal's Case* (1) did not bind the Court to hold that nothing but *G.*'s coparcenery interest passed to the purchasers.

What passes by such a sale depends upon the nature of the debt (*e g*, whether or not it is tainted with immorality) and the intention of the parties. The other coparceners not being parties to the sale or the execution proceedings, are entitled to try the fact or the nature of the debt in a suit of their own. The purchaser, if he has bought the entirety, may defend his title on any ground which would have justified the sale.

Appeal from a decree of the High Court (June 16, 1882) reversing a decision of the Subordinate Judge of *Bhagulpore* (May 14, 1879), and dismissing the suit of the Appellants with costs.

Mr. *Doyne* for the Appellants.

Mr. *Woodroffe*, and *C. W. Arathoon* for the Respondents.

18th December, 1885.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

This is one of the cases, frequently occurring of late years, which raise questions as to the circumstances under which ancestral estate of a family subject to the Mitakshara law becomes liable to answer the debts of the head of the family.

This family is one governed by the Mithila law, which on the point under consideration does not differ from the Mitakshara. Its head is one *Girdhari Singh*. He has a wife, the Appellant *Nanomi Babuasin*, and two sons, the other two Appellants, who were born before the transactions which gave rise to this suit, and were minors when this suit was commenced. The family are, or were, possessed of valuable ancestral property in land.

In the year 1870 one Mrs. *Collis*, complaining that *Girdhari* had wrongfully ousted her from land held under lease from him, sued him to recover possession and mesne profits. The lease had been granted as part of an arrangement under which *Girdhari* took a loan of Rs.45,000 from Mr. *Collis*, the predecessor in title of Mrs. *Collis*. On the 10th of April, 1871, a decree was made according to the prayer of Mrs. *Collis's* plaint, and the sum of Rs.32,318 was awarded to her for mesne profits.

On the 9th of September, 1872, a portion of the family ancestral land was brought to sale by execution proceedings in satisfaction of the decree, and the Respondent *Hirdey Narain* became the purchaser. The property sold was described as "8 annas 11¼ gundahs out of the entire 16 annas, the right and interest of the judgment debtor in mouzah

* 13 Cowell's In. Ap. 1; I. L. R. 13 Cal. 21.

(1) Law Rep. 4 Ind. Ap. 247.

Rampore Bhatkera." The fraction mentioned was the share of the whole of *Girdhari's* joint family, the remaining annas and gundahs belonging to some relatives who were separate in estate. A dispute arose as to the regularity of the sale, which led to further litigation; but in the result the sale was upheld and *Hirdey Narain* took possession, which he still retains

In September, 1878, the present suit was brought by the Appellants against *Hirdey Narain* and *Girdhari*. They pray that either the sale to *Hirdey Narain* may be wholly set aside, or that they may recover possession of the land and that *Hirdey Narain* may be put to take proceedings for partition. They contend first, that, nothing passed by the sale except such share as *Girdhari* would have taken on partition; and secondly, that he would only have taken one fourth part.

The Subordinate Judge of *Bhagulpore* agreed with the Appellants on the first point, but differed on the second. He was of opinion that by the Mithila law the wife, having had a provision made for her, would take no share on partition, and that the father would take a double share. He therefore gave the Appellants a decree for a moiety of the estates in suit. In deciding for the first contention, the Subordinate Judge founded himself on *Deendyal's Case* (1). In his opinion, as Mrs. *Collis* sued *Girdhary* alone, she did not intend her decree to extend over the entire property of the joint family. And on the same grounds he construed the language used to describe the property in the execution proceedings as though it meant nothing more than the coparcenery interest of *Girdhari*.

Both parties appealed to the High Court, who were of opinion that the whole interest of the family passed to *Hirdey Narain* by the sale, and ordered that the suit should be dismissed with costs. The Court considered that the interest which all parties believed that *Hirdey Narain* was buying was the whole 8 annas 11 gundahs into possession of which he was actually put. As regards *Deendyal's Case* (1), they held that it does not lay down an invariable rule that in no case will the coparceners' interest pass in an execution sale unless they are joined in the suit. And they point out that in *Modun Mohun's Case* (2), a different rule was laid down; and that in *Suraj Bunsi's Case* (3), a statement was made of the effect of the then decisions on the subject, which embodied the principle of *Modun Mohun's Case* (2). The present appeal is brought from the decree of the High Court.

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in *India* or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenery rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

(1) Law Rep. 4 Ind Ap. 247; 3 P. C J. 730

(2) Law Rep. 1 Ind. Ap 321; 3 P. C. J. 380.

(3) Law Rep. 6 Ind. Ap 88; *Ante* p. 1.

The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's Case* (1) bound the Court to hold that nothing but *Girdhari's* coparcenery interest passed by the sale. If this debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenery interest alone (and in *Deendyal's Case* (1) there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale it the sons had been brought in to oppose the execution proceedings.

That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion whether the debt originated in the loan of Rs 45,000, or in *Girdhari's* receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt. The Subordinate Judge does not give any opinion on this point. If it is a joint family debt, a sale to answer it effected either by *Girdhari* or in a suit against him cannot be successfully impeached.

There remains only the question whether anything more than the father's coparcenery interest was bargained for, paid for, and taken possession of by the purchaser. On this point, their Lordships are clearly of opinion that the High Court have decided rightly. Indeed, the Subordinate Judge did not decide otherwise, so far as the facts go. As before mentioned, he held that only the coparcenery interest passed, because of the effect he ascribed to *Deendyal's Case* (1). But he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same.

The purchaser therefore has succeeded in shewing that he bought the entirety of the estate, which could lawfully be sold to him, and the suit fails upon the merits. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the Appellants must pay the costs.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitor for the Respondents: *T. L. Wilson.*

(1) Law Rep. 4 Ind. Ap. 247.

8th and 9th July, 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Monkeswell, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

NILAKANT BANERJI (Plaintiff) ... } *Appellant,*

and

SURESH CHUNDER MULLICK and others (Defendants) ... } *Respondents.**

Possession, Suit for, by Mortgagee—Purchase by third parties of mortgagee's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Joinder of parties—Mortgage account—Form of Decree.

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to pay the debt, his equity of redemption was sold, and was bought by the mortgagee.

In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion, *Held*, that (*a*), as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*), the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. *Nawab Azmat Ali Khan* v. *Jowahir Singh* (1) referred to.

A decree which ordered that the Defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was *held* to be incorrect, and was, accordingly, reversed.

Appeal from a decree (16th March 1882) of the High Court, modifying a decree (27th June 1879) of the Subordinate Judge of *East Burdwan*.

Mr. *J. Graham*, Q. C., and Mr. *Woodroffe*, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

In this case the Appellant was the Plaintiff and the Respondents were the Defendants in the first Court. The case raised between them was of this nature. In the month of October, 1866, the Plaintiff advanced money to the representatives of one *Asutosh Deb* on mortgage of his estate. There was a further charge afterwards, and the total amount advanced was Rs.30,000. In the month of December, 1866, a writ of *fieri facias* was issued by some creditors of *Asutosh Deb* upon a decree obtained by them prior to the mortgage. It does not appear at what date the seizure was effected under that *fieri facias*, but the sheriff sold the property mortgaged, amongst other property, in the month of July, 1867, and the portion now in dispute was purchased by one *Khogendra Nath Mullick*. The present Respondents claim under *Khogendra*, but the issues in the suit have not been varied by the transmission of title, and the matter may be treated in precisely the same way as if *Khogendra* was himself before the Court. In the meantime, before the sale in July, 1867, and in the month of June, 1867, the Plaintiff had instituted a suit in the ordinary form

* 12 Cowell's Ind. Ap. 171; I. L. R. 12 Cal. 414

(1) 13 Moore's I. A., 404.

for the realization of his mortgage by foreclosure or sale. When he learnt of the purchase by *Khogendra* he applied to the Court to make *Khogendra* a party to the suit as a person having an interest in the mortgaged property. Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable, that was, *primâ facie* at all events, a right thing to do. An order was made by Mr. Justice *Macpherson* in the High Court, adding *Khogendra* as a party to the suit, and directing an amendment in the prayer of the plaint accordingly. When *Khogendra* was brought before the Court he put in a plea or written statement by which he claimed a title paramount to the mortgage. We have not got that written statement before us. We have only got statements of it by the Courts below. The Subordinate Judge says of it, "*Khogendra Nath* having entered appearence, raised divers other questions adverse to the Plaintiff's title. He, however, did not set up a defence as claiming through the mortgagors." The High Court makes a similar statement of *Khogendra's* position. So that the result was this, that *Khogendra*, being brought there as having purchased subsequent to the mortgage, sets up a paramount title, and does not accept his position as a person who is either to redeem or be foreclosed. Upon that defence being raised the case came on for settlement of issues before Mr. Justice *Markby*, and he, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss *Khogendra*, which he did with costs. It may be mentioned that there were several other purchasers of other portions of the mortgaged property who were made parties and who also alleged paramount titles in themselves, so that the suit would have been multifarious and confused in the highest degree if it had gone on in that shape. They were all dismissed with costs. The High Court then went on to make the ordinary decree for mortgage accounts and for sale in default of redemption. It appeared to one of the dismissed Defendants, the Subordinate Judge states that it was *Khogendra* himself, that the ordinary decree was calculated to prejudice the paramount title which he claimed. While it was being drawn up, he appeared to contest it, and persuaded the Court to vary its terms in a way which he thought to be more favourable to himself. In the month of September, 1880, the property now in suit was put up to sale, and the mortgagee himself, the Plaintiff, purchased the equity of redemption for Rs 1,600. At that time *Khogendra* was in possession. It is to be presumed that he got it under the sheriff's sale, but it is not exactly known how he got it; and why the Plaintiff did not then sue him for possession does not appear. There was considerable delay in bringing this suit for possession, but it has been held in both Courts that the delay is not such as attracts the law of limitation. Therefore the suit may be brought and the legal questions are just the same as if it were brought the day after the Plaintiff purchased.

This suit being brought against *Khogendra's* representatives, a written statement is put in by the only adult representative to this effect. He pleads that the mortgage was fraudulent, that it does not comprise the lands in suit, that he has a preferential title. Then he puts in the extraordinary plea that the matter was decided in his favour in the suit of 1867. Finally he complains that, being entitled to the equity of redemption, no opportunity has been afforded him to redeen the mortgage.

All the issues raised by the Defendants, excepting the right to redeem, if it can be said they have raised that issue, have been found against them; or in other words, it has been found that the preferential title which they alleged but did not disclose in the suit of 1867 is an entirely false and fictitious title, and that *Khogendra*, so far from being improperly made a party to that suit, was a person who had a right of redemption and no other right at all. If the truth had been known when the

matter was before Mr. Justice *Markby*, in the suit of 1867, it is clear he would have held either that *Khogendra* was rightly a party to that suit, or was not simply because he had purchased *pendente lite*, and that in either case the decree must go against him, that when the mortgage accounts had been taken he must redeem or be bound by the sale.

Upon these circumstances the Subordinate Judge held that *Khogendra* was bound by the decree he himself had asked to have; that he had virtually asserted in the suit of 1867 that he could not be put to redeem but had a paramount title which could not be tried in that suit; that he was dismissed and got his costs on that ground; that he could not now be heard to say that he wished to redeem; and therefore he gave the Plaintiff a decree for possession.

It may here be mentioned that the case is a little confused by the introduction of section 13 of the Code of 1877. That section has nothing to do with this case. This is not a question whether a person is bound by a decree made in some other suit. The question is whether he is bound by the decree made in this very suit of 1867 in which the Plaintiff bought the land, and whether after that decree was passed his rights were not entirely gone.

The High Court have reversed the decree made by the Subordinate Judge, and it must be asked on what grounds they do so. The grounds are these. First they say that the suit of 1867 did not override the interest acquired by *Khogendra* at the execution sale, and then they draw this inference:—"We think, therefore, that the Plaintiff is not entitled, in virtue of having filed his suit previous to the Defendant's *fieri facias* purchase, to ignore that purchase and to hold the mortgaged property free from any right which the Defendants acquired by the *fieri facias* sale. We think that we are bound to give effect to the well-recognised rule that the interest of a person who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the Defendants having purchased the mortgagor's interest in the estate, *viz.*, the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of *Asutosh*." Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted; but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the Plaintiff did not ignore the purchase by *Khogendra*. So far from ignoring it, he assigned to *Khogendra* the precise position which the High Court now assign to him in their judgment, and doing so, made him a party to the suit of 1867 in order that he might redeem if he were so minded, and if he were not so minded he might be for ever shut out. It is not the case that the equity of redemption is affected by a decree in a suit to which the owner of it is not a party. He was a party to the suit, and he declined to accept the position of a party to the suit, and he insisted upon it that the Court should dismiss him and treat him as if he were not a person who could be put to redeem at all. He even did more. He insisted on being present when the order for sale was settled, and on having a voice in its terms, and he actually got them varied to his satisfaction. That is the first ground taken by the Court.

Then they go on:—"The next question is, whether the Defendants having been joined in the mortgage suit on the Plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present Defendants, had no effect beyond deciding that, whatever their claims might be, they could not conveniently be tried in that suit."

It was the paramount claims that could not be conveniently tried in that suit. If *Khogendra* had accepted the position of a person who was entitled to redeem, then, so far from his claims

not being conveniently tried in that suit, he was (apart from the doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own shewing that he was not entitled to redeem, and on that ground he was dismissed.

The next ground is this:—"An objection has also been grounded on the form of the present suit, and it has been urged that the Plaintiff having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed. We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by *Pontifex*, J., in *Kasumun-nissa Begum* v. *Nilratna Bose* (1), and to give the Plaintiff a decree for possession conditional on the Defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the Defendants may be permitted to redeem. The Plaintiff has himself purchased several of the mortgaged properties, and he cannot therefore throw more than a proportionate share of the mortgage charge on another portion of the mortgaged premises." That doctrine of apportionment is stated somewhat broadly, and is not applied correctly. The true application of it is this, that the Court may direct accounts, to which the purchasers of fragments of the equity of redemption must be parties, with a view of settling between them all what is the proportion to be charged on each fragment. This is shewn by the case which the High Court cite from *Moore* as an authority for their decision. In that case an equity of redemption had been sold in parcels, and the mortgagee had purchased some. The purchaser of a parcel then sued the mortgagee alone for redemption of that parcel alone on payment of its proportion of the debt; and his suit was dismissed because he was bound to add the other purchasers as parties, and to offer to redeem their parcels.

It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come without bringing the other purchasers before the Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

But so far from contemplating accounts between all the parties concerned, the High Court do not direct any account at all; not even the ordinary account on which a redemption decree must be founded. They go at once to say of their own discretion what shall be the price paid for this mortgaged property. They say: "In the present instance the Plaintiff paid Rs.1,600 as the price of the mortgaged property. And we think that the equities of the case will be met by giving the Defendants six months within which to redeem by payment of this sum, together with interest at 6 per cent. from the date of the Plaintiff's purchase, the 27th of April, 1870; the Plaintiff in default of such redemption within six months to be entitled to khas possession." So a sale having taken place with the knowledge of *Khogendra* under the decree which gave him his costs and dismissed him as one having no interest subordinate to the mortgage, and the Plaintiff having paid Rs.1,600 for the equity of redemption at that sale, he is to have the whole property taken away from him by *Khogendra* on receipt of what he has paid for the equity of redemption alone, and

(1) Ind. L. R. 8 Calc. 79.

not to have a single farthing for that proportion of his mortgage debt which the Court themselves say ought to be charged upon the property. Nor is he to have anything for *Khogendra's* costs which he paid, or for his own costs of that suit which failed by *Khogendra* setting up a fictitious title. The hardship of such a decree upon the Plaintiff is apparent in stating the facts. Their Lordships think that it is founded upon entirely wrong grounds. It is not consistent with itself, because it does not give to the mortgagee what the Court says he is entitled to have, but besides the inconsistency it is founded upon wrong grounds. Their Lordships hold that *Khogendra* is bound by the decree in the suit of 1867, and that he could not, after that decree was passed, ever come in to redeem this property.

The result is, that in their Lordships' judgment the High Court ought to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to make that decree, reversing the decree of the High Court, and so restoring the decree of the Subordinate Judge. The costs of this appeal must be paid by *Chunder Nath Mullick*, who appears on his own behalf and also as next friend of the minor Respondents.

With reference to the costs their Lordships have to observe that the bulk of the record has been unduly swelled by the insertion of a schedule upwards of 80 pages in length, containing particulars of either the property in suit or the whole of the property mortgaged, it does not matter which, in either case they are particulars which could not by any possibility have come into controversy or have aided the controversy in this present appeal. They will therefore intimate their opinion to the Registrar that in taxing the costs of this appeal he shall disallow all costs occasioned by that bulky schedule.

Solicitors for the Appellant: *Watkins & Lattey.*

9th, 10th, 15th, and 18th July 1885.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, The Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

COOMARI RODESHWAR (Defendant) ... } *Appellant,*

and

MANROOP KOER and another (Plaintiffs) } *Respondents.*

Practice—Discussion of Evidence and its Effect.

Case in which evidence is discussed and its true effect pointed out, and in which it is *held*, reversing a decree of the High Court, that an ikrarnamah relied upon by the Respondents was fabricated. It was connected with other documents already found to be forgeries, its contents did not dispel suspicion, it was not established by credible witnesses, nor supported by evidence of possession under it. No order made as to costs, fabricated documents having also been put forward on behalf of the Appellant.

Appeal from a decree of the High Court (May 13, 1882) reversing a decree of the Subordinate Judge of *Tirhoot* (April 29, 1880). The issue in the case was as to the genuineness of an ikrarnamah dated the 13th of December, 1852. The first Court decided that it was fabricated; the High Court that it was genuine.

Mr *Cowie*, Q. C., and *C. W. Arathoon*, for the Appellant.

Mr. *Woodroffe*, and *Branson*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD WATSON:—

The only substantial question in this appeal relates to the genuineness of an ikrarnamah, which is alleged by the

13 Cowell's Ind. Ap. p. 20.

Respondents to have been duly executed in their favour, on the 13th of December, 1852, by the deceased *Ramkishen Singh*, the husband of the late *Rajroop Koer*, the original Appellant, whose daughter, *Koomari Rodheshwar*, has now been substituted as Appellant by an Order in Council of the 24th of June, 1885.

Radha Mohun Singh, who died on the 24th of December, 1850, was owner of an estate consisting of shares of numerous villages in pergunahs *Mahashee* and *Bibrah*. On his decease, the estate was claimed, on the one hand, by *Ramkishen Singh*, as his maternal grandson and heir *ab intestato*, and, on the other hand, by *Roghunundun Singh*, son of *Dost Dewan*, an elder brother of *Radha Mohun*, as the guardian of *Deonundun Singh*, who was his nephew and a grandson of *Dost Dewan*. The Respondents, *Manroop Koer* and *Janki Koer*, are, respectively, the widow and daughter of *Hurnundun*, son of *Radha Mohun*, who died many years before his father. It is not matter of dispute that the Respondents were and are entitled to maintenance from the estate of *Radha Mohun*.

Cross applications were made by *Ramkishen* and *Roghunundun*, in the year 1851, under Act XIX. of 1841, for a certificate to the estate of *Radha Mohun*. In support of his claim, *Roghunundun* produced and founded on a wasiutnama or will, which purported to have been executed by *Radha Mohun*, upon the 7th of September, 1849, in favour of his ward *Deonundun*. The Judge appears to have declined to entertain any question as to the validity of the will, which *Ramkishen* disputed; and, accordingly, he dismissed *Ramkishen's* application, and directed that the minor *Deonundun*, under the guardianship of *Roghunundun*, should continue in possession, until some other order was passed.

On the 4th of October, 1852, *Ramkishen* brought a suit before the Zillah Court of *Sarun*, against *Deonundun*, and his brother *Sheonundun*, who had meanwhile succeeded to the guardianship on the death of *Roghunundun*, for the purpose of setting aside the will, and of establishing his right to succeed, as heir, to the estate of *Radha Mohun*. The suit was defended mainly on these grounds,—that there had been no partition of the ancestral estate between *Radha Mohun* and his brother *Dost Dewan*, and that the will of *Radha Mohun* had been duly executed. As regards the first of these defences, it is sufficient, for the purposes of the present case, to state that, whilst the Judge of first instance decided that there had been complete partition, the Judges of the High Court were of opinion that there had been none; and that, on appeal to this Board, their Lordships held that there had been a separation of the families and their estates, but that twenty-six villages or lots, forming part of the property in dispute, were excluded from the partition. As regards the second of these defences, all three tribunals pronounced against the validity of the will. The Judge of the Zillah Court was of opinion that there was no sufficient proof to establish the validity of the will; but the conclusion to which the High Court came, upon the evidence, was, "that the wasiutnama was not executed by *Radha Mohun Singh*, and that he did not give possession of his share of the estate to *Roghunundun Singh* as guardian for the minor *Deonundun*, but retained it till the time of his death." In accordance with its usual practice, this Board affirmed the concurrent decisions of the Courts below, upon this part of the case, it being admitted by the Defenders' counsel "that no special grounds existed upon which they could hope to disturb on appeal these concurrent judgments upon a question of fact." The result of the litigation, which began in October, 1852, and was terminated by the judgment of this Board on the 25th of March, 1875, was to affirm the right of *Ramkishen* to take, as heir, the whole estate of *Radha Mohun*, with the exception of the twenty-six villages or lots which were held to be joint ancestral estate.

The Respondents, *Manroop Koer* and *Janki Koer*, were called by *Ramkishen*

as defenders in the suit thus instituted by him on the 4th of October, 1852; and it may be convenient to explain now the connection which the Respondents had with these proceedings.

Of the same date with the wasiutnama or will of the 7th of September, 1849, *Roghunundun Singh*, as the guardian of his nephew, executed an ikrarnamah, which is referred to in the will as containing the conditions laid down for the expenses and subsistence of *Radha Mohun*, as well as for the subsistence of the deorhi. That ikrarnamah narrates the execution and import of the will, and its first and leading condition is that fifteen mouzahs, which are described in a schedule annexed to the document, have been charged with payment of the personal expenses of *Radha Mohun* and the deorhi, &c, without being incumbered with payment of revenue, and other expenses in any suit relating thereto, during the lifetime of *Radha Mohun*, of *Mussumat Ram Koer*, and of the Respondent *Manroop Koer*. Thereafter, on the 23rd of January, 1850, *Radha Mohun* executed, or at least is said to have executed, a deed or letter of gift, by which, after reciting the wasiutnama of the 7th of September, 1849, and the relative ikrarnamah of the same date by his son *Roghunundun*, and also the death of *Mussumat Ram Koer*, he makes over to the Respondent *Manroop Koer*, for her maintenance, "the fifteen mouzahs mentioned in the ikrarnamah, together with jagirs, mokurruri, &c., which are in the names of my dependents." There is a letter of the same date, purporting to bear the seal and signature of *Radha Mohun*, by which he directs possession of his shares of these fifteen mouzahs to be given to *Manroop Koer*, and declares that thenceforth he, and the legatee under his will, shall have no concern with the management of the villages, lands &c.

Assuming, as we are bound to do, that the wasiutnama was not executed by *Radha Mohun*, it is impossible to suppose that *Roghunundun's* ikrarnamah, the letter of gift, and relative letter of intimation of the 23rd of January, 1850, are genuine documents Independently of the wasiutnama, *Roghunundun's* ikrarnamah could have no meaning and no effect; and it is inconceivable that *Radha Mohun* should have made a gift to the Respondent *Manroop Koer* in these terms, when he had not parted with his estate, and should have affirmed the existence of a will which he had never executed. All of these documents hang together; they are *partes ejusdem negotii*, and their terms and character must have been known to all the fabricators, whoever they may have been. That the Respondent *Manroop Koer* had such knowledge is very plainly apparent from a petition of intervention presented by her against the claim of *Deonundun* for registration in the year 1859. In that proceeding, she founded upon the will and *Raghunundun's* ikrarnamah, and prayed for confirmation of her possession of her shares of the fifteen mouzahs, upon the allegation that they had been in her possession from the time when they were made over to her, by her father-in-law *Radha Mohun*, under a deed dated the 23rd of January, 1850.

The alleged ikrarnamah, the genuineness of which is the subject of controversy in the present appeal, bears date the 13th of December, 1852, about two months after *Ramkishen Singh* had brought his suit for establishing his rights as heir of *Radha Mohun*. It narrates the institution and object of that suit, and also that *Radha Mohun* "in his own lifetime had settled and granted kismut of the talook kolom out of his own shares and rights in villages and 377 bighas 1 biswa of zerat lands mentioned below, for the expenses of *Mussumat Manroop Koer*, the widow, and *Babui Janki Koer*, minor daughter, the heir of *Rajcoomar Babu Hurnundun Singh*, deceased, *and accordingly it is in the possession of the aforesaid ladies*." *Ramkishen Singh* then goes on to declare that, in the event of a favourable issue to his suit, on his obtaining possession of the villages mentioned in his plaint, he "shall confirm and

maintain" the possession of the Respondents "over the villages mentioned below, and the zerat lands in hât and gunge of *Kahturwa*, and hât and gunge of *Birugnian as before*." He farther declares that the two Respondents, "*who are in possession of the aforementioned villages and zerat, &c., shall as before remain in possession*, and pay the proportionate recorded Government revenue into the treasury of the Collector." There is no consideration expressed in the deed, but the Respondents aver, in their plaint, that *Ramkishen Singh* was, at the time, in straitened circumstances, that the Respondent *Manroop Koer* helped him fully with money, influence, and with oral and documentary evidence; that the suit was brought and the case conducted with her aid; and that owing to her help thus given to him, as well as in consideration of the Respondents' rights which his ancestor had granted, *Ramkishen*, during the pendency of the case, executed and delivered to them the ikrarnamah in question.

Ramkishen Singh did not live to reap the fruits of his successful litigation, having died upon the 18th of October, 1875, before the order of Her Majesty in Council could be carried into execution. It was not until his widow, the late *Rajroop Koer*, took steps to have her name registered as owner of all the villages to which he was found to have right, by that order, that the Respondents asserted their right to have possession of the mouzahs now in question, in virtue of the alleged ikrarnamah of the 13th of December, 1852. That circumstance does not appear to be in itself material, inasmuch as the ikrarnamah, even assuming its validity, did not, by its terms, become legally enforceable against *Ramkishen*, or his representatives, until they actually obtained possession of the estate decreed to him. Notwithstanding the opposition of the Respondents, *Rajroop Koer*, in April, 1878, eventually succeeded in obtaining registration; and that led to the institution, by the Respondents, of the suit in which this appeal is taken, in which they pray, *inter alia*, to have their right to the mouzahs therein specified established in terms of the said ikrarnamah of the 13th of December, 1852; to have their possession of the property in suit confirmed and allowed to stand; and to have the name of *Rajroop Koer* expunged, and their own names inserted in the register as owners of the mouzahs.

The alleged ikrarnamah by *Ramkishen*, which is the sole foundation of the claims urged by the Respondents in this suit, appears to their Lordships to be *primâ facie* a document of very doubtful authenticity. From the narrative already given of the transactions by which it was preceded, during the lifetime of *Radha Mohun*, it is obvious that a system of fabrication of deeds was being unscrupulously carried out, with the view of depriving *Ramkishen Singh* of his inheritance, and of vesting the succession which truly belonged to him in *Deonundun* and the Respondents. *Roghunundun's* ikrarnamah, and *Radha Mohun's* two letters of the 23rd of January, 1857, were undoubtedly fabricated in the interest of the Respondents; and it is by no means improbable that those persons, who had already been guilty of such fraudulent practices, for the purpose of giving the Respondents possession of the fifteen mouzahs, should have gone one step farther, in order to secure the possession of the Respondents, in the possible event of these previous frauds being detected, and *Ramkishen's* right of inheritance vindicated. In point of fact, the ikrarnamah attributed to *Ramkishen*, is, by its tenor, almost as closely linked to the deeds previously fabricated, as each of these deeds is to the others; and it is not easy to reject the inference that the same tissue of frauds runs through them all, and connects the ikrarnamah now set up with its predecessors, which were falsely represented to be the deeds of *Radha Mohun*.

The internal evidence afforded by the ikrarnamah of the 13th of December, 1852, does not tend to dispel the suspicions created by its antecedents and general character. *Ramkishen* is thereby

made to affirm that *Radha Mohun* had granted certain villages to the Respondents for their maintenance; and it is not pretended that there ever was such a grant, unless it were contained in the letter of gift dated the 23rd of January, 1850, which is not a genuine letter. It is hardly credible that *Ramkishen* should have recognised the authenticity of that letter or the validity of the gift thereby made to the Respondents; because the letter, if genuine, was an affirmation, under the hand and seal of *Radha Mohun*, that he had executed the very wasiutnama which *Ramkishen* was then endeavouring to set aside on the ground that it had not been executed by *Radha Mohun*. It might possibly be suggested that *Ramkishen* accepted the Respondents' statement that there had been such a gift to them by *Radha Mohun*; but the Respondents cannot make that suggestion, because any such statement would have been false and fraudulent. It is also a remarkable feature of this ikrarnamah that it makes *Ramkishen* undertake an obligation to "confirm and maintain" the Respondents' possession, not only of the fifteen mouzahs included in *Radha Mohun's* fabricated letter of gift, but of six additional mouzahs, of which *Ramkishen* is farther made to state that the Respondents were actually in possession at the date of the ikrarnamah. That statement is now proved to have been untrue; but an ingenious attempt has been made to shew that the obligation undertaken by *Ramkishen* was, to confirm the Respondents' possession of the fifteen mouzahs, and to deliver to them possession of the six new mouzahs. In the opinion of their Lordships it is impossible to put that construction upon the plain and unambiguous language of the deed; and it is not the construction which the Respondents themselves have put upon it, but a mere afterthought, suggested by the necessities of their case. In the 5th article of their plaint the Respondents aver that—"In accordance with the ikrarnamah above adverted to (*i.e.*, the ikrarnamah of the 13th of December, 1852), *Rajah Ramkishen Singh*, husband of the Defendant, having admitted the proprietary right and title of the Plaintiffs *to the mouzahs, lands gunj, &c., specified in the ikrarnamah aforesaid, which were in the possession of the Plaintiffs since former times.*" Again, in the 7th article of their plaint they aver that the Appellant, after the death of *Ramkishen*, "executed the decree of the Privy Council, and, at the time of carrying out the process of delivery of possession, in conformity with the conditions set forth in the ikrarnamah above adverted to, *allowed the possession of the Plaintiffs to stand in regard to the mouzahs and lands specified below*, which are included in the decree of the Privy Council."

The Respondents may, of course, rebut the presumptions arising from these suspicious circumstances by reliable evidence shewing that the ikrarnamah was, in point of fact, duly executed and delivered to them by *Ramkishen Singh*. The burden of proving the due execution and delivery of the deed lies upon the parties who, in these circumstances, are endeavouring to set it up; and it now becomes necessary to consider how far the Respondents have succeeded in satisfying the heavy *onus* thus incumbent on them.

The evidence adduced and relied on by the Respondents, in support of the genuineness of the ikrarnamah, may be conveniently dealt with under these two heads:—First, evidence tending to prove that the deed was executed by *Ramkishen*, on the date it bears; and that, in consideration of its execution and delivery to them, the Respondents, in terms of a verbal agreement to that effect, gave *Ramkishen* documents, and money to the amount of Rs.5,500, to assist him in the prosecution of his suit; and secondly, evidence tending to prove that *Rajroop Koer*, after her husband's death, fully recognised the validity of the ikrarnamah; and also that, at the time when she executed the decree of the Privy Council, *Rajroop Koer* expressly confirmed the Respondents' possession of the fifteen mouzahs

described in *Radha Mohun's* letter of gift, and likewise gave them possession of the six additional mouzahs specified in *Ramkishen's* ikrarnamah

Their Lordships agree with the Judge of the Subordinate Court in thinking that the evidence comprised in the first of these heads is not of a reliable character. There are, no doubt, four witnesses, *Sham Lal, Chulhai Roy, Chowdry Jodu,* and *Sajiwan Lal,* who speak to the verbal communications which are alleged to have passed between *Ramkishen* and the Respondents, at the time when the ikrarnamah is said to have been arranged and executed; but their depositions are neither consistent with each other, nor satisfactory, and, moreover, they do not tally with the terms of the ikrarnamah. *Chulhai Roy* also attests his own signature, as a witness, to the ikrarnamah, and another witness attests his father's signature; but the evidence of *Chulhai Roy* upon that point cannot be credited, if his testimony, upon other and equally important matters, be, as their Lordships think it ought to be, rejected. There is also a considerable amount of oral testimony as to the money payments, amounting in all to Rs.5,500, said to have been made at various times to *Ramkishen;* and that evidence is supported by letters alleged to have been sent to the Respondent *Manroop Koer* by *Ramkishen,* none of which are authenticated by his seal or signature. In a case like the present, where there has been so much fabrication of formal deeds, such writings as these must be received with extreme caution. Regular account books were kept by the Respondents, but these have not been produced. It is not probable that *Ramkishen Singh,* who at the time when the greater part of these advances are said to have been made, was the adopted son of a wealthy Maharanee, stood in need of pecuniary assistance. Nor is it probable that money intended for remittance to *Calcutta* or *London,* for the purposes of *Ramkishen's* suit, should have been sent to him *in specie;* but evidence of payment in that shape can be very easily got up, and cannot be so easily checked as when money is remitted by banker's draft or letter. The Subordinate Judge before whom the numerous witnesses who testified to these payments were examined, did not believe them; and that is a circumstance to which their Lordships attach considerable weight, especially in a case where the conclusion drawn by the Judge who saw the witnesses under examination is in accordance with all the presumptions arising from facts established beyond dispute.

It has also been argued in connection with this part of the case that the written pleadings filed by the Respondents, as defenders in *Ramkishen's* suit, afford conclusive evidence that they were acting in concert with the Plaintiff, and aiding his contention that the wasiutnama set up by *Deonundun* and his guardian was invalid. The learned Judges of the High Court express an opinion that "in both these written statements the wasiutnama was denounced as an unreal document." Their Lordships have been unable to find a single passage in these documents which will bear that construction. *Manroop Koer* did state by her pleader that, "according to the assertion of the Plaintiff, the wasiutnama was in reality false;" but the substance of her defence was that the wasiutnama had already been held to be valid, in the proceedings under Act XIX. of 1841, and that, inasmuch as *Deonundun* and his guardian had been, "in conformity with the condition laid down in the said wasiutnama, as well as in the ikrarnamah dated the 7th of September, 1849, executed by Rajah *Roghunundun Singh,* in possession, and your Petitioner's client, too, has been in possession of some of the villages covered by these documents. Where then has the Plaintiff any claim now?" In the written statement filed by *Janki Koer,* it is not asserted, that *Radha Mohun* did not, in point of fact, execute the wasiutnama, but that *Radha Mohun* had no power to dispose thereby of certain village shares which, she alleged, had pertained to her father, and belonged to her by right of inheritance.

To come next to the evidence of possession, which is of some importance in this case. There can be no doubt that, if the Respondents were able to shew that, before this suit was instituted, they had, with the assent of *Rajroop Koer*, obtained, and had thereafter continued in possession of the mouzahs in question, under and in virtue of the ikrarnamah of the 13th of December, 1852, that would go a long way towards establishing the validity of the deed, in any question between them and the Appellant. The alleged possession of the Respondents may be divided into three periods The first of these begins with *Radha Mohun's* letter of gift, dated the 23rd of January, 1850, and ends with the execution of the decree of the Privy Council, in favour of *Ramkishen*, by his widow, *Rajroop Koer*; the second begins with the execution of that decree, and terminates with the institution of the proceedings taken by *Rajroop Koer*, with the view of obtaining registration of her name as owner of the mouzahs in question; and the third embraces the period between the last-mentioned date and the institution of the present suit by the Respondents.

Having regard to the terms of the judgments pronounced in *Ramkishen's* suit, to which the Respondents were parties, it is at least doubtful whether they can be held to have been in possession of the fifteen mouzahs specified in the letter of gift of the 23rd of January, 1850, before the death of *Radha Mohun*, on the 24th of December of the same year. But it does not seem to admit of doubt that, from the death of *Radha Mohun*, until the decree of the Privy Council was executed by *Rajroop Koer*, the Respondents were in the possession of these mouzahs. Their possession, during the whole of that period, was dependent upon the right of *Deonundun*, derived from the invalid wasiutnama of the 7th of September, 1849, and can therefore throw no light upon the question arising for decision in this appeal. The state of actual possession during the third period already referred to is also, in the estimation of their Lordships, of little or no value as evidencing the genuineness of *Ramkishen's* ikrarnamah, because, during the whole of that period, there were disputes going on, both as to the validity of that deed, and the possession of the mouzahs to which it relates.

The second of the periods referred to is, accordingly, the only one which is of real importance, as regards possession. A great mass of oral testimony has been adduced by the Respondents, to the effect that, when the decree of the Privy Council was executed, *Rajroop Koer* caused intimation, at the same time, to be made to all concerned, that the Respondents were to remain in possession of the mouzahs already possessed by them, and were also to have possession of the six new mouzahs specified in *Ramkishen's* ikrarnamah. Their Lordships have come to the conclusion, with the Judge of the Subordinate Court, that the witnesses who speak to these facts are unworthy of credit. They are unable to indorse the views expressed, upon this part of the case, by the learned Judges of the High Court. They seem to be of opinion that, it not being proved to their satisfaction that *Rajroop Koer* was in actual possession of these mouzahs, it must necessarily follow, not only that the Respondents were in possession, but that possession had been ceded to them by *Rajroop Koer* in terms of *Ramkishen's* ikrarnamah. But it must be observed, that the execution of the decree of 1875 had not the effect of transferring actual possession, it was merely an authoritative intimation, to persons interested, that the decree holder had the right to possess for the future. Nothing is more probable than that the Respondents, who had then begun to set up the ikrarnamah, upon which they now rely, should have attempted to retain the mouzahs which they then possessed, and to usurp possession of the additional mouzahs which they now claim. But it does not follow that *Rajroop Koer* assented to their retaining or taking possession. On the contrary, all the real evidence, apart from the depositions of the Respondents' witnesses, points to the conclusion that

she did not assent. About a year after the execution of the decree, *Rajroop Koer* presented four separate petitions for registration, in respect of these very mouzahs, all of which were opposed by the Respondents, on the ground that they were in possession under *Ramkishen's* ikrarnamah. The question of possession was decided against the Respondents, both in the Collector's Court, and in the Civil Court to which they appealed. It is a remarkable fact, and one not easily reconcilable with the depositions of the Respondents' witnesses in this suit, that, as recorded by the Judge in these registration proceedings, *Manroop Koer* virtually abandoned "her claim respecting present possession," and merely pleaded that she had a right to be in possession. The Judge of the Civil Court not only records the fact that her allegations of present possession were given up, but states expressly that it was quite clear that *Rajroop Koer*, when taking out execution of the Privy Council's decree, made no exception of shares in the Respondents' favour, but took out execution of the entire decree. The Respondents have made no attempt to explain the reason why that judicial admission was made in April, 1878; and the absence of any such explanation strongly suggests that the evidence of possession which they have adduced in this suit was not, at that time, in existence.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Hight Court, dated the 13th of May, 1882, ought to be reversed, and the judgment of the Subordinate Court, dated the 29th of April, 1880, restored. Seeing that both Courts below have held that the original Appellant was guilty of using fabricated documents in support of her allegations of possession, their Lordships deem it right to mark their sense of the impropriety of such conduct by making no order as to costs.

Solicitors for the Appellant: *Henderson & Co.*

Solicitors for the Respondents: *Woodroffe, Burgess, & Loch.*

10th and 11th December, 1885; and 6th February, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Madras.

MAHARAJAH MIRZA SRI ANANDA, Sultan Bahadoor of Vizianagram Samastanam (Plaintiff) ... ... } *Appellant,*

and

PIDAPARTI SURIANARAYANA SASTRI and others (Defendants) } *Respondents.**

Madras Regulation XXV. of 1802, sect. 3—Inams—Presumption.

Madras Regulation XXV. of 1802, sect. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zemindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription.

Where inamdars had received a grant in perpetuity of certain lands in 1811, and in 1863 had received a regrant thereof from the Appellant's predecessor on terms less favourable to themselves, *held*, that the Appellant had no power after the death of the last mentioned grantor to determine their tenancies by notices to quit.

Appeal from a decree of the High Court (May 1, 1883) reversing a decree of the Subordinate Judge of *Vizagapatam* (May 12, 1882) and dismissing the Appellant's suit with costs.

Mayne and *Johnstone*, for the Appellant.

The Respondents did not appear.

6th February, 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The question in this case is whether

* 13 Cowell's Ind. Ap., 32.

the Respondents are entitled to hold the village of *Buradapeta*, in the principality of the Appellant, as tenants in perpetuity at a rent of Rs.253. 6*a*. 7*p*., under a grant made by the Appellant's father in 1863, a suit to recover the village having been brought by the Appellant on the ground that he had, after his father's death, determined the tenancy by a notice to quit. The facts of the case, as proved by the evidence in the suit, are stated in the judgment of the High Court.

In 1794 *Visiaram Raz Pusapati*, zemindar of *Vizianagram*, the ancestor of the Appellant, took up arms against the Government, and was defeated and slain at *Padmanabham*. His son *Naraina Gajapati*, then a youth of sixteen years of age, fled to the hills; but in 1797 came in and surrendered himself, and on payment of a heavy fine was allowed to resume possession of his raj. Probably, out of his gratitude for his good fortune, *Naraina Gajapati* at once created several inams in favour of Brahmins and his dependants. Among others one *Pidaparti Sitaram Sastri*, the ancestor of the Respondents, received in 1797 a lease, expressed in the terms of a pious gift, of certain lands at *Chetanapalli* to be held by him and his heirs from generation to generation, subject to annual quit-rent of Rs 50, and in 1800 the same grantee also received other lands in the same village to be held with the lands formerly granted on payment of a quit-rent increased by Rs. 100, which was reduced shortly afterwards to the extent of Rs. 50.

In 1802 the Permanent Settlement was introduced, and the villages of *Chetanapalli*, *Malliada* and *Buradapeta* were included in the assets of the zemindari.

Early in 1802 *Naraina Gajapati Raz* conferred on *Sitaram* lands in *Malliada* in lieu of those held by him in *Chetanapalli*, and in 1811 he conferred on him the village of *Buradapeta*, to be held in lieu of the lands in *Milliada* at a quit-rent of Rs.45 by the grantee and his heirs from generation to generation "for the satisfaction of Sri," the expression usual in cases of pious gift.

On *Sitaram's* death, his sons *Seshadri* and *Appayya* made a partition of the village in March 1842, and, to discharge outstanding debts due by the family, each of the brothers made a usufructuary mortgage of his share for Rs.4,000 to the Durivars. *Naraina Gajapati Raz* was unable to live within his means, and, on more than one occasion, it was necessary for the Government to take charge of his revenues. Eventually he died at *Benares* leaving large debts.

At that time, owing to a misconception of a provision in the regulations which was intended for the security of the land revenue, it was believed by some officers that grants made by a zemindar were generally resumable by his successor.

It appears from proceedings of the Government, dated 30th of January 1853, that on receipt of the news of *Naraina Gajapati Raz's* death, "the Board of Revenue directed the Governor's agent, who was in charge of the zemindari, to adopt all measures in regard to resumptions of inams and shrotriems to which it would be legal and proper for the late Rajah's successor to have recourse," and that the agent, in anticipation of such instructions, had already issued orders for the attachment of all lands conferred by the late Rajah subsequently to the permanent settlement, whether agraharams (grants made to Brahmins), mokhasas, or other inams. It also appears that in 1848 the agent "requested permission to employ the collections derived from the attached lands for the liquidation of the public debt of the zemindari, and offered suggestions for the settlement of the claims of the ousted inamdars," and "that the Government while considering this money available for the purpose agreed with the Board of Revenue that the claims of the parties who had been dispossessed called for further inquiry, and only permitted the agent to employ the collections as a present recourse on the distinct understanding that the sums appertaining to such of the inams as might be eventually

restored should be repaid from the zemindar's treasury." It further appears that it was reported to the Government in 1852 that the lands attached in 1845 consisted of 87 villages and 184 detached plots bearing a gross assessment of Rs.83,312, from which sum quit-rents of Rs.6,839 being deducted, a sum of Rs.76,473 represented the net income of which the grantees were deprived. It was also reported that the zemindar wished to resume the whole of the lands attached indiscriminately, and to grant compensation in certain cases by money allowances, and that the collections derived from the attached lands up to the end of F. 1261 (1851—52) amounted to 3 lacs, of which Rs 2,40,000 had been devoted to the liquidation of the public debt.

The condition of the dispossessed mokhasadars and inamdars, in the opinion of the Commissioner for the Northern Circars, Mr. *Walter Elliot*, demanded great consideration, and, while he believed the zemindar was empowered, under Regulation XXV. of 1802, sect. 3, to resume lands alienated by his father, he urged him to deal liberally with the inamdars. The Governor in Council, in Minutes of Consultation recorded on Mr. *Elliot's* report, said the Government felt "themselves bound to express their disapproval of resumptions and the substitutions of money allowances (except with the full consent of parties interested) when there has been long possession such as gives all persons a legal title by prescription. It would be an injustice such as they could not sanction where such prescriptive right as is recognised by Hindu law may have been in existence by an unquestioned and undisturbed enjoyment for many generations. The Governor in Council could not view such resumption as other than a spoliation, which should not be carried out, as interfering with the peace of the country for which the Government are responsible." The Governor in Council also expressed doubts as to the soundness of Mr. *Elliot's* opinion as to the effect of Regulation XXV. of 1802, sect. 3, and intimated that the true construction of the regulation was probably that which has been since adopted by this Committee, namely, that it imposed restrictions on alienations only to secure the interests of the public revenue, and that the zemindar would have no power to disturb grants, otherwise valid, made by his predecessor, or titles to inams acquired by prescription. Considering the prompt and liberal settlement of the claims of the dispossessed grantees essential to the tranquillity of the country, and having been informed that the zemindar was willing to abide by the opinion of the Government, the Governor in Council desired the Commissioner and Special Agent at *Vizagapatam* to consider themselves empowered to use the name and authority of the Government in impressing upon him the absolute necessity of at once entering into a liberal and just settlement of all the claims. It was ordered that the views entertained by the Government should be communicated to the zemindar.

It appears that in 1850, during the dispossession *Appayya*, one of the sons of *Sitaram*, took a lease of *Buradapeta* for three years at an annual rent of Rs.650. On the termination of this lease, the late Maharajah directed his agent to collect from the *Buradapeta* ryots the quit-rents then existing, and a quarter of the *Gudikattu* dowle (the entire assessment), and payments were made on that footing up to 1863, the village still being regarded as attached. The dispute relating to the propriety of the resumption was still subsisting, and it seems probable that a settlement was delayed by the provision which, in 1847, the Government had made for the inamdars, that the income of any inam appropriated for the liquidation of arrears of revenue in the zemindari should be repaid from the treasury of the zamindar on the restoration of the inam.

However this may be, in 1863 the eldest sons of *Seshadri* and *Appayya* each presented to the late Maharajah a petition respecting the moiety of the village which had fallen to his branch of the family in the following terms :—

"Darkast (application) presented by *Pidaparti Surianaryana*, Agraharamdar of *Buradapeta*, alias *Lakshminaraina-puram Agraharam* attached to *Viziana-garam Tana*.

"The said village which was granted to my paternal grandfather, *Pidaparta Sitarama Sastrulu*, by *Sri Naraina Gajapati Razu Maharazulungaru* subsequent to the settlement, having been after (the time of) the donor attached by the then Collector, still continues under attachment. The same not having been as yet released from attachment, I have been suffering much.

"I therefore humbly submit as follows:—

"In the event of your Highness being graciously pleased to take all the money collected from the said agraharam during its attachment up to the end of Fusli 1272 on account of your installation and other nazars (presents), and to grant me my share of lands in that agraharam from Fusli 1273, I shall pay the kattubadi fixed by your Highness and enjoy the remaining income, and be bound by the Circar orders.

"I, therefore, pray that your Highness will be graciously pleased to restore the said agraharam and protect (me).

"18th of July, 1863."

Upon these petitions, the Maharajah issued an order to each of the Petitioners which differed only in the amount of the rent. In one, it was Rs.115 3*a*., and in the other Rs. 138. 3*a*. 7*p*., the total rent of the village being Rs.253. 3*a*. 7*p*. instead of Rs.45 under the grant made in 1811. The order is as follows:—

"*Buradapeta*, alias *Lakshminarayana-puram Agraharam*, attached to *Viziana-garam Tana* which was favoured by our father subsequent to the settlement being under attachment, it was settled that you should for the four and a half vruttis of land in your holding in that village pay, out of Rs.691 3*a*., being the gudikattu dowle (the entire revenue) thereof, Rs.115 3*a*. inclusive of Rs.22½ kattubadi in existence prior to the attachment, and enjoy the remaining income, and that the said village should be placed under the head of zuft villages. While such state of things continued, you submitted to our Huzur on the 18th instant, a sannad (petition) requesting among other matters that the land might be restored to you, the said amount itself being fixed as kattubadi, and that you will continue to enjoy the said four and a half vruttis of land, paying every year the said kattubadi, and be bound by the Circar orders. Being moved to shew you favour, we have issued orders this day to the Tana Amin to put the attached lands in your possession from the current Fusli 1273, subject to the kattubadi of Rs.115 3*a*. (rupees one hundred and fifteen and annas three). You shall accordingly take possession, pay the said kattubadi of Rs.115 3*a*. duly every year, and be bound by the Circar orders."

Thereupon each of the Petitioners executed sanads engaging to pay the rent and "act up to the orders of the Circar," and they were put in possession of the village.

The Maharajah died in 1879, and was succeeded by the Appellant. In 1881 the Appellant called on the Respondents to execute fresh engagements, undertaking to pay such rent as he might fix, and on their refusal notice was given them to quit the village on the 1st of July, 1881, which they refused to do.

Before stating their opinion on the main question, their Lordships will dispose of another question which was raised. In 1866 the *Darivar* mortgagees sued the inamdars to enforce the mortgages executed in 1842. The inamdars pleaded that the mortgaged lands having been resumed in 1845 by the Collector, the original right possessed by them therein and the mortgage lien of the Plaintiffs thereon had ceased to exist. The suit was dismissed by the First Court, and their decree was affirmed on appeal. As the Maharajah was not a party to the suit, this plea does not operate as an estoppel, but is only an admission and not conclusive. This was so held in the present suit by the High Court, which then proceeded to consider the real nature of the arrangement in 1863, and held

that it resulted in a confirmation of the original grant on terms more favourable to the zemindar, that if the arrangement was to be regarded as a new grant, it was intended to be the grant of an estate in all respects save the amount of quit-rent similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity.

Their Lordships think the latter is the correct view, but the difference is not material in this suit, where the question is whether the tenancy could be determined by the notice to quit. The circumstances under which the applications to the Maharajah and his reply were made are to be considered. He was, doubtless, aware of the opinion of the Government. The inamdars had not relinquished their rights under the grant of 1811. The effect of the attachment in 1845 and the subsequent transactions was at least doubtful, and the inamdars had a claim to have the collections repaid to them from the zemindar's treasury. In the application to the Maharajah, the applicant is described as Agraharamdar of *Buradipeti*, and it is proposed that the Maharajah shall take all the money collected during the attachment on account of his installation and other presents. It is prayed that he will be pleased to restore the said agraharam. This meant more than becoming yearly tenants, and when the Maharajah replied that they were to take possession, and ordered it to be given to them, he, in their Lordships' opinion, intended that they should hold the agraharam at the increased rent, in the same manner as they had done before the attachment. And it was admitted by the Appellant's counsel that the Maharajah had power to do this. Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and to affirm the decree of the High Court dismissing the suit.

Solicitor for Appellant *T. R. Tasker*.

10th February, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAE SARABJIT SINGH (Plaintiff) ... } *Appellant*,

and

F. C. CHAPMAN (Defendant) ... ... } *Respondent*.*

Lunatic—Act XXXV of 1858, s. 9—Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.

The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh Talukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act, with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager.

A Civil Court having made an order declaring a talukdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the District, who also acted as manager of the Court of Wards:

Held, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years.

Appeal from a decree (19th September 1883) of the Judicial Commissioner of *Oudh*, affirming a decree (19th September 1882) of the District Judge of *Rae Bareli*.

Mr. *J. Graham*, Q.C., and Mr. *J. D. Mayne*, for the Appellant.

Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne*, for the Respondent.

* 13 Cowell's Ind. Ap 44; I. L. R. 13 Cal. 81.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD BLACKBURN:—

Their Lordships think that the decision of the Court below, which has been appealed against, was the right decision, but they do not agree exactly with the reasons given below.

Their Lordships have first to consider what point is raised by this case. The talookdar who owned the property in question became a lunatic, and an application was duly made for an inquiry into the state of his health under the 3rd section of Act XXXV. of 1858. That application was made by the officer of the district where this talook was situated, and the Civil Court to which the application was made having caused notice to be given, did enter into an inquiry, and the result was that the talookdar was adjudged to be a lunatic. Thereupon the 9th section of Act XXXV. of 1858 applied, which provides that:—"When a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same." At the time Act XXXV. of 1858 was passed, *Oudh* was not part of the British dominions, but it has become so since, and their Lordships take it that the Court of Wards may be considered as having the same jurisdiction and all the powers that the Court of Wards elsewhere would have had. Therefore, under section 9, the Court of Wards was authorized "to take charge of the same." It seems to have been rather hastily concluded by the Judge below that the Court of Wards being authorized by the Legislature "to take charge of the same," required some further order from the Civil Court which adjudged the talookdar to be a lunatic to justify them in acting. Their Lordships think there is no ground for saying that, though section 9 goes on to provide:—"In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate."

It appears that the Civil Court, when they declared the talookdar to be a lunatic and so authorized the Court of Wards in *Oudh* to manage his property, did contemporaneously make an order appointing as the manager of the property the same person who acts as the manager under the Court of Wards. In the 14th section of the Act there is a provision that—"Every manager of the estate of a lunatic appointed as aforesaid," that is a manager appointed, not the Court of Wards, "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic; but no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years." Their Lordships suppose that the object of this order probably was that the Court thought *ex majore cautela* "if there is any ambiguity about it we will take care that the Court of Wards has double power, and the manager shall act both under this Court and the Court of Wards." It may not have been judicious, but that is the utmost object the Court could have had, and if it was wrong it will not be a bit the worse.

Such being the case, the Court of Wards did enter into possession of the estate and the management of it. The lunatic continued to live till 1874, when a lease was granted, the details of which need not be further stated than to say that it was a lease for twenty-five years with various terms and provisions in it. It professes to be a lease of certain villages belonging to the *Bhadri* estate under the Court of Wards which was granted to Captain *F. C. Chapman*, with the sanction of the Chief Commissioner of *Oudh*, conveyed in a letter of the 2nd of April, 1874, to the Subordinate Commissioner. Their Lordships pause to ask, what objection is there to this lease?

No attempt is made to shew that it was a lease improper in its terms, or that there was anything that amounted to an imposition, or that it was obtained by fraud or obtained improperly; but the one point relied upon against the lease is that it could not be granted for more than five years, and that objection, whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards. That is the objection on which it is sought to set the lease aside.

The Judge of the first instance entered into a great many questions which their Lordships do not pretend to follow; but there are a great many allegations to shew that even if the lease was originally void if granted for more than five years, it had been made good by subsequent acts after the lunatic was dead, and the present Appellant (the Plaintiff in the suit) had come into enjoyment of the estate. Their Lordships do not propose to enter into those questions at all, because they do not arise unless it can be shewn that the objection that the lease exceeded a term of five years applies, and it certainly seems to their Lordships that it does not. The Judicial Commissioner on appeal arrived at the same result, that the lease was good, by a different process of reasoning, for he held that there were various things, by estoppel and otherwise, which prevented the Plaintiff from setting aside an invalid lease. Their Lordships would require a good deal more thought and consideration than has yet been given to the case before they pronounced an opinion upon such a point as that; but if it be correct to say, as their Lordships are decidedly of opinion that it is, that the Court of Wards could grant such a lease as this, and that it was not impeachable merely because it exceeded five years in length, no other objection being made, this lease is good and nothing further arises upon it. The lease was not void and could not be set aside, and consequently it stands. If there were other objections than this they have not been raised. Their Lordships do not suppose there are any, and they therefore think that the judgment appealed from should be affirmed, although not for the same reasons by any means that were given below.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed with costs.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitors for the Respondent: *Sanderson & Hollands.*

11th, 12th, 13th and 16th February, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the Special Court of British Burmah.

NAN KARAY PHAW and others (Plaintiffs) ... ... } *Appellants,*

and

KO HTAW AH (Defendant), ... } *Respondent,*

AND CROSS APPEAL AND

KO HTAW AH and another (Defendants, ... } *Respondents,*

and

NAN KARAY PHAW and others (Plaintiffs) ... } *Appellants.**

Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties, for damages for the detention

* 13 Cowell's Ind. Ap. 48; I. L. R. 13 Cal. 124.

of property which had belonged to the estate of the deceased. In the first, the Plaintiffs appealed; and in the second the Defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits.

Held, that as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtfull whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the Defendant to raise it on this cross appeal.

Appeals and cross appeal consolidated and heard together under orders in Council (5th March and 13th June 1885) from two decrees (28th and 8th August 1883) of the Special Court of *British Burmah*, reversing in one suit, and confirming in another, decrees of the same date (24th April 1882) made in two suits by the Judge of *Moulmein*.

Mr. *R V. Doyne* and Mr. *A. Agabeg* appeared for the representatives of *Phatadah*.

Mr *A Phillips* (with whom was Mr. *A. Scoble, Q. C.*) appeared for *Ko Htaw Ah*.

16th February, 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD MONKSWELL:—

These are two appeals from judgments of the Special Court of *British Burmah*, in both of which the widow and children of one *Phatadah* were Plaintiffs, and *Ko Htaw Ah*, a Burmese merchant, was Defendant, in the second case an agent of his being joined as a co-Defendant with him. In the first case, which may be conveniently called the "timber case," the Court of *Moulmein* gave judgment for the Plaintiffs. That judgment was reversed by the Special Court of *British Burmah*, by which judgment was given for the Defendant and the suit dismissed. From this judgment the Plaintiff appeals, and there is a cross appeal by the Defendant on the ground that he has a cross claim which makes *Phatadah* to have been his debtor. In the second case, which may be called the "elephant case,', both Courts concurred in finding for the Plaintiff, and the Defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible a short statement is necessary.

On the banks of the *Salween* river and its tributaries are extensive forests, partly, it would appear, in the Burmese territory and partly in the territory of a neighbouring semi-barbarous tribe called the Karens A large timber trade is carried on in these forests, timber being cut, and as it is called, ounged—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find its way, apparently without assistance, down to *Moulmein*. Near *Moulmein* there is a station called *Kadoe*, where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to *Kadoe*, used certain marks for its identification, which marks were registered by a Government official at *Kadoe*. It has not been very distinctly explained what the regulations were under which those marks were registered, but their Lordships collect (what appears to be sufficient for the present purpose) that the existence of the mark of a merchant on timber was sufficient *primâ facie* to constitute some title on his part to it, and also some title of the Government to be paid revenue by him for it.

The late husband of the Plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subject of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to *Moulmein*, and he had consequently no registered mark. The Defendant is a timber merchant carrying on

extensive transactions, having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the Plaintiff's cause of action clearly and succinctly. She says she is the widow of *Phatada*, who died in 1879. "That in or about the year 1871 *Phatadah* entered into an agreement with the Defendant, whereby he was to send to *Moulmein* timber marked" with the "pin-byit" mark—which may be shortly described as three circles with crosses within them —"worked and purchased by him in the *Thoungyeen* forests, and Defendant was as *Phatada's* agent, and for and on his behalf, to dispose of the same and render an account of the proceeds of the sales effected by him. That between July, 1871, and January, 1879, the Defendant received and entered at *Kadoe* 5,226 logs of timber bearing the said mark, which he disposed of. That subsequently, that is to say, about six years ago, the said *Phatadah* agreed with the Defendant to work and send timber down from the *Mai Nget** forests to *Moulmein*, which timber was to be marked by him with the mark 'Ko Lan,' and that the Defendant should sell the same for *Phatadah* as his agent and account for the proceeds of the sales effected by him. That between November, 1879, and July, 1880, the Defendant received and entered at *Kadoe* 1183 logs of timber bearing the said mark, and disposed of the same." The plaint then states that the Defendant paid *Phatadah* Rs. 30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the Defendant.

The Defendant in his written statement denies having entered into either of the alleged agreements. He says that the "pin-byit" mark is his own, but registered by him in his son's name, and that the timber which came from the *Thoungyeen* forest was his own, purchased by him there out of his own moneys. He further says that "with regard to the timber marked Ko Lan (which is the Defendant's own registered hammer mark) Defendant begs to state that in the year 1238 *Phatadah*, who had for several years previously been working on his own account in the *Maipain* forests, came to him and asked him to assist him with some money to buy elephants, and to permit him to work in the *Mai Nget* forests. That in accordance with his request Defendant lent him Rs.17,555 on the understanding that he should work for Defendant in the *Mai Nget* forests on the following terms:—*Phatadah* was to cut and oung with his elephants as much timber as he could, and make it over to Defendant in the *Salween* river, at the rate of Rs.17 per log for full-sized logs, and Rs.5 for under-sized logs, Defendant paying the revenue due to the Chief of *Zimmay* on all timber so delivered. *Phatadah* was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the *Mai Nget* forests as long as he was indebted to the Defendant." The plea then states that in accordance with the above arrangement *Phatadah* worked in the Defendant's forests until his death, during which time he took several further advances from the Defendant; and that at the time of his death *Phatadah* was indebted to Defendant in the sum of Rs.40 234, which with further payments and interests amounted to a cross claim of Rs.55,360 against the estate of *Phatadah*.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through it in detail, and it will be enough to indicate some of its leading features. The Plaintiff, the widow, speaks of the original contract in these terms. After saying that her husband was a head man among the Karens, she says: "I know the Defendant; he came to my house at *May Too* village twelve years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the

*Ghet I. L. R. 13 Cal. 130.

Karens, if they make a solemn contract, for each party to drink the blood of the other. "The Defendant told the deceased to cut down timber and send it to *Moulmein*, and he, that is Defendant, would sell it. Defendant said, 'Friend, this is your mark' (exhibit A., a marked hammer, identified). Defendant produced this and gave it to *Phatadah*. My husband worked timber after Defendant went up for five years at *Thoungyeen*. He came down to *Tsin-yo*." Then she says, "After arrival at *Tsin-yo* I came with my husband to *Kaw Nhat*, where Defendant was residing, to ask for the price of the 6,000 logs of timber sent down from *Thoungyeen*." It is represented by this lady and several of the witnesses that *Phatadah* sent down as many as 6,000 logs of timber from *Thoungyeen*. Then she says:—"The Defendant said, 'Friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at *Mai Nget*. "My husband said he was getting old and could not do it. Defendant said, 'You are acquainted with the Karens, and if you work timber can be obtained.' *Phatadah* was to send down the timber; Defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the *Mai Nget* forests. He never got any money from Defendant," and so on. She also says in her evidence that *Phatadah* was to become security, with the other Karens, for the Defendant; and that that was the consideration on which the Defendant agreed to act for him. She says, subsequently, in respect of the second contract:—"The Defendant agreed to sell *Phatadah's* timber at the second agreement out of gratitude, as he had stood security for him." She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though somewhat vaguely, of the transaction, namely that *Phatadah* was to cut timber and send it down, and that the Defendant was to sell it for him in consideration of friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having gone security, whatever that expression may mean.

It may be observed here that, according to this lady's evidence, herself and a number of her witnesses were entertained by a person of the name of *Ma Bwin*, a rich lady, who seems to have maintained the suit, the Defendant suggests out of ill-will to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that in the event of her succeeding in establishing her case they were all to receive something.

The coolies also speak of *Phatadah* having, during five or six years, sent down as many as 1,000 logs a year; so that on the whole some 6,000 logs of timber were sent down, according to their account, from the *Thoungyeen* forest to *Kadoe*, to be sold for the Plaintiff by the Defendant. There is also some further evidence to the effect that *Phatadah* bought some logs of timber, about 500, and that he put, or caused to be put, his "pin-byit" marks upon some timber which he sent down; further that he demanded payment of Defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the Defendant is put in, by which it appears that although the circles remained, the crosses had been in a great measure intentionally defaced. That is in substance the case of the Plaintiff.

The Defendant denies the contracts. He admits that he received a large number of logs, amounting to 5,000 in round numbers, at *Kadoe*, some bearing the "pin-byit" mark, and others bearing the mark of the circles without the crosses, *i.e.*, the "pin" mark only, and he accounts for it in this way. He says that he made an agreement in 1870 or 1871 with one *Tsit Paw*, a Karen (who is dead), to buy of him 3,500 logs. and that he put this circle and cross mark upon all of those. He further says that upon the

conclusion of his transaction with *Tsit Paw* he bought a number of other logs, some 1,500, and afterwards some more, from *Ko Nan Gay*; and that in order to prevent confusion between his purchases from *Tsit Paw* and his purchases from *Ko Nan Gay*, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated. So that, according to his story, there ought to have arrived from *Tsit Paw* some 3,500 logs with the "pin-byit" mark and *Tsit Paw's* mark; and there ought to have arrived from *Ko Nan Gay*, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at *Kadoe* that 3,318 logs with the "pin-byit" mark and *Tsit Paw's* mark arrived in the course of two or three years, which certainly is confirmatory of the Defendant's story, as far as it goes, and 1607, or somewhere about that number, came with the plain pin mark, together with some other marks which, though *Ko Nan Gay* had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of Defendant's story. He goes on to say that with respect to the subsequent alleged agreement in 1876 the forest of *Mai Nget* was his own; and he puts in his lease. He insists that it is highly improbable that he should have given *Phatadah* his own timber and consented only to act as agent for him. He says that what he really did was to employ *Phatadah* to cut and oung timber for him in his own *Mai Nget* forest; and that he made him a considerable advance—some Rs.17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that with regard to the former alleged contract, having reference to the *Thoungyeen* forest, he said that he did employ *Phatadah* to oung 4,000 logs at eight annas a log; he further says with respect to the *Mai Nget* forest that he made subsequent advances and that he got promissory notes for them. He maintains that *Phatadah* was largely in his debt.

The first question is whether the Plaintiff has proved her case. In the first place we have to deal with a supposed contract made twelve years before the trial, entirely by word of mouth, and on which the evidence is that of the Plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. *Phatadah* was a Karen with some but not a large capital. Before this transaction he had confined his dealings to cutting and selling timber in the forests. It does not seem very probable that he should have entered upon transactions of the magnitude alleged whereby he sent down some 6,000 logs, the price of which would far exceed a lac of rupees. Again it seems improbable that the Defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with *Phatadah*, to make *Phatadah* the principal and himself the agent, and to agree to account to *Phatadah*. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the Plaintiff—the first as to the *Thoungyeen* forest, and the second as to the *Mai Nget* forest—are not sufficiently proved. They regard the account which the Defendant gives of the transactions the more probable; and they may further observe that the production by the Plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The Defendant states that he obliterated the crosses, and why he did so; the hammer is shewn, and the crosses appear to be obliterated so far that though traces of them remain, they would not be sufficient to impress the cross mark upon timber.

That would indicate that the hammer must have been in the possession of the Defendant for some time, and does not accord with the case of the Plaintiff that *Phatadah* continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the Defendant's account, and disagrees with that of the Plaintiff, who appears to have had no knowledge of the obliteration, and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of Appeal was right in holding that the Plaintiff had not proved her case.

With respect to the cross claim on the part of the Defendant, the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set-off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the Defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships, however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her Majesty in this case that the judgment of the special Court of *British Burmah* be affirmed, and that both appeals, the Plaintiff's appeal and the cross appeal be dismissed. The appeal will be dismissed with costs; and the cross-appeal without costs, save those which were incurred by *Nan Karay Phaw* in opposing the petition for special leave to enter a cross-appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the Defendant, certain elephants of *Phatadah* which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the Defendant for two years. The Defendant seeks to justify the detention of the elephants on the double ground, first of a contract with *Phatadah*, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Plaintiff: *Bramall & White.*

Solicitors for Defendants: *Sanderson & Holland.*

17th February, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Allahabad.

KUAR BALWANT SINGH (Plaintiff) ... ... } *Appellant,*

and

KUAR DOULUT SINGH (Defendant) ... } *Respondent.**

Civil Procedure Code, s. 549.

An appeal, although it may have been rejected by the appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.

The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion

* 13 Cowell's Ind Ap, 57; I. L. R. 8 Alla. 315.

and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.

Appeal by special leave from an order (29th November, 1882) of the High Court, refusing to restore to the file an appeal rejected (14th August, 1882) for default in furnishing security for costs demanded by its previous order (26th June, 1882).

Mr. *R. V. Doyne* and Mr. *W. A. Raikes*, for the Appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

This comes before their Lordships in rather a peculiar way, and there is some difficulty in saying what in substance is the proper course to be taken. It appears that the Appellant is seeking to recover property in the possession of the Respondent, and that being defeated before the Commissioner of *Jhansi*, he appealed to the High Court. The Respondent applied that the Appellant might give security for costs, and on the 3rd of June, 1882, the High Court made an order directing the Appellant to shew cause why the Respondent's petition should not be granted. That order to shew cause was not properly served upon the Appellant, and on the 26th of June the Appellant then, as it would seem, knowing nothing about the order, a further order was made by the High Court in these terms: "Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs.2,500 within six weeks from this date," viz, by the 8th of August. On the 5th of August the Appellant presented a petition shewing cause why he should not be ordered to give security, and on the 14th of August another order was made by the High Court. It is simply in these terms: "Security has not been filed within the time prescribed by the Court. The appeal is, therefore, of necessity struck off the file with costs." Whether the Court considered the merits of the cause then for the first time shewn by the Appellant, does not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th of September the Appellant presented a petition in which he stated the non-service of the original order to shew cause of the 3rd of June, and his ignorance of it until he got information in time to file his petition on the 5th of August; and he prayed for the restoration of the appeal. It would seem that, on that petition, an order was made dated the 13th of September, 1882; but their Lordships cannot tell certainly upon what proceedings that order was made, nor can they do more than guess at the terms of it, for by some omission which is entirely unexplained that order has not beeen transmitted to this country. The direction given by Her Majesty on the petition for leave to appeal was that the High Court should transmit the prior orders and also all subsequent orders relating to the refusal to restore the appeal, but for some reason or other this order has not been transmitted. The nature of it can only be gathered from a subsequent order which was made in this way. On the 27th of November, 1882, the Appellant again petitioned the High Court, and in that petition he states that "in obedience to the order of the Court, dated the 13th of September, 1882, the Petitioner submits herewith two security bonds for Rs.2,500, as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file." Therefore it would seem that by the order of the 13th of September the Court had held that the Appellant must give security, and had allowed time for the purpose. On the 27th of November he tenders the security, and asks that the proper order may be made for the restoration of the appeal. Upon that there comes an order of the 29th of November, which their Lordships have great difficulty in understanding. It is a very short one. It does not say on what petition or proceedings it was made except that it was on a petition of the Appellant.

It does not state who appeared upon it. The whole of the order is this: "The Petitioner's appeal was not dismissed under sects. 556 or 557 of the Civil Procedure Code. This petition, therefore, is not entertainable under sect. 558 of that Code, and it is inapplicable to an order made, as ours was made, under sect. 549 of the Code." It is extremely difficult to apply the terms of this order to the petition of the 27th of November, and it is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th of August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is, first, whether the Appellant should give security; and their Lordships assume that on the 13th of September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th of November, which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the Appellant may give security for the costs mentioned in the order of the 3rd of June, 1882, of such nature as shall be satisfactory to the High Court, and within such reasonable time as shall be fixed by that Court; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for the Appellant: Messrs. *Oehme* and *Summerhays*.

Solicitor for the Respondent: Mr. *T. L. Wilson*.

17th, 18th February, and 6th March, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Monkswell, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

DHARANI KANT LAHIRI CHOWDHRY (Plaintiff) ... } *Appellant*,

and

KRISTO KUMARI CHOWDHRANI and another (Defendants) ... } *Respondents.**

Benami transaction—Purchase in the name of Hindu wife.

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself, or for her husband, her name being used *benami* for him.

The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judicial Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami*, in his wife's name.

Appeal from a decree (6th February 1882) of the High Court (1), reversing a decree (9th April 1880) of the Subordinate Judge of *Mymensingh*.

Mr. *T. H. Cowie* Q. C., and Mr. *R. V. Doyne*, appeared for the Appellant.

Mr. *H. Cowell* for the Respondents.

6th March 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

At a sale on the 6th of September,

* 13 Cowell's Ind. Ap. 70; I. L. R. 13 Cal 181.

(1) I. L. R., 8 Calc., 545: *Chowdhrani v. Tarini Kant Lahiri Chowdhry.*

1871, in execution of a decree against one *Goluck Nath Chowdhry*, the original Appellant *Tarini Kant Lahiri Chowdhry*, who has died during this appeal, became the purchaser, for Rs.61,100, of whatever right, title, and interest *Goluck Nath* had in 12 gundahs out of a share of 1 anna 15 gundahs of the zemindari No. 144, of Pergunnah *Sherepore*, in the Zillah *Mymensingh*, and received the sale certificate of the Court, dated the 30th of November, 1871. It does not appear that he took any steps upon this purchase to obtain registration of his name, but upon *Srimati Chowdhrani*, the widow of *Goluck Nath* (he having died in the meantime), making an application, under the Bengal Act VII, of 1876, to the Deputy Collector of *Mymensingh* to have her name registered in respect of the three gundahs share of the 1 anna, 15 gundahs, he objected, on the ground that she had no share in the estate, and was not entitled to registration. The title of *Srimati* was said to be founded on a purchase by her, at a sale on the 9th of June, 1842, of the three gundahs share, part of 12 gundahs of which her husband *Goluck Nath* was then the proprietor, by the Collector of *Mymensingh*, in satisfaction of a claim of the Government against *Goluck Nath* as surety for one *Jugal Kishore Sen*, who was employed in the *Mymensingh* Collectorate. The Appellant contended that this purchase was a *benami* transaction, and that *Goluck Nath* was the real owner of the three gundahs when the sale to him was made. The Deputy Collector rightly refrained from deciding that question. He found that *Srimati*, subsequently to her purchase, obtained registration of her name as proprietress jointly with the other proprietors, but did not find the date of it more precisely. He found that the ijardar, who will be referred to afterwards, was in possession for her, and that her name was in the previous register of proprietors, and ordered her to be registered as proprietress of what he described as equivalent to the three gundahs share. This order was made on the 28th of February, 1878, and in consequence of it the present suit was instituted, on the 27th of February, 1879, by the Appellant against *Srimati* and her son *Hurro Coomar Chowdhry*. The plaint prayed that the Plaintiff's title to the three gundahs might be declared, and his name be directed to be registered in respect thereof. The written statement of *Srimati* stated that she made the purchase *bonâ fide*, and really for herself, with the money of her own fund and own *stridhan*.

Goluck Nath was the son of *Rama Nath*, one of five brothers, each of whom had a share of six gundahs in the estate. On the death of *Rama Nath*, *Goluck Nath* became entitled to his six gundahs. He afterwards inherited the six gundahs of one of his uncles, and, being thus entitled to twelve gundahs, became surety for *Jugal Kishore Sen*, and pledged one-fourth of his then share in the property. This fourth was the three gundahs sold on the 9th of June, 1842. Subsequently *Goluck Nath* inherited the share of another uncle, and he then sold a twelve-gundah share to one *Shib Dyal Tewari*, and, upon the same date, he and his wife *Srimati* executed, in favour of *Shib Dyal Tewari*, an ijara, or usufructuary mortgage, of a further six gundahs share for the period of twenty-six years. The date of this ijara is the 6th of December, 1859. Its not having expired when the suit was brought is the reason that the plaint prayed for a declaration of title only and not for possession. After this sale and mortgage *Goluck Nath* inherited the share of another uncle, and thus, at the time of the execution sale in September, 1871, there were twelve gundahs, of which *Goluck Nath* was clearly entitled to nine, and the remaining three are the subject of the present suit.

The certificate of the sale on the 9th of June, 1842, states that the property was purchased by *Doorga Pershad Roy*, the mokhtar of *Srimati Chowdhrani*, of *Girda*, in pergunnah *Sherepore*, for the sum of Rs.560; and that on payment of the earnest money a proceeding was passed by the *Dacca* Commissioner, on the 15th of July, 1842, sanctioning the sale,

and thereupon the said purchaser paid the whole amount of the purchase-money into the public treasury. The evidence for the Plaintiff was that *Doorga Pershad Roy*, who had died before the trial, was the servant of *Goluck Nath*, and served him as naib, and was said by *Hurro Coomar Chowdhry* not to have been his mother's servant before the sale, that the earnest money, about Rs.100 or Rs 125, was paid to *Doorga Pershad* by *Goluck Nath*, that *Goluck Nath* paid the purchase-money, and borrowed it from *Madari Lal Bajpai*, and gave a bond for it. *Madari Lal*, who was living, and was said to have a house in *Rae Bareli*, was not called. A witness also deposed that *Nobo Coomar Chowdhry*, a cousin of *Goluck Nath*, who was present at the sale and purchased other properties, told *Goluck Nath* to keep this property. There were several sureties whose property was sold at the same time. The evidence of *Srimati* herself, who was examined as a witness, was that *Doorga Pershad Roy* purchased for her, and she paid the purchase-money, that she gave him Rs.1,000 out of Rs.3,000 which she had from presents on the occasion of her marriage and money her mother-in-law left her. She said that she did not tell her husband anything about the auction sale, she did not tell him she would purchase the property, and he did not tell her anything about the purchase of that property. She was about twenty-three or twenty-four years of age when her mother-in-law died, which was about a year before. She was supported in this account of the transaction by two of her witnesses. The Subordinate Judge, a Hindu, who found that the purchase was a benami one said it was unlikely and incredible that she, a purdah-nashin lady in a Hindu family, and the wife of a respectable zemindar, should herself bring the money and give it to an officer, that there should have been one or two unconnected persons present, and that they witnessed that fact. The High Court, on the contrary, were of opinion that the story told by the Plaintiff's witnesses of the manner in which *Goluck Nath* supplied the money with which the purchase was made was "not in itself a very credible one," and they said that the impression which the evidence left upon their minds was that *Srimati* had funds of her own, and that with a portion of these funds this share in the property was purchased. In this conflict of opinions their Lordships are disposed to prefer that of the Subordinate Judge, who saw the witnesses, and would be better acquinted with the habits of Hindu ladies than the Judges of the High Court could be.

There is, however, an important fact which the High Court does not appear to have noticed. It has been seen that the sum paid for the three gundahs was Rs.560. *Srimati* in her deposition said that the income of the property purchased by her at the auction sale would be Rs.700 or Rs.800 a year, exclusive of the sudder rent. The Defendants put in evidence an attested copy of a bond, dated the 21st of February, 1855, by which *Srimati* mortgaged to *Shib Dyal Tewari* one gundah out of the three for a loan of Rs.4,500, stated to be taken by *Goluck Nath* and herself. This would give to the three gundahs at that time a mortgage value of Rs 13,500. It appears to their Lordships that this mortgage is also some evidence that *Goluck Nath* was the real owner.

On the 30th of March, 1855, *Shib Dyal Tewari* obtained a decree upon this bond against *Goluck Nath* and *Srimati* for Rs.4,936 for principal, interest, and costs. On the 12th of November, 1859, *Srimati* executed a mokhtarnama, in which it is stated that having received Rs 7,795, inclusive of costs and interest due to *Shib Dyal Tewari* on this decree, and Rs.26,205 in cash for payment of the debts of other creditors, she appointed her son, *Hurro Coomar Chowdhry*, mokhtar on her behalf for the purpose of granting a temporary ijara, together with her husband, to the said *Tewari*, of her three gundahs, and three out of the six obtained by her husband by right of inheritance from his uncle, *Gopinath Chowdhry*, at an annual rental of Rs.1,760 14*a*. This

shews a value of the three gundahs slightly in excess of that before given. The ijara was executed accordingly, and is dated the 16th of December, 1859, there being to it a schedule of nankar lands which were excluded from it. There is no evidence what the debts of other creditors were, whether of *Goluck Nath* or of *Srimati*. Their Lordships think it is improbable that if *Srimati* had become the owner of the three gundahs as her *stridhan*, and had incurred debts which had to be paid by borrowing money, she would not have made a separate mortgage of her three gundahs. If she were not a benamidar the transaction is a singular one, if she were it is explicable. It seems more probable that the debts were *Goluck Nath's*, and *Srimati* joined in the mortgage because she was the apparent owner. The difference between the price paid for the three gundahs in 1842 and the value is very significant. There is no evidence of what happened at the sale, what biddings there were, or how the property came to be sold for so small a sum. It appears to their Lordships incredible that *Goluck Nath* allowed this, which was a fourth of the ancestral property he then had, to be purchased by his wife on her own account, and to become her *stridhan*, with the incidents belonging to such property.

As to the evidence of possession, the registry of *Srimati's* name, whenever it took place, is of no value, as it would follow the sale certificate; and rent suits would be properly brought in her name jointly with *Goluck Nath*, as was done in the suit the decree in which is in the record. The witnesses to possession cannot be relied upon. The Subordinate Judge said that the evidence of some of the Defendants' witnesses with regard to this was clearly tutored and false, and the High Court say they think there is as good evidence on one side as on the other.

It was argued for the Respondents that the Appellant claimed to be registered for the first time in February, 1878, and that he might have taken proceedings with regard to the nankar lands before then. It does not appear that he could have been registered separately for those lands. The point was not taken in the Lower Courts, where an explanation of his not doing so might have been given. As to the six gundahs included in the ijara, it is clear, from the judgment of the Deputy Collector before noticed, that a claim to be registered in respect of those would have been unsuccessful. In fact, the Appellant did not, in February, 1878, claim to be registered. He only objected that *Srimati* was not entitled to registration. She admitted in her evidence that he was in possession of the other six gundahs, but whether his name had been registered in respect of them did not appear.

Their Lordships have not been unmindful that this is an inquiry into nature of a transaction which took place so far back as 1842, but until the Appellant's purchase no occasion had arisen for the inquiry. There was not any opposition of interests between *Goluck Nath* and his wife, and the Appellant brought his suit without substantial delay after he found his title challenged. Moreover, though some evidence has been lost which might have been material, there still exists one of the co-sureties, and, what is more important, *Srimati* herself is living, who, if her story be true, was the leading actor in the acquisition of the property by herself.

Their Lordships have to decide between the conflicting decisions of the Lower Courts on a question of fact. They think the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. They will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to decree that the appeal to that Court be dismissed with costs. The Respondents will pay the costs of this appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Respondents: *Watkins & Lattey.*

17th, 18th, and 30th, March, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

JUDOO LALL MULLICK (Defendant) ... } *Appellant,*

and

GOPAUL CHUNDER MUKERJEE and another (Plaintiffs) ... } *Respondents.**

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of 1876).

As establishing his right of way over the Defendant's passage, the Plaintiff relied upon a user of it, several times in the year, for twenty years prior to the Defendant's interruption of it, by mehters for the purpose of removing the contents of a cess pool connected with a privy belonging to the Plaintiffs' house.

The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the Plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so.

In and after 1876, instead of the Plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the Plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily.

Held, that the above was neither a discontinuance by the Plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the Plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times.

Appeal from a decree (27th January 1883) of the High Court (1) reversing a decree (14th March 1882) made in its Ordinary Original Jurisdiction.

Mr. *R. V. Doyne* and Mr. *A. Phillips* appeared for the Appellant.

Mr. *J. Rigby* Q. C., and Mr. *J. D. Mayne* for the Respondents.

30th March, 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

The Plaintiffs below, who are the Respondents here, and the Defendant, who is the Appellant, occupy contiguous houses and premises in *Calcutta*, with a southern frontage in *Pathooria Ghattah Street*. The Plaintiffs' house lies to the eastward of the Defendant's. Adjoining the north side of the Defendant's premises lies a piece of ground, also belonging to him, and fronting northwards to a street called apparently by various names, of which *Jorabagan* is one. At a point between the two streets the Defendant's property juts out a few feet to the eastward, and to that extent overlaps the property of the Plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties; that an open drain used to run along the eastward boundary of the Defendant's property from the point where it juts eastward into *Jorabagan*; that at the same point there communicated with this drain one of the drains of the Plaintiffs' house leading directly from one of their privies; that at the point of communication there was a doorway in the Plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The Plaintiffs brought evidence to shew further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the Plaintiffs or their predecessors entered the drain at *Jorabagan* and made their way up it to the doorway; that the door-

* 13 Cowell's Ind. Ap. 77; I. L. R. 13 Cal. 136

(1) I. L. R., 9 Calc., 779.

way was furnished with a door which was kept locked, but was opened by the Plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the Plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the Defendant's drain into *Jorabagan*. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than twenty years prior to the Defendant's interruption of it, which was in December, 1880. The suit was instituted in June, 1881.

Against this evidence the Defendant has produced nothing at all except that he never saw the Plaintiffs' scavengers at work, and that he and Mr. *Edwards*, a surveyor, say that it was impossible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the Defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the Defendant appears to have relied mainly upon imperfections in the Plaintiffs' evidence. Mr. Justice *Wilson* who presided in the Original Court, thought that the Plaintiffs had failed to shew user for twenty years. But it is observable that he says there is only one witness, viz., *Turrabullub Chatterjee*, who professes to carry his memory back to twenty years at all. He does not notice *Dwarka Nath Bonnerjee*, who had known the privy and drain for upwards of twenty-five years, and who speaks of the action of the Plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the Plaintiffs' story by the construction of their walls and of their doorway, both of which date more than twenty years before the interruption.

Mr. Justice *Wilson* dismissed the suit. On appeal the High Court took a different view, and gave the Plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the Appellate Court has taken of the evidence, and think that the user on which the Plaintiffs rely is sufficient unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of *Bengal* passed an Act for the more efficient municipal government of *Calcutta*. Under the powers conferred by that Act that town commissioners made bye-laws to regulate the removal of refuse. It is not to be discharged in any other way than as the commissioners direct. The servants of the municipality are to cleanse daily the privies of every house on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated, and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than twenty-four hours. Under these regulations the open drain bordering the Defendant's land was, as before stated, filled up, and the surface has been used by the scavengers of the municipality ever since to gain access to the privy of the Plaintiffs for the purpose of removing the refuse. This they do daily.

Mr. *Doyne* has argued for the Defendant that the change of system thus brought about operates as a breach of the user by the Plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency the user is much more active than before. The purpose is still the purpose of cleansing the privy. The mode of access from *Jorabagan* to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the Plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the Plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the Defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the Defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to 1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the Plaintiffs have acquired over the Defendant's land? There is no agreement specifying times or occasions of access. The Defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants of the Plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the municipality, the Plaintiffs had chosen to cleanse out their privy every morning, they might have used the passage at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that in their Lordships' opinion the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The Appellant must pay the costs.

Solicitors for the Appellant: *Sanderson & Holland.*

Solicitors for the Respondents: *Wrentmore & Swinhoe.*

19th, 23rd, 24th, 25th and 26th March; and 9th April, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

JAGADAMBA CHOWDHRANI and others (Defendants) ... } *Appellants,*

and

RAKHINA MOHUN ROY and others (Plaintiffs) } *Respondents.*

FOUR APPEALS CONSOLIDATED.

Limitation Act (IX of 1871), Sch. II, Art. 129,—Meaning of "suit to set aside adoption."

Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession.

The Plaintiffs, as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognized in formal instruments, proceedings, and decrees to which the Plaintiffs were parties. *Held,*

* 13 Cowell's Ind. Ap. 84; I. L. R. 13 Cal. 368.

on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the Plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under Art 129 of Sch. II of Act IX of 1871

Part of the language of the judgment in *Rajah Bahadur Singh* v. *Achumbit Lall* (1) referred to, and that case, in which the Plaintiffs' claim was not affected by the widow's adoption, distinguished from the present.

Consolidated appeals from two decrees (25th March 1882) of the High Court, reversing two decrees (5th October 1877) of the Subordinate Judge of *Rangpur*.

Mr. *R. V. Doyne*, and *J. D. Mayne*, for the Appellants.

Mr. *T. H. Cowie*, Q.C., and *H. Cowell*, for the Respondents.

9th April 1886.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

Their Lordships have upon consideration found themselves able to dispose of these appeals upon one of the questions which were argued at the Bar very fully, and with great learning and ability, with reference to the law of limitation. And though the cases, which embrace many complicated issues, are very voluminous, the facts material for this decision are few and simple.

Hurro Mohun died childless in April, 1846, leaving two widows. That he had given them permission to adopt sons is clear; but in what order of priority the permission was given is one of the many points in dispute. What happened was that each of the widows adopted a son who died, and afterwards each of them adopted another. Of course both adoptions could not be valid, though both might be invalid, as the Plaintiffs contend they were. But during the minority of the adopted sons both were treated as adopted, and after they attained age they agreed to raise no question as between themselves, but to enjoy *Hurro Mohun's* property in equal shares. If therefore either of the adoptions was valid, both of the adopted sons were safe in their possession

The Plaintiffs in the suits are the persons who, failing adoption, were the heirs of *Hurro Mohun* at the death of his surviving widow. One suit was instituted by one heir in April, 1873, the other by the other heir in August, 1874. The Defendant *Saroda* was adopted in December, 1853, the Defendant *Jagadamba* is the widow of *Durga*, who was adopted in August, 1856. The surviving widow, *Radha Sundari* by name, died in July, 1868. It thus appears that the earliest suit was brought 18 years after the latest adoption, and the latest suit a little less than six years after the death of the surviving widow.

The *Limitation Act* in force when these suits were commenced is Act IX, of 1871, and it is on the construction of that Act that the question depends. The suits may possibly be considered as falling under one of three articles. They may be considered as suits to set aside an adoption (Art. 129), or as suits for possession of immoveable property by Hindus entitled to possession on the death of a Hindu widow (Art. 142), or as suits for possession of immoveable property not otherwise specially provided for in the Act (Art. 145).

The Subordinate Judge of *Rangpur* who heard the suits in the first instance, dismissed them with costs. He decided for the Defendands, not only on the ground that one of the adoptions was valid, but also on the ground of limitation. His opinion is found in the Record thus expressed, probably with some inaccuracy in the transcription:—

"The Plaintiffs, although they have only sued for possession of the property as heirs-at-law of their deceased uncle *Hurro Mohun Chowdhry*, but as a fact apparent in itself they cannot likely succeed unless and until the adoptions of *Saroda Mohun* and *Durga Mohun* be set aside, making the way plain and smooth for the Plaintiffs to enter into possession as heirs of *Hurro Mohun Chowdhry*. The

(1) L. R., 6 Ind. App., 210; *Ante* p. 15.

formation of the plaints can render no advantage to the Plaintiffs. Whatever terms they might have used in framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions."

That is a clear statement of reasons for thinking that the suits fall under Art. 129, and are therefore each barred by the lapse of 12 years from the date of the adoption which it seeks to set aside.

The High Court reversed the decision of the Subordinate Judge, and gave the Plaintiffs the decree they asked for. On the issue of limitation they say :—

As regards the plea that the "suits are barred by limitation, we would merely remark that the general rule in all cases of this description brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow is that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow."

They do not appear to have addressed themselves to the question whether or no Art. 129 governs the case.

The Plaintiffs' Counsel here contended that the case falls under Art. 142, or if not, that it is not specifically provided for and so falls within Art. 145, and that in either case time runs against them only from the death of *Radha Sundari*. The endeavour to apply those Articles raises several difficult questions of fact and law, but it is not necessary to pronounce any opinion on them if Art. 129 applies to the suits and raises a bar which in each suit is 12 years after the adoption.

It is ingeniously argued for the Plaintiffs that they are suing, not to set aside any adoption, but to recover possession on their *primâ facie* title as heirs, that it is the Defendants who have to allege and prove adoption, and that, on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the Defendants are in possession in the character of adopted sons; the *primâ facie* title is with them, and until that is displaced they ought to retain their possession. It may not make any difference in law, but it does so happen in this case that the Plaintiffs have recognized the adoptees as such for many years in formal instruments and proceedings, and even that parts of the property now sued for have been recovered from the Plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority. Indeed in one of the present suits the Plaintiff tells the story of the adoptions, and directly impeaches their validity. In the other the plaint is silent on that point. But whatever the mode of pleading, there is but one issue on the merits of the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the Defendants hold their property. If the validity is proved, the Plaintiffs cannot succeed in their claim. Now Art. 129 of the *Limitation Act* provides that for a suit to establish or set aside an adoption the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. And each of the Defendants contends that the true construction of these words is that the validity of his adoption shall not be challenged after 12 years from the later of the two dates assigned as the starting points of time, which in this case is the date of the adoption.

It must be confessed that the words of the Article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all. Very early in the argument their Lordships asked to be informed what is meant by setting aside an adoption. The only answer is in the language of the reports, from which it would seem

that the phrase "suit to set aside an adoption" is a short and familiar way of describing a class of suits well known to practitioners and spoken of in those terms with accuracy enough for all ordinary purposes. In the earliest case cited at the Bar from the S. D. A. Reports for 1850 (1) it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption. Mr. Justice *Colvin* says, "The plain remedy for the Plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement" of continued possession of the adopting widow. In the case cited from the S. D. A. Reports for 1856 (2) the suit was for possession of the property; but the reporter styles it "suit to set aside adoption." In the case cited from the 4th *Bengal* Law Reports (3) the reporter calls the suit one to recover possession and to set aside the adoption. Mr. *Justice Kemp* calls it a suit to set aside an adoption. Chief Justice *Peacock* corrects the expression, saying: "Although the suit is said to be a suit to recover possession by setting aside the illegal adoption, the suit is, in fact, a suit by the reversionary heir to recover possession notwithstanding that adoption." In the case cited from 15th *Bengal* Law Reports (4) where the adopting widow was still living, the suit is called one to set aside an adoption. In his judgment Mr. *Justice Jackson* refers to the case in the 4th *Bengal* Law Reports as one in which a Full Bench determined "that the cause of action in a suit for setting aside the adoption accrues after the death of the widow."

It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the *Limitation Act* of 1877, which superseded the Act now under discussion, the language is changed. Art. 128 of the Act of 1877, which corresponds to Art. 129 of the Act of 1871, so far as regards setting aside adoptions, speaks of a suit "to obtained a declaration that an alleged adoption is invalid or never in fact took place," and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression "suit to set aside an adoption" to be one of a loose kind, and that more precision was desirable.

If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The Plaintiffs' counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within 12 years from the adoption, while yet the very same issue is left open for 12 years after the death of the adopting widow, it may be 50 years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute,

(1) *Bhyrub Chunder Chowdhry*, S. D. A. 1850, p. 369.
(2) *Gobind Kishore Roy*, S. D. A. 1856, p 450
(3) *Srinath Gangopadhya*, 4 B. L. R., F. B., 3.
(4) *Mrinmoyee Dabea*, 15 B. L. R., p. 1.

so that it shall strike alike at all suits in which the Plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the Defendant is in possession.

Considerable stress has been laid upon a passage in the judgment which this Board delivered in the case of *Raj Bahadur Singh* v. *Achumbit Lal* (1) and which is said to be decisive of the present point. The passage is as follows :—

"Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a Plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit."

Detached from its context and from the facts of the case, that would seem to be a strong authority in favour of the Plaintiffs in the present case. But when read with what goes before, it has no such effect. The suit in question was brought by the heir of *Doorga Pershad* to recover possession of his estate after his widow's death. The real contest was whether he had given an absolute interest to his widow which she could transmit to the Defendant. But she had executed an instrument called a deed of adoption, which their Lordships describe thus :—"This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. . . . On the above view of the document the words of the statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear therefore that in that case the Plaintiff was not embarrassed by the widow's adoption of the Defendant. He could recover the estate of *Doorga Pershad* without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The Respondents, who are in the interest of the original Plaintiffs, must pay the costs of these appeals.

Solicitors for the Appellants : *Barrow & Rodgers.*

Solicitors for the Respondents : *Watkins & Lattey.*

31st March, 1886.

PRESENT :

Members of the *Judicial Committee* :— The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Halsbury, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Bombay.

HARI RAVJI CHIPLUNKAR (Plaintiff) ... } *Appellant,*

and

SHAPURJI HORMUSJI and others (Defendants) ... ... } *Respondents.**

Mortgagor and Mortgagee—Suit to redeem barred—Former Suit by Mortgagees—Act XXIII. of 1861, s. 11.

Where in 1877 a mortgagor sued to redeem lands which had been included in a mortgage executed in 1806, but based his claim on a decree obtained by the mortgagees in 1825, under which an account had been taken of what was due under

* Law Rep. 6 Ind. App. 110 ; *Ante* p. 15.

* 13 Cowell's Ind. Ap. 66; I. L. R. 10 Bom. 461.

the mortgage, no date being fixed for redemption :—

Held, that redemption could only under Act XXIII. of 1861, s. 11, be effected under the said decree, and was barred, and that a fresh suit for the same purpose could not be brought. The Plaintiff could not fall back, contrary to his plaint, on the mortgage of 1806; nor could he contend that limitation ran from the acknowledgment thereof, no issue to that effect having been raised.

Appeal from a decree of the High Court (August 2, 1882) affirming a decree of the Subordinate Judge of *Poona* (April 15, 1880), whereby the Appellant's suit to redeem from mortgage one and a half rukas of Maharki land in village *Mairjion* was dismissed.

Mr. *Scoble*, Q. C., and *C. W. Arathoon*, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR, RICHARD COUCH :—

This is an appeal from a decision of the High Court of *Bombay* confirming a decree of the Subordinate Judge, who held that the suit was barred by the operation of sect. 11 of Act XXIII. of 1861.

The suit was in form to redeem a mortgage, and the facts out of which it arose were that on the 25th of May, 1806, two persons, named *Narsoji* and *Nagoji*, mortgaged to two others, named *Bhavanji* and *Zanoji*, a quantity of land described as three rukas, each ruka containing about six acres, to secure an advance then made to the former. In fact *Narsoji* and *Nagoji* were themselves the mortgagees of the land from persons described in the proceedings as the Mahars; but that is not material now, because their title under the Mahars does not come into question, and for the purposes of this suit they may be treated as the owners of the land. A further advance was made in 1807 to *Narsoji* of Rs 500, the result being that the mortgage by *Narsoji* for the debt due by him exceeded the amount of the mortgage for which *Nagoji's* share was liable. In November, 1823, a suit was brought by *Bhavanji* and *Zanoji* against the heirs of the mortgagors, and a decree was made in that suit which it is necessary to notice particularly. The decree, which is dated the 8th of September, 1825, set out the mortgage of 1806, and the accounts which had been taken, the suit being brought to enforce the mortgage, and ordered the Defendants to pay in all Rs.2,396 4*a*. 9*p*. to the Plaintiffs—treating the mortgage as a joint mortgage, and the whole sum as being due by both mortgagors—by the date fixed, and they were to redeem their Maharki field which they had mortgaged to the Plaintiffs. Then it says:—"Until the Defendants clear off the money the Plaintiffs should use and enjoy the field according to [the terms of] the agreement. On the day on which the Defendants will pay the money, the Plaintiffs should compute the interest on rupees, two thousand three hundred and ninety-six and a quarter, at the rate of one per cent. [per mensem] from the date [that will be] fixed; should deduct therefrom the amount of produce from the fixed date onwards; should receive the remaining amount, together with the interest, and should restore the field to the Defendants." Although this decree speaks about a date which will be fixed, no date was fixed by it, and the operation of the decree appears to have been that an account having been taken of what was due on the mortgage, the mortgagors might at any time make a tender of the amount due, with the interest up to that time, and require that the land should be restored to them.

Some time in 1837—the precise date is not very material—an application was made for the execution of this decree, and it resulted in *Yashwantrav*, the son and heir of *Narsoji*, one of the mortgagors, paying his share of the money due on the mortgage, whereupon, so far as regards the one-half of the land mortgaged in 1806 that belonged to *Narsoji*, the mortgage became redeemed; and the question in this suit relates to the other half, namely, that which was the property of *Nagoji*. Some other proceedings took place, the result being that the

present Plaintiff represents the interest of the original mortgagors, and would be, if the suit were not barred by the operation of law, entitled to redeem the property, and the Defendants may be taken to represent the mortgagees.

The plaint in the present suit, which was filed on the 13th of September, 1877, begins by stating that the claim is a claim for redeeming from mortgage the under-mentioned land. It states the mortgage of 1806, and then sets out the proceedings in the suit in 1823, and the decree which was made in 1825, and after that it says:—"The cause of action accrued when in the decree mentioned above in the third paragraph the previous transaction 'merged,' [and] an order was made 'on the new basis' as to the way in which the mortgagees should carry on the management, &c.; that is to say, [it accrued] on the 8th of September, 1825." Then it proceeds to state that there were certain acknowledgments in writing of the mortgage made by the mortgagee.

The suit as framed, then, apparently treats this decree as in the nature of a fresh mortgage, and as regulating the rights of the parties from that time; and the reason for this appears to be that the law of limitation gave sixty years for a suit for redemption of a mortgage from the date of the mortgage, and this suit was brought in 1877, not many years short of the sixty years.

When the suit came before the Subordinate Judge, he gave a very long judgment, going into all the facts of the case, the result being that he was of opinion that the decree in 1825 must be regarded as a decree, and not as a mortgage, and that under the Act XXIII. of 1861, sect. 11, which provides that questions arising between the parties to the suit and relating to the execution of the decree must be determined by order of the Court executing the decree, and not by a separate suit, the parties ought, if they wished to redeem the property, to have applied to the Court to execute the decree by putting them into possession of the property after paying the money due on the mortgage; and inasmuch as the time limited by law for the execution of the decree had long since elapsed, and had indeed elapsed at the time when the Plaintiff had become the purchaser of the equity of redemption in right of which he brought the suit, there was no cause of action existing and the suit was barred.

The High Court took the same view of the matter, and held that the suit was barred by the Act XXIII. of 1861, and therefore the Plaintiff could not sue to redeem in the manner in which he claimed. Their Lordships are of opinion that this view, which was taken by the lower Courts, is the right one; and that the right of the mortgagors must be treated in this suit as a right to execute the decree, and not a right to sue as for the redemption of a mortgage.

It was contended by the learned counsel for the Appellant that he could fall back upon the right to redeem the mortgage of 1806, the law of limitation, by Act XIV. of 1859, providing that there should be sixty years for a suit to redeem from the time of the mortgage, or from the date of an acknowledgment made in writing signed by the mortgagee, or some person claiming under him. The difficulty in the way of the Appellant availing himself of that is, that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806, or allege that there had been an acknowledgment of that mortgage. If he had, the question whether there had been such an acknowledgment made would have been inquired into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of *Madras*, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts, and on which the case has been tried and decided.

Their Lordships will therefore humbly

advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

Solicitor for Appellant: *T. L. Wilson.*

31st March; 1st, 2nd and 6th April, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Blackburn, the Right Hon'ble Lord Halsbury, the Right Hon'ble Lord Hobhouse, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GAN KIM SWEE and others (Defendants) } *Appellants,*

and

RALLI and others (Plaintiffs) ... } *Respondents.**

Contract, Breach of—Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.

Under five contracts for the sale of good *Burma* cutch, to be delivered to a *Calcutta* firm, in *Calcutta*, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers.

The latter having sent advices of this purchase to a *New York* firm, with which they were in partnership, parcels of cutch were sold to different buyers in *America*, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the *Calcutta* firm.

On the arrival of the cutch, objection was taken to its quality by the *American* buyers, who refused to take delivery. The *Calcutta* firm, thereupon, sued the vendors under the five contracts above mentioned.

The burden of proof being upon the Plaintiffs, who had accepted the cutch after full examination in *Calcutta*, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held* that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the Plaintiffs, on the voyage from *India* to *America*, and at the port of arrival.

Appeal from a decree (13th September 1883) of a Divisional Bench of the High Court.

Mr. *A. Cohen*, Q. C., Mr. *A. Charles*, Q. C., and Mr. *J. H. A. Branson* appeared for the Appellants.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne* for the Respondents.

6th April, 1886.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HALSBURY:—

Their Lordships will not trouble you to reply, Mr. *Cohen*.

This is an appeal from the High Court at *Fort William* in *Bengal*, where judgment was given for the Respondents, the Plaintiffs below, with damages for the breach of warranties contained in five several contracts for the sale of cutch to the Respondents.

The course of the evidence in this case renders it unnecessary to draw any distinction between the first and the four later contracts. It is not denied that in all five contracts the obligation was to deliver good cutch, and the real dispute in this case is whether good cutch was delivered. Had the evidence raised any distinction between cutch of a peculiar manufacture or quality, as indicated by a recognised mark, it might have been necessary to consider more minutely the effect of the warranties contained in the four later contracts; but the contest between the parties has been conducted on much broader grounds. The 11,000 bags, the subject of the five contracts, were delivered in *Calcutta* between the 5th of April, 1879, and the 26th of April, 1880. In the course of the deliveries extending over this period an examination to determine whether it should be accepted as according to contract or not took place. Some was rejected, other cutch substituted, and extra allowance made for weight. This was done in the presence of one or other of the brokers and of the person

* 13 Cowell's Ind. Ap. 60; I. L. R. 13 Cal. 237.

selected by the purchasers, who made the examination and conducted the examination in the manner in which, at that time, cutch was generally examined. The correspondence between the Respondents and their *New York* agency at pages 184, *k.*, *l.*, and *m.* discloses the fact that upon some telegrams and letters which are not before us, the Respondents explained to their agency why they had accepted some which, in their judgment, might not exactly have come up to the contract quality. At page 184 *k*, they say, "We had to reject several lots, receiving only what would pass as prime. We had to complain also in some instances about heavy tare, and we only received such lots with full allowance of weight." Then at page 184 *l*, in a letter dated June 22, 1880, they say, "As you are aware, we were all along receiving our cutch on advancing markets, and although we were very careful in receiving, in many instances we were compelled to accept deliveries which we would have rejected if our market was quiet, and we were not pressed by freight engagements." Then at the bottom of the page they say, "We may here add, that owing to the strong demonstrations and the rejections made by our competitors and ourselves, the quality and the packing of the supplies since February had improved, and we hope that on arrival you will find an improvement in our shipments." Then at page 184 *m*, line 9: "We are sorry of not having been aware of the objectionable form of your contracts for cutch, which do not admit of any allowances in case of inferiority of quality, as otherwise we would have certainly been much more particular in restricting our business to the very best marks. Being ignorant of this, and seeing our competitors (who had far better experience than ourselves in this article) buy the EO mark, we thought that by being careful in the delivery, and receiving full allowances for any inferiority in the quality or extra tare, we could protect ourselves and take our share in this business. On several occasions we have rejected lots for inferiority of quality or false packing (when we were not pressed for shipment), and the same lots have been accepted and shipped by our competitors, and this was an argument of our seller for our being very particular in our deliveries." Then at the bottom of the page they say again, in a letter dated the 30th of July: "After the great disappointments we have had (which, however, have been partly caused by the fact that we were never aware of the clause in your contracts allowing the buyer to reject out-and-out any inferior quality) we shall of course be more careful in our deliveries and ship only really good quality."

It is to be observed that that correspondence, which obviously arises from some telegram not before us, had taken place between the parties before the end of April, 1880, and indeed the selected specimen on which so much turns, and which will have hereafter to be dealt with, was taken before the end of April, 1880, and throughout the course of delivery in *New York*, occupying from the 13th of April until the 21st of October, no complaint whatever is made of either quality or packing until the letter of the 4th of November. Mr. *Cowie* very fairly admitted that although that letter of the 4th of November refers to some communication by these persons, it refers to some verbal communication on or about that time, and the letter itself, when looked at, does not refer to inferiority of quality at all, but refers, apparently, to the question of false packing.

It probably is not necessary, upon this state of facts, and seeing what the course of delivery has been, to put any construction on the *Indian Contract Act*, since treating it as a matter simply of fact and inference, it is impossible not to see that the evidence of the searching examination at *Calcutta*, and the period which is allowed to elapse from the time, and during the course, of delivery, extending over the period referred to, renders it at all events incumbent, by very cogent evidence on the part of the Respondents, to rebut the inference which justly would be drawn from the acceptance in *Calcutta* after such searching examination that the

goods delivered were according to contract.

Their Lordships are of opinion that the Judges of the High Court were right in rejecting the claim in respect of false packing. If the evidence of the condition of the cutch as received in *New York* was accurate, it is absolutely impossible to suppose that it could have escaped the examination at *Calcutta*. To take the one specimen which has been more than once referred to of a fraudulently packed bag—there is no other phrase that will adequately describe it—in which there were two or three inches of cutch outside and the interior filled with dirt and rubbish, and which has been referred to once or twice as a piece of evidence that it is impossible to reconcile with a really honest examination at *Calcutta*, it is worthy of remark that although a considerable quantity—and, as Mr. *Doyne* has pointed out in his argument, a very considerable number—of bags were rejected at *Calcutta*. it is not suggested in any part of the evidence that anything of that sort was discovered during the examination. It would almost have followed as a matter of course, that if any such fraudulent trick as that had been discovered, the examination would have been much more stringent even than it was. But the Respondents took delivery after examination, and if they had sought to shew that the article as delivered in *New York* was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence(for the burden was clearly on them) of its treatment in *Calcutta* after delivery to them, its loading on board, the conditions of the voyage, and, further, have shewn that no changes of heat, moisture, or pressure by superincumbent weight, could have affected the article during the voyage until its delivery in *New York*. It is obvious that the Respondents have offered no evidence on any one of these questions, and it appears to their Lordships they have entirely failed to satisfy the burden which was upon them. But while their Lordships entirely agree with the Judges of the High Court in rejecting the claim as to false packing, they are unable to follow the learned Judges in their conclusion as to the inferior quality of the cutch. The judgment apparently depends upon the proposition that the cutch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the cutch was incapable of being discovered in *Calcutta* upon the examination on account of the semi-liquid state of the cutch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the cutch at *Calcutta* had prevented examination, and upon its arrival at *New York* it disclosed that, as originally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the proposition. Their Lordships fail to discover any evidence that the examination at *Calcutta* was prevented or even affected by the liquid condition of the cutch, and there is absolutely no evidence of the cutch being so manufactured that it contained an undue quantity of earthy or sandy matter. The learned Judges appear to have acted upon their own view of what was described by the sample marked "T 3," and they have regarded this sample, the size of which does not distinctly appear, but which appears to have been taken at the latter end of April, 1880, as having sufficiently informed their minds of what was the quality of the 11,000 bags of cutch. Their Lordships are wholly unable to acquiesce in the inference drawn, and therefore will humbly advise Her Majesty that the judgment of the High Court should be reversed, and the suit be decreed to be dismissed with costs, and the Respondents will pay the costs of this appeal.

Solicitors for the Appellants: *Watkins & Lattey.*

Solicitors for Respondents: *Sanderson & Holland.*

4th June, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Madras.

SRI RAJAH RAO VENKATA MAHAPATI SURYA RAO BAHADUR (Plaintiff) ... } *Appellant,*

and

THE HON. SRI RAJAH RAO VENKATA MAHAPATI GANGADHARA RAMA RAO BAHADUR and another (Defendants) ... ... } *Respondents.**

Mitakshara Law—Agreement of Joint Owners not to alienate—Rights of Son.

Where two Hindu Mitakshara brothers entered into an agreement that "in case of failure of 'aurasa' (self-begotten) male issue" of one, their joint immoveable property should go to the other, and should not be alienated by making adoption and the like; and it appeared that one of them had a son living at the date of the agreement:—

Held, that, whether or not this agreement bound the brothers, it could not bind the son or prevent that son's adoption from conferring title by inheritance.

Appeal from a decree of the High Court (Sept. 19, 1882), affirming a decree of the District Court of *Godavari* (Aug. 23, 1880) which dismissed the suit. The suit was brought by the Appellant to be declared the next heir of the first Respondent to the zemindary of *Pittaparam* in the district of *Godavari*, and that the adoption by the first Respondent of the second Respondent was illegal and invalid, and without any effect against the right of the Appellant to succeed to the zemindary.

Mayne, and *Johnstone*, for the Appellant.

Leith, Q. C., and *Doyne*, for the second Respondent, were not called upon.

* 13 Cowell's Ind. Ap. 97.

The judgment of their Lordships was deliverd by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This case has been very ably argued by the learned counsel for the Appellant. He very properly did not contend that the custom not to adopt had been proved. That is a question of fact which was decided concurrently by both Courts below, and could not properly be raised now before this Committee.

The case having now been thoroughly sifted, it appears that the only point to be decided is, what was the legal effect of the agreement of the 26th of April, 1845, between *Surya Rao* and his brother *Kumara*. At that time *Gangadhara*, the son of *Surya*, was living. The estate was governed by the Mitakshara law. It is clear that *Surya*, the father, could not by the agreement of 1845 so bind the estate that an adopted son of his son *Gangadhara* should not take by descent. The agreement is contained in the 10th article, by which the two brothers stipulated as follows:—"As to the immoveable property belonging to us both, the said immoveable property shall, in case of the failure of aurasa (self-begotten) male issue in either of these two lines, *i.e.* either for yourself or in your line of aurasa sons or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." It is unnecessary for their Lordships to determine whether what agreement was or was not binding between the parties who made it. It is clear that the father of *Gangadhara* could not bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt, the son so adopted should not inherit. The words are:—"in case of the failure of self-begotten male issue." Mr. *Mayne* was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent, and

contrary to the principle laid down in the *Tagore Case* (1).

Their Lordships are therefore of opinion that the decision of the High Court was right, and that the agreement of 184[illegible] did not operate to prevent the adopted son of *Gangadhara* from succeeding to this property. It has been very properly admitted by the learned counsel for the Appellant that the similar agreement which was made by *Gangadhara* is not one of which the present Plaintiff, who was no party to it, could take advantage.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court, and dismiss this appeal. The Appellant must pay the costs of the appeal.

Solicitor for Appellant: *T. L. Wilson.*

Solicitors for Second Respondent: *Frank Richardson & Sadler.*

8th, 9th, and 25th June, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court for the North-Western Provinces.

GENDA PURI and another (Plaintiffs) ... } *Appellants,*

and

CHHATAR PURI (Defendant) ... ... } *Respondent.**

Succession of Mohunts—Custom.

With regard to the succession of mohunts, the only law to be observed is to be found in custom and practice, which must be proved.

Where the Plaintiff failed to prove that the deceased mohunt had the power to appoint his successor, and that the sect to which he belonged were bound to instal the disciple whom he had selected:—*Held*, that his suit must be dismissed.

(1) Law Rep. Ind. Ap. Supp. Vol. p. 47.

* 13 Cawell's Ind. Ap. 100; I. L. R. 9 All. 1.

Appeal from a decree of the High Court (April 1, 1882) reversing a decree of the Subordinate Judge of *Mainpuri* (Aug. 25, 1879) and dismissing the Appellant's suit with costs.

Graham, Q. C., and *Doyne*, for the Appellants.

C. W. Arathoon (*Umar Buksh* with him), for the Respondent.

25th June 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The suit in this case was brought by the first of the Appellants for a declaration of right in respect of the moveable property and for possession of the immoveable property of one *Kapur Puri*, Goshain, the mohunt of a religious establishment in mauza *Godha*, in the discrict of *Mainpuri*, who died on the 21st of December, 1873, which *Genda Puri* claimed as his disciple appointed to succeed him. At the time of his death *Kapur Puri* had two disciples, *Genda* and his brother *Ramjit*. Their Lordships think this was proved, and that the reasons given by the Judges of the High Court in their judgment for not being satisfied with the evidence of it, contrary to the finding of the Subordinate Judge, are not of any weight. The Respondent, *Chhatar Puri*, had also become a disciple of *Kapur Puri* before the year 1868, but it was alleged by *Genda Puri* that he had some time before January, 1872, been expelled by *Kapur Puri* for misconduct, and had ceased to be a disciple. A wajib-ul-arz, dated the 4th of February, 1872, of mauza *Ghaaspur*, part of the property in dispute, which was proved to have been verified by *Kapur Puri*, was relied upon by the Plaintiffs. It contained a statement that he was the present lambardar of the village, and that any person whom he might make a chela (disciple) would succeed him as lambardar after his death. As yet he had made no chela. In case he made no chela his ablest and nearest

relation would be lambardar after his death.

The statement that he had made no chela is not only inconsistent with *Chhatar Puri* being then a disciple, but also with the evidence as to the time when *Genda* and *Ramjit* became disciples, which would seem according to some of it to have been before the date of the wajib-ul-arz. It was proved by *Mathura Puri*, a Goshain, that *Kapur Puri* about twenty days before his death, being then ill, called a meeting of the Goshains and householders of the neighbourhood, and in their presence said, "I am sick, there is no hope of my recovery; after my death instal *Genda Puri* on the gaddi, and appoint *Ramjit Puri* as house-steward (bhandari), both of them are my disciples." According to *Tikam Puri*, another witness, his words were, "You are all my brethren. I have no hope of my life If anything happens to me place *Genda Puri* on the gaddi, and make *Ramjit Puri* bhandari." Another witness, *Shib Lal Puri*, said the words were, "I have made two disciples, viz., *Genda Puri* and *Ramjit Puri*. I am ill. There is no certainty of life. Should I die, and a dispute arise (between the disciples), you all should give the gaddi to *Genda Puri*, and make *Ramjit* bhandari." Several other witnesses gave similar evidence.

Immediately upon his death disputes arose as to the succession, and, by an order of the magistrate of *Mainpuri*, dated the 2nd of March, 1874, in which it is stated that a considerable body of men, taking advantage of the absence of the heir in possession, *Chhatar Puri*, forcibly entered the house, turned out the servants, and kept possession against all comers until a strong body of police had been sent to dislodge them, eleven men were directed to enter into recognizances to keep the peace until the succession was lawfully decided. And, by another order of the magistrate, dated the 10th of March, it was ordered that both the parties should apply to the Civil Court for a certificate of heirship. On the 28th of March, 1874, the tehsildar of *Shikahabad*, having made an investigation and taken the statements of residents and zemindars in the neighbourhood, made a report that *Chhatar Puri* was in possession and *Genda Puri* was not, whereupon the Deputy Collector of *Mainpuri*, by an order without any date, ordered that *Chhatra Puri's* name should be substituted in lieu of that of *Kapur Puri* in the revenue records.

There was no installation of either *Genda Puri* or *Chhatar Puri*. The latter being in possession, *Genda Puri* brought a suit against him *in formâ pauperis*, claiming as heir to *Kapur Puri* according to the Hindu law and the custom prevailing in the Goshain sect. The claim to sue *in formâ pauperis* was disallowed, and he and *Ramjit* then brought a suit for a declaration of right, with a Court fee of Rs.10, which was dismissed, on the ground that it ought to have been for possession, a suit which required a much higher Court fee. The present suit was then brought, the Appellant *Hazari Lal* having been made a co-Plaintiff after its institution in respect of an interest which he had acquired.

The Subordinate Judge of *Mainpuri* dismissed the suit for the declaration of right to the moveable property, on the ground that the persons in possession of it should be sued, and made a decree in the Plaintiff's favour as to the immoveable. This was reversed by the High Court of the *North-Western Provinces*, and the suit was dismissed with costs. That Court was of opinion that the claim rested on the ground that *Genda Puri* was a disciple of the deceased, and appointed by his will to succeed him, and was duly installed, and that the appeal must prevail with reference to the first and fifth grounds of appeal. The first ground was that the Plaintiff's title, as alleged in the plaint, was not established by reliable evidence, and the fifth that the Plaintiff, having failed to prove his own title to succeed, the title of the Defendant required no scrutiny. The plaint stated that, after the death of *Kapur Puri*, the Goshains installed the Plaintiff to the gaddi. If the evidence had proved that the title to succeed de-

pended solely upon the nomination or appointment by *Kapur Puri*, and the installation was only the giving effect to it, their Lordships would not have considered the failure to prove that avermen in the plaint as fatal to the Plaintiff's case. The plaint is very informal, and might possibly be read as stating a title by the appointment of *Kapur Puri*..

In determining who is entitled to succeed as mohunt in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must shew that he is entitled according to the custom to recover the office and the land and property belonging to it. This has been laid down by this Committee in several cases. The infirmity of the title of the Defendant, who is in possession, will not help the Plaintiff as the Subordinate Judge seems to have thought. The witnesses for both the Plaintiff and the Defendant deposed as to the custom. Some said that the choice or election was made by the Goshains, others (and these are a majority) that they instal on the gaddi the disciple whom the guru (mohunt) recommends. One said that the guru nominates his successor and they give the gaddi to him, and another that when a mohunt becomes ill he leaves directions as to who would become the mohunt. There is no finding of the Subordinate Judge as to the custom. In the judgment of the High Court the whole of the evidence upon it appears to be quoted, and they say, "The general result of this evidence seems to shew that a disciple only can succeed, and that the guru can nominate his successor, who, as a rule, is appointed, but we do not understand the evidence in the sense that the guru has an absolute power of appointment; the evidence points to the necessity of confirmation and instalment on the gaddi to make a complete title; otherwise the ceremony of installation, on which much stress is laid, would be but an idle form." It is unnecessary to quote the evidence here. It appears to their Lordships to fail in proving that the mohunt had power to appoint his successor, and the Goshains were bound to instal the disciple that he appointed. What was done by *Kapur Puri*, which in the plaint and judgment of the Subordinate Judge is called his will, was not according to the custom proved sufficient to entitled *Genda Puri* to recover the property. Their Lordships will therefore humbly advice Her Majesty to affirm the decree of the High Court, and dismiss the appeal. The costs of it will be paid by the Appellants.

Solicitors for Appellants: *Ford, Ranken Ford, & Ford.*

Solicitor for Respondent: *T. L. Wilson.*

23rd June, and 10th July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Madras.

THE COLLECTOR OF GODAVERY (Defendant) ... ... } *Appellant,*

and

ADDANKI RAMANNA PANTULU (Plaintiff) } *Respondent.**

Limitation—Act XV. of 1877, sched. ii. art. 144—Adverse Possession—Presumption—Co-proprietor with Joint Family.

Where the husband of a female member of a Hindu joint family had been, on the purchase of an estate, admitted by the male members as a co-proprietor in respect of a one-fourth share thereof:—

Held, that possession of the whole estate by the joint family or its manager was adverse to such co-proprietor in respect of his fourth share unless shewn to have been authorized by him, and consequently that the Plaintiff, who claimed title from him, was barred by *Limitation Act* XV. of 1877, sched. ii. art. 144.

Appeal from a decree of the High Court (Feb. 26, 1884) reversing a decree of the District Court of *Godavery*

* 13 Cowell's Ind Ap. 147; I. L. R. 9 Mad. 482.

(Dec. 22, 1882), and deciding the Respondent's suit in his favour

Mayne, and *Phillips*, for the Appellant.

Doyne, and *Johnstone*, for the Respondent.

10th July, 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK :—

This is an appeal from a decision of the High Court of Judicature at *Madras*, by which a decree of the District Court of *Godavery* in favour of the present Appellant, the Defendant in the suit, was reversed.

The suit was commenced on the 24th of May, 1880. The Plaintiff, now Respondent, prayed that his Right might be established to a fourth share in the mutta of *Kesanakurru*, in the district of *Godavery*, and that a fourth share might be divided and delivered over to him, with Rs.3,000 on account of past profits for three years, at Rs.1,000 a year for his one-fourth share.

The suit was brought against the Defendant, the Collector of the district of *Godavery*, as agent to the Court of Wards and guardian of *Ramalaksmamma*, a minor, who was the widow of *Sarvarayya* deceased. The Plaintiff claimed as a purchaser of the undivided fourth share. He alleged that one *Anandarayya*, who as the joint proprietor of the mutta had been entitled to a fourth share thereof, and had been in enjoyment of the same, on the 26th of May, 1868, by a registered sale deed sold his right, title, and interest therein for Rs.10,000 to *Seshayya*, who on the 8th of March, 1880, sold the same to him, the Plaintiff, for Rs.5,000. It appears that the estate of which the Plaintiff claimed an undivided fourth share was originally purchased sometime about the year 1848, before the birth of *Sarvarayya*, the deceased husband of *Lakshmamma*, by his father *Krishnayya*, in his own name; that at that time *Krishnayya* and his two brothers, *Pattabhiramayya* and *Adinarayya*, constituted a joint Hindu family governed by the Mitakshara law of inheritance. There was no direct evidence to shew what funds were employed in the purchase of the estate. The presumption, therefore, in the absence of evidence to the contrary, would be, that it was purchased with joint family funds, and that the estate so purchased became the joint estate of the family. However, on the 31st of March in the year 1853, after the birth of *Sarvarayya*, *Krishnayya* his father presented to the District Collector of *Godavery* an arzi accompanied by a will, dated the 29th of March, 1853, which he stated that he had executed to his younger brothers, &c.

The following is a copy of the will :—

"Will executed on the 29th March, 1853, by me *Balusu Buchchi Krishnayya*, proprietor of *Kusba Kapileswarapuram*, &c., in favour of my son *Buchchi Sarvarayyadu* and the joint proprietors with me of *Kapileswarapuram*, *i.e.*, my two undivided brothers, *Pattabiramayyagaru* and *Adinarayanarayudugaru*.

"The illness I have been suffering from for the last two months having at present grown serious, I think that I cannot survive it any longer, and as, after my death, my son *Buchchi Sarvarayyadu* and both of you are the joint proprietors of our joint proprietary estate of *Kusba Kapileswarapuram* possessing equal rights, you three should jointly enjoy the said estate, and you *Pattabiramayya* who are capable of managing business, should manage the whole business from this day, until my son, who is now a minor, should enter into a partition of the estate with you on attaining his proper age. Further, as all of us possess equal rights to *Kesanakurru* mutta estate which was purchased by means of our family funds and the funds of *Kolupati Anandarayyadu*, the husband of our sister, and which now stands registered in my name alone, you four persons, *i.e.*, my two undivided brothers, my son *Buchchi Sarvarayyadu*, and *Kolupati Anandarayyadu*, who is the husband of our sister, should jointly enjoy the produce of *Kesankurrd* mutta."

This is the estate in dispute.

"You *Pattabhiramayya* should hold yourself also the management of the business of the said estate of *Kesanakurru* mutta from this day, and as your younger brothers *Adinaryanarayadu*, my wife, and our brother-in-law *Kolupati Anandarayyadu* have all agreed to your taking the responsibility of managing the said *Kesanakurru* mutta, you should protect the whole family holding the management of the *Kesanakurru* mutta yourself. If you should think of dividing the said two muttas among yourselves, *Kapileswarapuram* should be divided into three shares among my son *Buchchi Sarvarayyadu* and you both who have been joint proprietors with me, and *Kesanakurru* mutta into four shares among you three and *Kolupati Anandarayyadu*, and each should get registered in his name his share and enjoy each his share. Until then you, *Pattabhiramayya*, should conduct the whole management of the two estates yourself, and until my son *Buchchi Sarvarayyadu* attains his proper age, you should protect him, his sister, and his wife, and celebrate the marriages, &c., of him and his sisters. Should it happen that you have to divide among yourselves each his share, before *Buchchi Sarvarayyadu* attains his proper age, you yourself should, until he attains his proper age, retain his share of the estate under you and manage it yourself, and hand over to him his estate on his obtaining his proper age. Will executed of my full accord.

"(Signed) *Buchchi Krishnayya*."

It is unnecessary in the view which their Lordships take of the case to determine what was the effect of the arzi and will of *Krishnayya*, or to consider the effect of the documentary and other evidence adduced in support of *Anandarayya's* title; for assuming that he had a title to an undivided fourth share in the estate, his right and the rights of those who claim under him appear to their Lordships to have been barred by limitation.

It was proved by *Seshayya* that he married a grand-daughter of *Anandarayya*, that he made advances of money to him from time to time to the extent of Rs.6,000, and that *Anandarayya* being unable to discharge his debt, sold his share in discharge of the debt and for an additional sum of Rs.4,000 which were paid to him by *Seshayya*; and that on the 8th of March, 1880, *Seshayya* resold the share, together with past profits thereof to the Plaintiff for Rs.5,000. It was proved by *Seshayya* and admitted that the Plaintiff never had possession of any part of the estate, and never received any portion of the profits thereof. In order to shew what little confidence *Seshayya* had in his title, it may be observed that in the bill of sale from him to the Plaintiff he stipulated that the Plaintiff should not recover from him any costs which he might incur on account of suits that he might bring for the recovery of proprietorship, and of the past profits, or the amount paid for the purchase in case his suit for recovery of the property should be dismissed.

The absence of possession is carried as far back as the 26th of May, 1868, the date of the sale to *Seshayya*, a period of twelve years, minus two days, prior to the 24th of May, 1880, the date of the commencement of the suit.

One of the issues raised in the suit was whether the Plaintiff, or those under whom he claims, ever had possession of the property in the suit, and whether the suit was barred by limitation. The only question to be considered is whether during the two days prior to the 26th of May, 1868, *Anandarayya* had an actual or constructive possession of a one-fourth share, or whether the possession of *Sarvarayya* was not adverse to him during that period.

Adinarayya, the younger brother of *Krishnayya* died in 1857, *Pattabhiramayya* the elder brother, who appears to have acted as manager in accordance with the will of *Krishnayya*, died in 1866 or 1867, and on his death *Sarvarayya*, who had no authority to act as manager of *Anandarayya's* fourth share, assuming him to have had one, entered into possession of the whole estate.

It does not appear upon any credible evidence that *Anandarayya* ever received any portion of the rents and pofits of

the estate, a fact which must have been capable of proof had it existed.

Their Lordships cannot believe the evidence of the Plaintiff's witnesses, of whom the fifth, viz., *Seshayya*, the first purchaser of *Anandarayya's* fourth share, went to the extent of stating that *Anandarayya* managed the estate, and the first of whom stated that although the lease to his master was in the name of *Pattabhiramayya*, the rent was paid to *Anandarayya*, and never to the other sharers. Their Lordships concur with the Subordinate Judge who heard the Plaintiff's witnesses and saw their demeanour, and who stated that he was not satisfied with them. The High Court does not express an opinion at variance with the finding of the Subordinate Judge that *Anandarayya* was never in possession or enjoyment of the one-fourth share. It is improbable that if *Seshayya* believed that *Anandarayya* was in the management of the estate or in the receipt of a fourth share of the rents and profits up to the time of his purchase, he having purchased that share for Rs.10,000, would have allowed *Sarvarayya* to retain the exclusive possession of the whole estate and of the rents and profits thereof for a period of nearly twelve years without any attempt to recover his share. He says as the estate had been in the management of the Court of Wards for twelve years he remained quiet, thinking he would have to incur much expense if he should institute a suit. Again he states that as the estate was made over to the Court of Wards he sold for Rs.5,000 the share that he had bought for Rs.10,000, not being able to file a suit. The High Court says "The seller, *Anandarayya*, died at the end of 1868, and that the purchaser was deprived of the opportunity of examining him in what manner, if any, he had enjoyed the share recorded in his name." It must, however, be borne in mind that *Anandarayya* lived for eight or nine months, and *Sarvarayya* for upwards of twelve months after the sale to *Seshayya*, during which period the latter might have brought a suit against *Sarvarayya* and called *Anandarayya* as a witness to prove that he had received his share of the profits down to the time of the sale to *Seshayya*, if such had been the fact. The Subordinate Judge alludes to the delay on the part of *Seshayya*. He stated that he was confirmed in the view that *Anandarayya* was never in possession by the consideration that had he really been in possession his vendor would not have remained quite for nearly twelve years. The High Court say that until the 6th of August, 1868, *Sarvarayya* did not set up a title hostile to *Anandarayya*. But if *Anandarayya* never had possession of the one-fourth share from the time of *Krishnayya's* death in 1853, and *Sarvarayya* and his uncles, as a joint Hindu family, had the exclusive possession thereof without any claim on the part of *Anandarayya*, of which there is no proof, there seems to be no reason why *Sarvarayya* should set up any title hostile to *Anandarayya*. Their Lordships fail to see any reason why if no claim was made a hostile title should be set up. As soon, however, as *Anandarayya* presented his petition, on the 14th of July, 1868, more than fifteen years after the date of *Krishnayya's* will to have *Seshayya's* name registered as the proprietor of the one-fourth share in consequence of his purchase, *Sarvarayya* did, on the 6th of August following, object to such registration, disputed *Anandarayya's* title, and asserted that he had never shared in the profits of the estate. The Collector, in consequence of such objection, refused to register the one-fourth share in *Seshayya's* name. Yet even then *Seshayya* took no proceedings to enforce his claim, and allowed *Sarvarayya* to retain possession of the whole estate up to the time of his death, on the 23rd of July, 1869, shortly after which date the whole estate was taken under the care of the Court of Wards for the infant widow of *Sarvarayya*, and so remained until the commencement of the suit. The High Court say that *Pattabhiramayya* remained in possession up to his death 1866, when possession was taken by his nephew *Sarvarayya* of his own three

shares as the surviving member of the joint family, and of *Anandarayya's* undivided fourth share, presumably as heir to his uncle the deceased manager. This, however, is clearly an error. If, as represented by *Krishnayya* by his will of 1853, the estate was purchased by means of the family funds and the funds of *Anandarayya*, and *Anandarayya* was entitled to an undivided fourth share, *Anandarayya* was not entitled to such share as a member of the joint family, for, as the husband of a sister or daughter of *Krishnayya*, he would not become a member of the joint family, nor would his share be inheritable by the members of the joint family according to the Mitakshara. His share would be inheritable by his own heirs, and the other three fourths would pass to the surviving members of the joint family by survivorship It was impossible, therefore, for *Sarvarayya* to succeed to *Anandarayya's* fourth share during *Anandarayya's* lifetime by inheritance from his uncle, the deceased manager. It appears to their Lordships that it must be presumed that at least from the time when *Sarvarayya* took possession after his uncle's death the possession was adverse to *Anandarayya*, and, consequently, that the suit was barred by limitation by art. 144, sched. ii., Act XV. of 1877. If *Sarvarayya* claimed to take the one-fourth share as heir to his uncle, the possession was clearly adverse to *Anandarayya* within the meaning of art. 144, and the suit would also be barred by limitation.

Upon the whole, their Lordships are of opinion that the decree of the Subordinate Judge was correct, and they will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the First Court be affirmed, and that the Respondent do pay the costs of the Appellant in the High Court.

The Respondent must also pay the costs of this appeal.

Solicitor for the Appellant: *H. Freeman.*

Solicitors for the Respondent: *T. Luxmore Wilson & Co.*

24th, 25th, 26th and 30th June, and 1st, 2nd and 21st July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

IMAMBANDI BEGUM (Plaintiff) ... } *Appellant,*

and

KUMLESWARI PERSHAD and others (Defendants) ... ... } *Respondents* *

Sale for arrears of revenue—Liability to incumbrances—Act XI of 1859, ss. 13 and 54—Mokurari lease—Inquiry as to tittle of alleged owners of share sold—Benami transfers—Surrender of dur-mokurari interest how proved—Limitation Act (XV of 1877), Sch. II, Art. 144

After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch II, Art. 144, the twelve years' bar commencing from the date of possession first held adversely.

The mokuraridar having granted a dur-mokurari lease of part of his holding, which was afterwards surrendered for good consideration, ikrarnamahs to this effect were executed, but not being registered were not receivable in evidence.

Held, that to prove a formal deed of re-conveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dur-mokurari interest.

The mokurari lease having been established as to so much only of the lands as were covered

* 13 Cowell's Ind Ap 160; I. L. R 14 Cal. 109.

by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid: *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding, if necessary.

Appeal from a decree (15th February 1881) of the High Court varying after a remand (13th September 1880) a decree (15th August 1878) of the Subordinate Judge of *Bhagalpur*.

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the Appellant.

Mr. *T. H. Cowie* and Mr. *R. V. Doyne*, for the Respondent.

21st July, 1886.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

On the 14th of June, 1875, *Rampershad*, the father of the Respondent in the original appeal and Appellant in the cross appeal, purchased at a sale for arrears of Government revenue a share of the mehal *Bisthazari*, pergunah *Bisthazari*, for Rs.64,600, and received a certificate of sale thereof from the Collector of *Monghyr*. The sale was made under the provision in sect. 13 of Act XI of 1859, the 54th section of which enacts that when a share or shares of an estate may be sold under the provisions of sect. 13 or sect. 14, the purchaser shall acquire the share or shares subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners. On the 25th of February, 1878, the Appellant in the original appeal, *Imambandi Begum*, brought a suit against *Rampershad Das* and others, claiming to have an incumbrance upon the estate by virtue of two mokurari pottahs, one executed by *Mirza Tasadduk Hossein Khan*, alias *Jhoti Khan*, on the 1st of March, 1866, and the other by *Mirza Mahomed Taki Khan*, alias *Bari Khan*, on the 6th of April, 1866. They were the brothers and heirs of *Mussamut Fatima Begum*, alias *Nawab Bohu Begum*, and they thereby leased in perpetuity to *Imambandi Begum*, in the names of her servants *Syed Jaffer Ali* and *Mussammat Nazirunnissa*, the mouzahs specified in the first paragraph of the plaint (being part of the estate purchased by *Rampershad Das*) at an annual jumma of Rs.5,801 7*a*. 6*p*. The main question in the suit and in the appeal is what was the right of *Bohu Begum* in the estate which was thus leased. The question in the cross appeal is whether the suit is barred by the law of limitation.

The property in dispute originally belonged to one *Abdur Rahman*, and it was along with the share of his brother, *Mokim Khan*, brought to sale in execution of a decree against them on the 1st of December, 1851. It was purchased by their servant *Najaf Ali*, and it was proved and has been found by both the lower Courts that his purchase was benami for *Abdur Rahman* and *Mokim Khan*. *Najaf Ali's* name appears to have been entered in the Collector's books as the proprietor, and to have remained there till the sale in 1875 to *Rampershad Das*. On the 26th of December, 1851, *Najaf Ali* executed two ikrarnamahs, one to *Sheik Ahmed Buksh*, and one to *Bohu Begum*, who was the wife of *Abdur Rahman*. In these the sale by auction on the 1st of December is mentioned, and it is stated that out of 16 annas of the purchased property he purchased 9 annas 1 dam for one *Sheikh Ahmed Buksh*, and 6 annas 19 dams for *Bohu Begum*, and that they having failed to procure the earnest money and the consideration money he had obtained it from Mr. *Peter Omraet*, and had made a conditional sale of parts of the purchased property to Mr. *Omraet* for Rs.19,190, and certain leases for nine years of other parts to *Omraet* and to other persons on zurpeshgi. Then follow these words, "That when the whole and entire Rs.19,190, the consideration money, with interest, will be paid off from the proceeds of the villages, or in cash, by *Sheikh Ahmed Buksh* and *Mussammat Nawab Bohu Begum* aforesaid, to Mr. *Peter Omraet*, purchaser, then I will execute deeds of sale according to their request, for the same consideration money, and that is the auction sale price of the entire property purchased by me, that is, in respect of 9 annas

1 dam to *Sheikh Ahmed Buksh*, and 6 annas 19 dams to *Mussammat Nawab Bohu Begum* aforesaid." The statement that the purchase was made for *Ahmed Buksh* and *Bohu Begum* was untrue, and the evidence proved that the loan by Mr. *Omraet* was negotiated for by *Abdur Rahman* and *Mokim* the real purchasers. The intention of the ikrarnamahs appears to their Lordships to have been that when the mortgage was paid off *Ahmed Buksh* and *Bohu Begum* should be respectively benamidar for each of the brothers in the place of *Najaf Ali*. If any cash was paid in satisfaction of the mortgage it would be paid in their names to give colour to the transaction.

Abdur Rahman died some time between 1854 and 1856. The precise date does not appear. He left as his heirs his brother *Mokim*, who was entitled to three-fourths of his property, and his wife *Bohu Begum*, who was entitled to one-fourth. The date of *Mokim's* death also does not appear, but it was before January, 1861, and he left as his heir his son *Isa Khan*, who thus became entitled to the three-fourths of *Abdur Rahman's* property.

On the 8th of January, 1861, *Najaf Ali* executed a deed of sale. It begins with the same false statement as to his purchase as is in the ikrarnamas. It then refers to the conditional sale to *Omraet* and the two ikrarnamas, and after stating that owing to drought and for payment of Government revenue, *Najaf Ali* had obtained other loans, and decrees had been obtained against him, it proceeds thus:—"Now *Mussammat Nawab Bohu Begum*, widow of *Khajah Mahomed Abdur Rahman*, deceased, has paid me wholly and in full on account of the purchase-money of the conditional deed of sale, and the amount of decree due to the aforesaid gentleman, in proportion to her own share which has been found due by calculation, and taken the zurpeshgi due to ticcadars for the aforesaid mouzahs, and the amounts of debts due to Mahajuns on account of her own share, upon herself to pay, and asked me to execute and give a deed of sale in due form." Then *Najaf Ali* sells and transfers to *Bohu Begum* the share which was purchase by *Abdur Rahman*, stating it to be in conformity with the ikrarnama.

There was no evidence of any payment to him by *Bohu Begum*, and the statement as to that is probably as fictitious as the statement of his purchase having been made for her. The mortgage being a usufructuary one had most probably been paid off from the proceeds of the estate included in it and in the zurpeshgi leases, the expiry of which coincides closely with the alleged payment. The Subordinate Judge thought, from the statement in the deed and the want of proof of payment by *Abdur Rahman* or out of his estate, that the money was paid by *Bohu Begum*, and that owing to that payment she had acquired an exclusive right to the share, but the Judges of the High Court were of opinion that there was a mere transfer of names, and the real ownership in the property after *Abdur Rahman's* death remained in his legal heirs. This is the conclusion to which their Lordships have come.

It is very difficult to understand what was the real character of the transactions which followed upon the deed of sale. On the 23rd of January, 1861, *Bohu Begum* executed a pottah, by which, after stating that the estate was especially owned and possessed by her, she leased it in perpetuity at an annual rental of Rs. 6,000, on payment of Rs. 7,000 as nuzurana money to one *Mussiti Khanum*. Three days afterwards she executed another deed, by which she conveyed her proprietary right to one *Hosseini Khanum*. These persons, who were described in the instruments as inhabitants of *Patna*, were slave girls of *Bohu Begum* living with her in *Patna*, where she resided Some time in 1862 *Bolakun*, the widow of *Ahmed Buksh*, in whose favour *Najaf Ali* had executed a deed of sale of *Mokim's* share in accordance with the ikrarnamah of 1851, and who is shown to be *Isa Khan's* benamidar, brought a suit against *Hosseini* and *Bohu Begum* to enforce her right of pre-emption based upon the alleged transfer of the disputed

share by *Bohu Begum* to *Hosseini*. On the 21st of April, 1863, this suit was decreed by the first Court, but an appeal by the Defendants that decree was reversed by the High Court on the 8th of March 1864. It has been seen that before this suit was brought *Isa Khan* had become entitled by inheritance to the share of *Mokim* and three-fourths of *Abdur Rahman's*. He did not, however, intervene in this suit, and it may, their Lordships think, be fairly surmised that the sale which was impeached was only a pretended one, and the suit was practically brought by *Isa Khan* in order to streng then the benami titles of *Bolakun* and *Bohu Begum*, and thereby defeat the creditors of *Mokim* and *Abdur Rahman*. It was said in this appeal that it was an admission by *Isa Khan* that *Bohu Begum* was the real owner. It may be so, but it is not conclusive, and must be looked at with the other evidence.

In May, 1856 or 1857 (two documents in the record giving different years), *Imambandi Begum* had obtained a decree against *Bohu Begum* for a large sum of money. In execution of that decree an order for the attachment of the disputed property was made on the 18th of May, 1861, but the actual attachment was not made till the 27th of January, 1864. It was probably the apprehension when the property had been transferred into the name of *Bohu Begum* of this decree being executed that led to the transfers to *Mussiti* and *Hosseini*. That proceeding was temporarily successful, for on their intervention the property attached was released on the 6th of December, 1864. *Bohu Begum* had died in October, 1864, and on the 29th of November, 1865, *Imambandi* brought a suit against her brothers and heirs and *Mussiti* and *Hosseini* to have the order of the 6th of December, 1864, set aside, and for a declaration that the property was liable to be sold in execution of her decree. In this she was successful, and, having made a fresh application for execution, some of the mouzahs attached in 1864 were sold and realized about Rs.34,000. At this auction sale *Isa Khan* was one of the purchasers, which was greatly relied upon as an admission of *Bohu Begum's* title. It is such an admission, but it is not sufficient to prevail against the evidence that *Bohu Begum* was only a benamidar. *Imambandi* did not in these proceedings disclose the existence of the mokurari pottahs, which are the foundation of her present suit

Where there are benami transactions and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important. In this suit it is also the meterial fact with reference to the law of limitation. On the 16th of December, 1862, *Rajah Mohender Narain*, an influential zemindar of the district, obtained a ticca pottah from *Mussiti Khanum* of 5 annas 12 dams of the property in suit in the name of one *Gujadhur* and dur-mokurari pottah of the remaining one anna of *Abdur Rahman's* share. On the same date, or shortly afterwards, *Hossieni* transferred to the *Rajah* her proprietary interest in the one anna. From that time till the surrender, which will be afterwards noticed, *Rajah Mohender*, and after his death his son *Rajah Ram Narain*, was in the actual possession of the property, and the question is, who received the rent of the 5 annas 12 dams which he held as lessee. The Subordinate Judge found that *Bohu Begum* held possession under the bill of sale until her death. He appears to have done this upon both the oral and documentary evidence. One of the Judges of the High Court was clearly of opinion that till the death of *Bohu Begum* the *Rajah* held the disputed property as her tenant; the view of the other was that the *Rajahs* held as tenants of *Bohu Begum* for the owners, viz., *Abdur Rahman's* heirs. With regard to the possession after her death, the Subordinate Judge came to the conclusion that her brothers, whom he calls the two *Khans*, did not hold possession of the shares in suit, either directly or by collecting the rent from the ticcadar, and that they granted the mokurari to *Imambandi* while they were out of possession. In his judgment on the first hearing he discusses the evidence and states his reasons for

this very fully, and refers to that judgment in his judgment at the hearing on the remand. The Judges of the High Court came to the same conclusion as to the possession of the *Khans*, but they thought that until the *Rajah* refused to pay the rent to them they were in constructive possession of the property through him

Both Judges found that there was no payment of rent to *Isa Khan* till after April, 1866, and consequently no adverse possession, and held that the suit was not barred by the law of limitation. The law applicable is art. 144 in the 2nd Schedule of Act XV. of 1877, which makes the period of limitation (twelve years) run from the time when the possession of the Defendant becomes adverse to the Plaintiff. The Subordinate Judge thought that *Isa Khan* got into possession by receipt of the rent from the Rajah through *Mussiti*, but he was unable to fix the time when he did so, and their Lordships see no reason for doubting the correctness of Mr. Justice *Mitter's* opinion that *Isa Khan* did not assume adverse possession through *Mussiti* till the end of 1869.

The other Judge, Mr. Justice *Maclean*, was of opinion that, in the absence of of clear proof of payment by the Rajah to *Isa Khan*, *Bohu Begum* and after her brothers were in possession as late as April, 1866. The Judges therefore held that the suit was not barred by the law of limitation. This decision is supported by the evidence of *Rajah Ram Narain*, who said that the Government revenue used to be paid out of the collection of the mouzahs, and very little was left after the payment of that, and he did not recollect whether he paid it to any one or not. It does not appear to their Lordships that there is any satisfactory evidence of the receipt of rent by *Isa Khan* twelve years before the suit was instituted, and the finding of the Subordinate Judge that there was appears to be based upon a supposition arising from *Isa Khan* having won over *Mussiti*, the benami lessor, to his side, and not upon evidence of a receipt of rent directly from the Rajah. Therefore, upon the main questions in the appeals, their Lordships have come to the conclusion that *Bohu Begum* was the real owner of the one fourth only, which she took by inheritance from *Abdur Rahman*, and that her suit as to that is not barred.

The High Court has made a decree in her favour as to the one fourth, but with two qualifications, which it appears to their Lordships ought not to have been made. The first is in regard to the one anna, the subject of the dur-mokurruri to the *Rajah Mohender*. As to this the evidence of *Rajah Ram Narain* was that in 1874, having been dispossessed and being ready to bring a suit, the servants of the heirs of *Bohu Begum* and *Imambandi Begum* came to him, and having taken Rs.7,000, he made a settlement of the ticca and dur-mokurruri and relinquished them to the heirs of *Bohu Begum* and *Imambandi Begum*. Ikrarnamahs were executed, but through some neglect they were not registered within the time required by law to give them validity. The High Court, on the ground that there was no valid reconveyance of the one anna share either to the Plaintiff *Imambandi* or her lessors, deducted it from the one-fourth share. This, in their Lordships' opinion, ought not to have been done. A formal reconveyance of the one anna share was not necessary. The receipt of the Rs.7,000 and relinquishment of possession by the Rajah to *Imambandi* or her lessors was sufficient to make it subject to the lease and to give a title against *Ram Pershad Das*.

The second qualification is that, although entitled to recover only a one-fourth share, she was held bound to pay the whole of the rent reserved by the mokurruri pottahs, and the decree in her fayour is expressly made subject to that condition. The question whether the rent should be apportioned or not does not appear to have been raised, and ought not to be decided in this suit. That condition should be omitted from the decree, leaving the liability for rent to be determined hereafter if it should become necessary. Their Lordships will therefore

humbly advise Her Majesty to vary the decree of the High Court in manner following, that is to say, that where the Plaintiff is decreed to recover a thirteen gundahs share out of the mouzahs mentioned therein she shall be decreed to recover a share of 1 anna 13 gundahs, and where she is decreed to recover a share of 11gundahs out of the mouzahs mentioned she shall be decreed to recover a share of 1 anna 11 gundahs, and that the part of the decree whereby she is ordered and decreed to pay the whole of the mokurruri rent to *Ram Pershad Das* shall be omitted, and that in other respects the decree shall be affirmed. Their Lordships think that the parties should bear their own costs of these appeals and the application to file the cross appeal, and they therefore make no order as to them.

Solicitors for the Appellant: *Oehme & Summerhays.*

Solicitor for the Respondent *Kumleswari Pershad*: *T. L. Wilson.*

3rd, 6th and 24th July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse and the Right Hon'ble Sir Barnes Peacock.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RAMCOOMER GHOSE and others (Defendants) ... ... } *Appellants,*

and

KALI KRISHNA TAGORE (Plaintiff) ... } *Respondent.**

Kabuliyat, Construction of—Stipulations as to rent of new Chur—Hawaladari tenure—Measurement and Assessment of Chur Land—Landlord and tenant—Bengal Act VIII of 1869, s. 14.

A kabuliyat, executed by the tenant of land held in hawala tenure, provided that on an adjoining chur becoming fit for cultivation the whole land, old and new, held by the tenant should be measured, and the old having been deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing pergunnah rates. It provided also that either (*a*) rent should be realized according to law with interest thereon; or that (*b*) at the close of the year, the owner should, by a notice served on the hawaladar, require him to take a settlement of the excess land, and within fifteen days to file a kabuliyat; or (*c*) the excess land might be settled with others.

Such a chur having been formed, the zemindar measured without notice to, and in the absence of, the hawaladar. He then served a notice on the latter requiring him to execute a kabuliyat within fifteen days for payment of a fixed rent upon the excess land as found by the measurement, or to yield up possession.

Disregard of this led to a suit in which the zemindar claimed either khas possession or rent on measurement by order of Court.

Held, that neither the kabuliyat nor the terms of s. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement; nor did the absence of authentic measurement as prescribed by the kabuliyat have that effect, or affect the measurement by the amin; but that, until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial determination), the zemindar could not put the hawaladar to his choice between (*b*) executing a kabuliyat for the rent, and (*c*) yielding up possession.

Appeal from a decree (11th May 1883) reversing a decree (29th June 1881) of the Subordinate Judge of *Faridpur.*

Mr. *C. W. Arathoon*, for the Appellants.

Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, for the Respondent.

24th July 1886.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD WATSON:—

The arguments upon this appeal had reference mainly to the construction of the following stipulations in a kabuliyat, dated the 23rd of April, 1850, executed by the then tenants, under a howladari tenure, of certain lands comprised in "the chur to the east of *Makhuakhali*," forming part of the zemindary now belonging to the Respondent:—

"If a new chur accretes contiguous

* 13 Cowell's Ind. Ap 116; 1 L R 14 Cal 99.

to the aforesaid howla, and as *hakiat* of the aforesaid (torn), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation, a fresh measurement shall be made of the land of the said chur and of the aforesaid howla; and after a deduction of the aforesaid 13. 6. 16 gundahs of land, we shall pay rent at the rate of Rs.2 7*a*. 7*p*. for the excess of land up to five drones, and at the *sara* (prevailing) pergunnah rates for land exceeding that quantity. If we fail to do so, the rent will be realized according to the law for the realization of rent, with interest on lapsed instalments according to the demands of the towzi of the said pergunnah; or at the close of the year, you will serve on the spot, and on some conspicuous place in the *mahakuma* (headquarters) of any hakim, an itlanama (notice) to our address, requiring us to take a settlement of the said excess land, and to file a kabulyat, and fixing the time at fifteen days; if, thereupon, we do not appear before you and take a settlement and fix a kabulyat, you will settle the said excess lands with others."

The 13. 6. 16 gundahs thus referred to was the original extent of the cultivable howla, and the rent payable for it was fixed by the kabulyat at Rs.462 In a suit brought by the zemindar in the year 1865, it was found that 2. 11. 13 gundahs, &c., had accreted to the said 13. 6. 16 gundahs, and that for such excess additional rent was payable at the rate of Rs.2 7*a*. 7*p*. per khani in terms of the kabulyat of 1850. The Appellants have since continued to be tenants of the howla and said accreted lands, amounting in all to 16. 2. 9 gundahs, &c., at a *cumulo* rent of Rs 570 1*a*. 1*p*., &c.

It is not matter of dispute that, at the commencement of the year 1876, a new chur had accreted to the hawala in question, which was to a large extent composed of land fit for cultivation. The Respondent alleges that, in April of that year, a new measurement of the original hawala and of the accreted chur was made by his servants under his instructions. The measurement was made without intimation to the Appellants, and in their absence. The Respondent thereafter, on the 28th of March, 1878, caused a notice to be served on the Appellants, who are the registered tenants of the hawala, setting forth the fact of measurement, intimating the precise amount of the increased rent due in respect of the excess land, according to the rates specified in the kabulyat, and requiring the Appellants to appear, either before himself or his principal officer, within fifteen days from service, "and file a kabulyat for the said quantity of land and for the said amount of rent; otherwise after the expiry of the said fixed period, under the terms of the said kabulyat, I shall take khas possession of the land in excess of the said Dr. 16. 2. 9 gundhas of land, for the purpose of settling the same with others."

The Appellants paid no attention to the notice, and the Defendant, on the 29th of March, 1879, presented his plaint to the Subordinate Judge, in which he prayed, (1), that the Court should direct a measurement of the excess land and give him khas possession thereof; or otherwise, (2), that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the kabulyat. On the Respondent's motion the Judge ordered a measurement of the accreted land, which was made by the Court amin in presence of the parties, and duly reported. Evidence was then led on both sides, and, on the 29th of June, 1881, judgment was given dismissing the suit with costs, but the formal decree was not made out and signed until the 27th of July, 1881. The Subordinate Judge came to the conclusion, though with some hesitation, that service of the notice of the 28th of March, 1878, was established. He was of opinion that the Respondent had failed to prove any measurement of the excess lands as alleged, and had also failed to prove pergunnah rates, both of which he held to be conditions precedent of the Respondent's right to possession. And, as matter of law, the learned Judge decided that the stipulation in the kabulyat with respect to khas possession, which he

terms the forfeiture clause, is void. The learned Judge further held that the suit, so far as it prayed for assessment of rent, could not lie, inasmuch as the case was regulated by sect. 14 of the *Rent Act*.

On appeal the decision of the Subordinate Judge was reversed by the High Court, consisting of *Cunningham* and *Maclean*, JJ., who, on the 11th of May, 1883, gave the Respondent a decree for khas possession of whatever land may be found, according to the Civil Court amin's map, to be in excess of 16*d*. 2*k*. 9*g*. 2*c*. 2*k*. Unfortunately the amin reports two measurements on the map prepared by him, leaving it to the Court to select one or other of them, and the decree does not specify according to which of these the excess lands are to be ascertained.

The learned Judges of the High Court differed in opinion from the Subordinate Judge, as to the fact of a measurement having been made by the Respondent before the notice of the 28th of March, 1878, was served. They state that, upon the evidence, they are "unable to find that there has not been a measurement within the terms of the kabulyat." Upon that view of the facts they seem to have been of opinion that, on receipt of the notice, the Appellants ought to have appeared within the fifteen days, and to have then stated any objections which they had to the measurement or to the rent intimated and that, seeing they raised no objection to either until the present suit was instituted, the Respondent was entitled to the alternative of possession

Their Lordships are of opinion that the Subordinate Judge erred in holding that the provisions of sect. 14 of the *Rent Act* apply to the additional rent, which is stipulated in the kabulyat of 1850 There is nothing in the terms of that document, or of sect. 14 of the *Rent Act*, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid for it. It is stipulated that before excess rent is payable, and before the zemindar can call upon his tenants to chose between making a settlement and yielding possession to him, there shall be a measurement, but the document does not specify by whom that measurement is to be made If the Respondent had given the Appellants full notice of his intention to make a new measurement, so as to enable them to be present, if they saw fit, at the time it was made, that would have cast upon them the duty of appearing before him within fifteen days after the notice was served; and if they had failed to appear within that period, the Court, if satisfied that the measurement was made in good faith, would probably have held them precluded by their own laches from objecting to it. But the Respondent gave them no intimation of his intention to measure; and, in the notice which he served, he did not require them, in terms of the kabulyat of 1850, "to take a settlement of the excess land, 'and to file a kabulyat,'" but called upon them within fifteen days to "file a kabulyat for the said quantity of land, and for the said amount of rent." The difference between these two requisitions is not one of form merely, but of substance. What the deed of 1850 contemplates is that after a measurement has been made, within the knowledge of the tenants, and to which they ought therefore to be prepared to state specific objections, they may be required to come in and say whether they are or are not willing and ready to take a lease of the excess land. It does not contemplate that the new kabulyat must of necessity be executed within the fifteen days. It is obvious that, after the tenants have come in, and have agreed to take a lease of the excess land, they and the proprietor may differ both as to the precise extent of the land and as to the rent to be paid for it; and in that case their differences must be settled by the Court. On the other hand, their Lordships are of opinion that, under the terms of the kabulyat of 1850, the proprietor is not precluded from bringing his suit, without taking any preliminary step, in order to have an authentic measurement made, and the rent assessed; but, in that case, he cannot put the tenants to their election between paying rent

and giving up possession until both these things have been done judicially.

In the present case their Lordships are of opinion that the measurement of 1876, without intimation to the Appellants, coupled with the peculiar terms of the notice of March, 1878, is not *per se* sufficient to entitle the Respondent to insist in his claim for khas possession of the excess land, as now ascertained by the measurement of the Court amin. But the Respondent is, in their opinion, entitled to have a decree, in terms of the alternative prayer of his plaint, fixing the extent of the excess land, and assessing the rent payable for it, in terms of the kabulyat of 1850. Their Lordships are unable to concur in the finding of the Subordinate Judge, to the effect that the Respondent has failed to prove "the prevailing purgunnah rates" within the meaning of the kabulyat. The evidence on both sides clearly shews that there is not now, and probably never was, any such thing as a fixed scale of rents for lands like these within the pergunnah, but that circumstance does not warrant the conclusion that no pergunnah rate has been proved It leads to the inference that the parties to the kabulyat must have contemplated payment of a fair rent, to be computed according to the average of rents paid by the tenants of similar lands within the pergunnah, due regard being had to the nature of the tenure. Their Lordships are of opinion that, taking into account the character of the Appellants' tenure, the pergunnah rate ought, for the purposes of this case, to be fixed at Rs.6 4*a*. per khani.

In the absence of any evidence enabling them to decide between Statements A and B contained in the report of the Court amin, their Lordships are of opinion that (the onus being upon the Respondent) the measurements given in Statement B must be adopted as correct. They are further of opinion that the increased rent now assessed ought to be paid by the tenants for their possession, from and after the date when the Respondent's notice was served upon them.

It will be necessary to remit the cause, in order that the precise extent of excess land for which rent is now payable, and also the precise amount of the increased rent may be ascertained in the Court below, and decree given accordingly. When that has been done, it will be in the option of the Respondent, either to realize the rents in terms of law, or to serve a fresh notice in terms of the kabulyat of 1850; and, if the Appellants do not come in and make a settlement and file a new kabulyat, he will then be entitled to khas possession of the excess land which has accreted to the original hawala, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865.

The parties to this suit seem to have maintained in the Courts below, as they certainly did in this appeal, pleas far in excess of their respective legal rights, the Appellants succeeding before the Subordinate Judge, and the Respondent, in his turn, succeeding before the Court of Appeal. In these circumstances, it appears to their Lordships that there can be no injustice done by deciding that each of them ought to bear their own costs.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court appeal from, dated the 11th of May, 1883, save in so far as it sets aside the decree of the lower Court, dated the 27th of July, 1881, and to find that neither the Appellants nor the Respondent are entitled to the costs of suit incurred by them in either of the Courts below; to declare (1) that the Respondent ought to have a decree ascertaining the extent of excess lands in the possession of the Appellants, and assessing the rent payable therefor, in terms of the kabulyat dated the 23rd of April, 1850; (2) that for the purpose of ascertaining the extent of the said excess land, the measurements contained in Statement B annexed to the report by the amin of the Subordinate Judge's Court are to be taken as correct, and that from the total area of land in the possession of the Appellants ascertained by the said amin to be cultivable

and properly assessable with rent, there must be deducted 13*d.* 6*k.* 16*g.*, the extent of the original hawala as fixed by the said kabulyat, the balance remaining after such deduction representing the extent of excess lands for which rent is payable; (3) that the rent payable for the excess lands ascertained as aforesaid is at the rate of Rs.2. 7*a.* 7*p.* per khani for five (5) drones thereof, and for the remainder thereof at the rate of Rs.6. 4*a.* per khani; (4) that rent became payable in respect of the said excess lands from and after the 28th day of March, 1878; and, subject to these declarations, to remit the cause to the Court below.

There will be no costs of this appeal.

Solicitor for the Appellants: *A. H. Wilson.*

Solicitors for the Respondent: *Wrentmore & Swinhoe.*

7th, 8th, and 21st July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of the North-Western Provinces.

LEDGARD and another (Defendants) ... } *Appellants,*

and

BULL (Plaintiff) ... } *Respondent.**

Jurisdiction under Act XV of 1859, s. 22—Objection to suit not competently brought—Civil Procedure Code, ss. 25, 562, 564—Withdrawal, transfer, and remand of suits—Effect of consent of parties as regards jurisdiction—Particulars of infringement required by Act XV of 1859, s. 34—Sufficiency of statement to satisfy that requirement.

An order for the transfer of a suit from one Court to another, under s. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *Peary Lal Mozoomdar* v *Konal Kishore Dassia* (1) entirely approved.

When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process: although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision.

On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

A suit, having been instituted in a Court not of competent jurisdiction, was transferred, with the consent of parties, to a Court which was competent; but the defence of jurisdiction was set up before the issues were fixed, and was afterwards insisted on throughout.

Held, that in the single fact that the Defendant had personally concurred in the transfer, there had been no waiver of the right to maintain this defence, and that the suit must be dismissed on the ground that it was not competently brought.

A Court of appeal, having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in the proper Court.

Held, that this order, equivalent to directing the Plaintiff to institute a new suit, was wrong; and that, with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed.

The sole object of s. 34 of Act XV of 1859, "An Act for granting exclusive privileges to inventors," (substantially the same as s. 41 of the English Act of 1852, 15 and 16 Vic., c. 82) is to compel the Plaintiff to give the Defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information is given in the plaint itself or in a separate paper. *Talbot* v. *La Roche* (2) and *Needham* v. *Oxley* (3) referred to and followed.

Particulars of breaches, upon an alleged infringement, are distinguished from particulars of objection for want of novelty in this, that, in the latter case, instances of use may not be within the knowledge of the patentee, and therefore must be specified, while, in the former, the Defendant must himself know whether, and in what respects, he has infringed the patent.

The Plaintiff had three patents relating to one article, a brick-kiln; the second and third being for improvements upon the invention specified in the first. The Plaintiff indicated a kiln, constructed and used by the Defendant, showing as to

* 13 Cowell's Ind. Ap. 134; I. L. R. 9 All. 191.

(1) I. L. R. 6 Calc. 30. (2) 15 Com. B. 310. (3) 1 El. and M. 248.

each of his patents the distinctive features of invention alleged to have been appropriated. *Held*, a sufficient compliance with s. 34.

Consolidated appeal and cross appeal from a decree (23rd February, 1883) of the High Court (1), reversing a decree (22nd May, 1882) of the District Judge of *Cawnpore*.

Mr. *Aston*, Q. C., and Mr. *Herbert Cowell*, for the Appellant.

Mr. *R. S. Wright* and Mr. *A. Phillips*, for the Respondents.

21st July, 1886.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD WATSON :—

These appeals are taken in an action of damages for the alleged infringement of certain exclusive rights secured to Mr. *Bull*, the Plaintiff, by three Indian patents; and the whole controversy between the parties depends upon two pleas maintained by the Defendant, the late Mr. *Petman*, who is now represented by his testamentary executors.

In his written statement, filed in answer to the plaint, before the District Judge of *Cawnpore*, the Defendant pleaded that the Judge had no jurisdiction to entertain the suit, in respect it had not been regularly brought into Court, and to that plea he has adhered throughout all the subsequent stages of the litigation. The Defendant also pleaded that the Plaintiff had failed to comply with the provisions of sect. 34 of the *Indian Patent Act* XV. of 1859, inasmuch as no particulars of the breaches complained of had been delivered with the plaint; and that, in the absence of such particulars, he could not be called upon to state a defence to the action upon its merits.

The District Judge, by an order dated the 2nd of March, 1882 (the day appointed for adjustment of issues), overruled both pleas, and adjusted issues for the trial of the cause. The first and second issues raised these two pleas; but the Defendant, not being satisfied with the decision of the District Judge, on the 7th of March, 1882, presented an application to the High Court under sect. 622 of the Civil Procedure Code, with the view of obtaining an alteration of the order of the 2nd of March, in so far as it related to these pleas. That petition was rejected, as irregular, by the High Court on the 20th of March, 1882; and the District Judge then proceeded with the trial of the issues adjusted by him. On the same day on which the Plaintiff's evidence was concluded, the Defendant presented a petition in which he reiterated his pleas, and for the first time stated certain particulars of objections to the validity of the Plaintiff's patents, which he desired to prove. The learned Judge held that the notice of particulars came too late, and negatived the Defendant's right to lead evidence in support of them; and thereafter he found, upon the Plaintiff's evidence, that the alleged infringement had been established, and assessed damages at Rs.10,000. That sum was fixed, on the footing that it was a fair consideration for the Defendant to pay for a license to use the Plaintiff's inventions; but in the argument upon these appeals, the Plaintiff's counsel admitted that the principal of assessment was erroneous, and that the damages due (if any) must be limited to the loss occasioned to the patentee by reason of the Defendant's infringement.

Upon an appeal by the Defendant, the High Court for the North-Western Provinces, consisting of Sir *Robert Stuart*, C.J., and *Tyrrell*, J., agreed with the Court below that the Defendant's plea of no jurisdiction was not well founded. They held, however, contrary to the finding of the District Judge, that there had been an entire failure on the part of the Plaintiff to observe the requirements of sect. 34 of the *Patent Act*, and consequently "that the Plaintiff came into Court without any case which could possibly be tried." Being of opinion, in these circumstances, that the Plaintiff

(1) I. L. R., 5 All. 371.

ought to be allowed another hearing on the merits, the learned Judges directed "that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at *Cawnpore*, and that with the plaint the particulars required by sect. 34 be duly delivered." The costs were ordered to "be reckoned as costs in the cause."

Their Lordships are of opinion that it is impossible, in any view which can be taken of the Defendant's pleas, to sustain the operative decree of the High Court. It sets aside, or at least ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the Defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the Plaintiff the alternative of having his suit dismissed, or of withdrawing it, with leave to bring a new action.

Their Lordships are of opinion that the Defendant's plea, founded on sect. 34 of the *Patent Act*, was rightly disposed of by the District Judge. It appears to them that the learned Judges of the High Court have misconstrued the enactments of that section which refer to the particulars of breaches to be delivered by a Plaintiff complaining of infringement. The sole object of these enactments is to give the Defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself, or in a separate paper. In so far as it relates to particulars of breaches, sect. 34 of the Indian Act is expressed in substantially the same terms with sect. 41 of the English *Patent Act* of 1852 (15 & 16 Vict. c. 83). In *Talbot* v. *La Roche* (1), which was an action for violation of a patent "for improvements in obtaining pictures or representations of objects," the Plaintiff merely alleged that, during a certain period of time and at a certain place, the Defendant had infringed, "by making, using, and selling pictures and portraits according to the Plaintiff's invention;" and that was held, by the Court of Common Pleas, to be sufficient compliance with sect. 41. Chief Justice *Jervis*, distinguishing between particulars of breaches, and paticulars of objection, to be delivered by the Defendant, said in that case (2):—"Under a plea of want of novelty, the Court require the particulars to condescend upon the paticular instances. But that is very different from this case, the matter there is not in the knowledge of the patentee. But the Defendant must know whether and in what respects he has been guilty of infringement." In *Needham* v. *Oxley* (3) the Plaintiff simply pointed to certain machines used by the Defendant, and stated in general terms that they infringed his patent. Lord *Hatherley* held that sufficient particulars had been delivered, and he accordingly refused the Defendant's motion for an order on the Plaintiff to specify in what respects his machines infringed the patent. There are other authorities to the same effect, but it is unnecessary to refer to them.

In the present case all three of the Plaintiff's patents relate to one article, a kiln for burning bricks, and the second and third in date are for improvements upon the invention specified in the first. The Plaintiff points to a particular kiln constructed and used by the Defendant, and in his plaint he not only refers to his patents, but indicates in the case of each of them the distinctive features of his invention which he alleges to have been appropriated by the Defendant in the construction and use of the kiln. It is therefore impossible to accept the views of the High Court upon this branch of the case without disregarding the authoritative construction which has been put upon the corresponding section of the English Act, a construction which ap-

(1) 15 C. B. 310.

(2) Page 321

(3) 1 H. & M 248.

pears to their Lordships to be just and reasonable.

There only remains for consideration the objection stated by the Defendant to the jurisdiction of the Court. The circumstances in which the plea was taken are these. The plaint was originally filed in the Court of the Subordinate Judge at *Cawnpore* on the 2nd of February, 1882, whereas sect. 22 of the Act XV. of 1859 provides that no action for infringement "shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue, or the Defendant shall reside as a fixed inhabitant." The principal Court of original jurisdiction was the Court of the District Judge. On the 15th of February, 1882, the Defendant personally signed, along with the Plaintiff and his pleader, a petition praying the District Judge to withdraw the case from the Court of the Subordinate Judge, and to try the suit in his own Court. On the same day an order was made in the District Court in these terms:—"That the case be transferred from the Subordinate Judge's Court to the file of this Court, and the date will be fixed hereafter." It is admitted that the District Judge had no authority to issue that order unless such authority was given him by Act X. of 1877, sect. 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the Subordinate Judge.

In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be completely instituted in the Court of the Subordinate Judge. Sect. 22 of the *Patent Act* expressly provides that no such suit shall be maintained before that Court; and the first and an essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the District Court was equally incompetent. It was decided by the High Court of *Calcutta* on the 10th of June, 1880 (1), that the Superior Court cannot make an order of transfer of a case under sect. 25 of the Civil Procedure Code, unless the Court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of sect. 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the Defendant, there was no competent suit depending at the Plaintiff's instance on the 6th of April, 1882, when the Defendant raised the plea of no jurisdiction in his written statement of defence.

But then it is said that the Defendant must be held, by reason of his conduct in the suit, to have waived all objection to the irregularities of its institution before his statement of defence was lodged. It is not said that the Defendant has done anything to waive that objection, since it was stated in his written answer to the plaint. On the contrary, he has taken every possible opportunity to insist in it. The result is, that the Defendant must now have the same judgment upon his plea of no jurisdiction which ought to have been given by the District Judge when the plea was first disposed of by him on the 2nd of March, 1882.

The Defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a Defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the

(1) *Peary Lall Mozoomdar* v. *Komal Kishore Dassit*, Ind. L. R. 6 Calc. 30.

merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the Defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected to the case being tried, and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the Defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the District Judge.

Great stress was laid by the Plaintiff's counsel upon the terms of a petition prepared by the Defendant's native pleader, which was filed before the District Judge on the 24th of February, 1882. It is a singular fact that this petition, now said to be so very important, is one of the documents which neither of the parties considered of sufficient importance to be forwarded along with the other papers in these appeals. But taking the account given of it by the District Judge, it must have been prepared by the Defendant's pleader, before the transference of the suit on the 15th of April, with the view of informing the Subordinate Judge that the Defendant was about to leave for England, in consequence of ill-health, and moving that Judge to have the cause heard and determined with the least possible delay. The petition states the plea of no jurisdiction in the Subordinate Judge, so that one of the points which the pleader, at the time when it was originally prepared, desired the Subordinate Judge to hear and determine at once was the plea against his own jurisdiction. Accordingly the Plaintiff's argument as to waiver really rests upon the single fact that the Defendant personally concurred with the Plaintiff and his pleader in petitioning the District Judge to transfer the suit, in terms of sect. 25 of the Procedure Code. The grounds of that petition had nothing to do with want of jurisdiction in the Lower Court, but were ordinary grounds of convenience, which would justify the removal of a suit to the Higher Court from the Lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the Defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the Subordinate Judge. They are consequently of opinion that the District Judge, instead of repelling, ought to have sustained the Defendant's plea.

Their Lordships regret that, in accordance with the opinion which they have formed, the suit must be dismissed, on the ground that it was not competently brought; but they cannot dispense with the requirements of the Patent Act and Procedure Code, and the result is due to the Plaintiff himself, who has shewn no less obstinacy than the Defendant in perilling the issue of the case upon his own views of the law. Nothing would have been easier than for the Plaintiff to obviate the objections to the regularity of the procedure urged by the Defendant in his written statement. On the other hand, the Defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the Plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the Defendant with a new trial of the cause, and would have given judgment for the Plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgment of the High Court, except in so far as it recalls the decision of the

District Judge, must be reversed, and the suit dismissed, with costs in both Courts below. The executors of the Defendant, Mr. *Petman*, will have their costs in the original and cross appeals.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitors for the Respondent: *Sanderson & Holland.*

9th July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

REWA MAHTON (Defendant) ... } *Appellant,*

and

RAM KISHEN SINGH (Plaintiff) ... } *Respondent.**

Civil Procedure Code, 1877, s. 246 (1)—Execution of cross-decrees—Jurisdiction—Bonâ fide purchaser—Presumption of validity of order for sale.

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution.

Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide*, and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale.

Appeal from a decree (21st April 1882) of the High Court, reversing a decree (3rd August 1880) of the Subordinate Judge of *Bhagalpur*.

Mr. *C. W. Arathoon*, for the Appellant.

The Respondent did not appear.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

This is an appeal from a decree of the High Court at *Calcutta* in a suit in which the Respondent, *Mussamut Radhek Koeri*, was the Plaintiff, and *Khoob Lal* and the Appellant, *Rewa Mahton*, and others, were the Defendants. *Koeri* died pending this appeal, and *Ram Kishen Singh*, her son and heir, was substituted for her. It appears that on the 7th of September, 1877, the Munsiff of *Jamoi*, in the district of *Bhagalpur*, made two decrees, one in favour of the Respondent against *Khoob Lal* for Rs.788. 0*a* 9*p*., and the other in favour of *Khoob Lal* against her for Rs.661. On the 10th of November, 1877, the Respondent took out execution against *Khoob Lal* for the whole amount of her decree without giving him any credit for the Rs.661 which he had recovered against her. Under that execution *Khoob Lal* was arrested and detained in prison for a period of about two months, at the expiration of which time he was released on the failure of the Respondent to lodge the necessary diet money. Subsequently, on the 26th of March, 1878, the Respondent made another application for execution against *Khoob Lal* upon her decree, and in that application she gave him no credit for the Rs.661 which he had recovered against her. Upon that execution being granted, an application was made to the Munsiff by *Khoob Lal* to set it aside. The Munsiff granted that application, but his decision was, on the 26th of July, 1878, reversed by the District Judge, who held that the Respon-

* Cowell's Ind. Ap. 106; I. L. R. 14 Calc. 18.

(1) Section 246 of Act XIV of 1882.

dent was entitled to execute her decree for Rs.788, notwithstanding all that had previously taken place. Upon that *Khoob Lal* appealed to the High Court, and whilst the matter was pending before that Court, *viz*, on the 31st of August, 1878, he applied for execution against the Respondent for the total amount of his decree for Rs 661. The execution was issued, and under it the property of the Respondent, consisting of a 2 annas share of mouzah *Mokoondpur Mohamda*, was attached and sold to the Appellant for a sum of Rs 9.775. Application was made to set aside that sale under sects. 311 and 312 of Act X of 1877. The Munsiff disallowed the application and confirmed the sale, and his order was on appeal affirmed by the Judge. By the last paragraph of sect. 312 it is enacted that "No suit to set aside on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made."

The present Respondent, however, brought a regular suit against *Khoob Lal*, and the present Appellant, the purchaser under the execution, and others, alleging that, owing to her having a decree against *Khoob Lal* for an amount greater than that of his decree against her, the latter decree was not fit to be executed; that the sale under it was contrary to the powers of the Court, and was not binding upon her, and that the purchaser acquired no right under the sale; and further, that the purchase by the present Appellant took place in collusion with *Khoob Lal*; that *Khoob Lal* was really the purchaser; that he, by fraud, had kept her from knowing that the execution had issued; and consequently that the sale in execution ought to be set aside. She prayed:—"(1). That the Court will be pleased to hold that the processes of execution of decree of *Khoob Lal*, the Defendant No. 1, were carried out entirely in contravention of law; and that in reality according to law and justice, the Defendant aforesaid had nothing to obtain from your petitioner the Plaintiff; and that the sale which has been held is invalid. (2). That the Court will be pleased to hold that the processes of the sale aforesaid, and the sale in question, were executed and held fraudulently. (3). That the Court will be pleased to cancel this sale." Written statements were put in on the part of the several Defendants, and issues were settled. The Subordinate Judge in the first instance settled two issues in bar. The first was:—"Is this case in the regular department,"—that is, is this suit which is brought as a regular suit—"unfit for hearing under the last portion of sect. 312 of the Code of Civil Procedure, or not?" Second. "Was it necessary for the Defendant, first party, to set off the amount of the decree of the Plaintiff against his own decree under sect. 246 of the Code of Civil Procedure, or not?" Subsequently he settled further issues of fact. He said:—"To-day the arguments of the pleaders for both parties on the first issue were heard. After hearing the arguments of the pleaders for both parties, I come to the conclusion that issues on facts also ought to be framed; that after receiving the evidence I shall try, on all the issues, as to whether this sale has been held fraudulently or not, and determine whether, in case fraud be proved, a regular suit will lie for cancelment of the sale in question." Then he settled the following issues of fact:—"1st. Did the Defendant No. 1 take the proceedings for execution of decree and service of attachment processes and a sale notification fraudulently (and) surreptitiously, with a view that the Plaintiff might not be aware of it; or were the proceedings of execution of decree and the issue of attachment processes and sale notifications executed in a *bonâ fide* manner without fraud? 2nd. Is the Defendant No. 2"—that is the present Appellant—"furzi for the Defendant No. 1 in the auction purchase, or is he the real purchaser; and were the Defendants Nos. 2 and 3 aware of the fraud stated by the Plaintiff at the time of the auction purchase or not? 3rd. Has the property sold at auction been sold for a small value owing to the fraud alluded to, or not?" Those issues came on for trial. Witnesses were

heard on both sides, and the Judge delivered judgment, by which, after stating that the pleas in bar were overruled by his predecessor, he decided in favour of the Defendants. With regard to the principal point as to the fraud, he said:—"There is no proof of the allegation that *Khoob Lal* purchased the share in question in the name of *Rewa Mahton*." And Again:—"In my opinion *Rewa Mahton* is the real purchaser, who made the other Defendant, *Omed Ali*, a partner in his purchase. I do not think that *Khoob* has any interest in the property." He also held that the property was not sold for an inadequate price. An appeal was preferred to the High Court, and that Court, without entering into the question of fraud or no fraud, but assuming that the Defendant, the present Appellant, was a *bonâ fide* purchaser at the sale, proceeded to consider the question whether the sale in execution was valid or not in consequence of the Munsiff's having granted *Khoob Lal's* execution when the Plaintiff held a decree for a larger amount against him.

That question depends upon sect. 246 of the Code of Civil Procedure, Act X of 1877, which enacts as follows:—"If cross-decrees between the same parties and for the payment of money be produced to the Court"—that is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not,—"execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction on the decree for the smaller sum." In this case the Plaintiff's decree was not brought before the Court when *Khoob Lal* applied for execution. At that time he brought before the Court only his own decree, and the Court ordered that an attachment should issue to satisfy his judgment for Rs.661, and the property was attached. We cannot in this suit enter into the question whether the decisions upon the petition to set aside the sale under sects. 311 and 312 were correct or not. Those decisions cannot, in consequence of sect. 312, be impeached in this suit on the ground of any irregularity which was the subject of those decisions.

The High Court determined the question simply upon sect. 246. They said: "The provisions of sect. 246 are explicit, that if cross-decrees between the same parties and for the payment of money be produced to the Court, execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum. It was not competent to the Munsiff by his judgment to modify this provision of the law, even if it were his intention to do so, which is by no means clear." The High Court does not say that the decree of the Plaintiff was brought before the Munsiff, or that the two decrees were before him at the time when he awarded execution for the smaller decree. They go on:—"Nor does it appear to us that there was anything in the Plaintiff's conduct which could render legal and valid proceedings of the Defendant, which were without the sanction of law. When the Defendant on the 31st of August applied for execution of his cross decree for a smaller amount he must have been aware that the Plaintiff's decree had been produced to the Court, and that since the order of the Appellate Court, the 26th of July, 1878, it was capable of execution. The Defendant accordingly had no right to execution except as provided by sect. 246, and the whole of the subsequent proceedings taken in execution of the Defendant's decree were, in our opinion, a nullity, and must be set aside." The Court, therefore, notwithstanding the finding of the Lower Court that the Defendant—the present Appellant—was a *bonâ fide* purchaser at the sale under the execution, and without themselves entering into the question of fraud or no fraud, held that the execution issued by the Munsiff, and all the subsequent proceedings, were a nullity, and must be set aside. The Defendant Appellant purchased *bonâ fide*, and for a

fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment.

Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of sect. 246, and that the judgment of the High Court in that respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.

It would have been more satisfactory if in this case, which was one appealable to Her Majesty in Council, the High Court had not decided the case merely upon the construction of sect. 246 without expressing their opinion upon the other issues which were raised and determined by the Subordinate Judge. Their Lordships, being of opinion that the decision of the High Court with reference to sect. 246 is erroneous, have been obliged to determine the other issues, and for that purpose to go through the evidence in the absence of the Respondent, who did not appear before them on the argument of the case, without having the advantage of any expression of the High Court's opinion as to the effect of that evidence. If the High Court had determined the other issues and had concurred with the Subordinate Judge in his findings, the case would have fallen within the rule of concurrent findings of fact, and the examination of the evidence by their Lordships would in all probability have been unnecessary.

Their Lordships having examined the evidence very carefully, have come to the conclusion that the Subordinate Judge was correct in holding that there was no fraud; that the Defendant was a *bonâ fide* purchaser under the execution; and that the property was not sold for an inadequate price.

Under these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal to the High Court with costs, to reverse the judgment of that Court, and to affirm the decision of the Subordinate Judge. The Respondent must pay the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

13th July 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Allahabad.

SAYYID MANSUR ALI KHAN (Plaintiff) ... } *Appellant,*

and

BABU SARJU PARSHAD (Defendant) ... } *Respondent.**

Regulation XVII of 1806, ss. 7, 8—Mortgage by conditional sale—Redemption.

In the part of India where Bengal Regulation XVII of 1806 (1) is in force, the right to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest.

Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagors contention, was,

* 13 Cowell's Ind. Ap 113; I. L. R. 9 All 20.

(1) "For a general extension of the period fixed by Regulations I of 1798 and XXXIV of 1803 for the redemption of mortgages and conditional sales of land, under deed of bai-bil-wafa, *Katkabala*, or other similar designation."

by the terms of the condition, treated as a separate debt.

Held, that, as the mortgagor had not deposited the interest due on the sum lent required, according to s. 7 of the Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption.

Appeal from a decree (23rd January, 1883) of a Divisional Bench of the High Court, reversing a decree (9th April, 1881) of the Subordinate Judge of *Gorakhpur*.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne* appeared for the Appellant.

Mr. *W. A. Raikes* and Mr. *Dunlop Hill*, for the Respondent.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought by the Appellant for the redemption of a mortgage made by his deceased brother, *Sayyid Zahur Ali Khan*, to whose estate the Appellant had succeeded by inheritance. The mortgage was by a conditional sale to the Respondent, dated the 14th of March, 1868, to secure the payment of Rs.11,200 which had been borrowed by the mortgagor, and interest thereon at the rate of Rs.1 4*a*. per cent, per mensem, being Rs.1,680. The condition was, that the interest should be paid annually for seven years, with compound interest if it was not paid at the stipulated periods, to be realised from the person and property of the mortgagor, and the principal sum of Rs.11,200 and Rs.1,680 on account of interest for the last year was to be paid on the 6th Badi Chait (March 28, 1875). On the 23rd of April, 1875, after the expiration of the time fixed, the mortgagee filed a petition under the *Bengal* Regulation XVII of 1806, in which he claimed Rs.17,304 7*a*. as due for principal and interest, being the principal sum and three years' interest and compound interest thereon. A notification was thereupon issued by the Judge according to the Regulation, but the service of it was not effected till the 20th of January, 1880. On the 17th of January, 1881, the mortgagor deposited in the Judge's Court Rs.12,881, the principal sum and interest for the last year, with a petition alleging that the interest for the previous years was, according to the condition, to be recovered by a separate suit, and on the 20th of January, 1881, he brought this suit.

The Lower Courts have given judgments at considerable length upon the construction of the mortgage deed, the Subordinate Judge holding that the Appellant was entitled to redeem, and the High Court reversing that decision and dismissing the suit. It does not appear to their Lordships to be necessary to consider the construction of the deed. In the part of *India* where the Regulation is in force, the right to redeem depends entirely upon it. The words of sect. 7 are, that where the mortgagee has not been put in possession of the mortgaged property (which was the case in this mortgage), the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to the redemption of his property before the mortgage is finally foreclosed in the manner provided by the 8th section. That section gives the mortgagor one year from the date of the notification to redeem the property, and says that if he does not do so in the manner provided by the 7th section, the mortgage will be finally foreclosed and the conditional sale will become conclusive. It could not be denied by the Appellant's counsel that much more than one year's interest was due. Indeed the arrear of interest had continued to increase from the 23rd of April, 1875, till the date of the deposit. The mortgagor had clearly not done what was necessary by the terms of the Regulation to entitle him to the redemption and for that reason their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The Appellant will pay the costs of it.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *Oehme & Summerhays.*

13th, 16th and 24th July, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

HURRONATH ROY BAHADOOR (Plaintiff) } *Appellant,*

and

KRISHNA COOMAR BUKSHI (Defendant) } *Respondent.**

Principal and agent—Suit by principal for an account—Object of a decree for an account, as distinguished from a decree made upon the hearing—Costs—Limitation under Act IX of 1871, Sch. II, Art. 118.

A continued agency, or employment as dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the Defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. The dewan having denied the receipt of the money, and any kind of accountability, it was found against him that the relation of agency existed between the parties. But, on the ground that it was impossible to decide, upon the evidence adduced at the hearing, how much of the principal's money was unaccounted for, though the attempt had been made to prove a balance due, the Appellate Court dismissed the suit. *Held*, that such a suit was essentially one for an account, and that the Courts below should have followed the regular course, *viz.*, to order an account to be taken of the Defendant's dealings with the Plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it.

As, however, the Defendant had falsely denied his fiduciary position, he was ordered to pay the whole costs of this suit hitherto, including the costs of this appeal, without regard to the result of the account. Limitation under Act IX of 1871, s. 118, which was applicable, commenced from the date on which the agency ceased.

* 13 Cowell's Ind. Ap. 123; I. L. R. 14 Calc. 147.

Appeal from a decree (18th February 1881) of the High Court which dismissed Appellant's suit, with costs, reversing a decree (11th September 1878) of the Subordinate Judge of *Rajshahye*, who decreed the claim in part.

Mr. *R. V. Doyne*, and Mr. *H. Cowell* for the Appellant.

The Respondent did not appear.

24th July, 1886.

The Judgment of their Lordships' was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

The Plaintiff in the suit, who is the present Appellant, is the owner of a large estate, and the Defendant acted as his dewan for some twenty years or so. Some months before the institution of the suit, the Plaintiff demanded an account of the Defendant's dealings, but the Defendant left the place without rendering any. In June, 1877, the plaint was filed. After stating the Defendant's position and duties as dewan, the Plaintiff alleged that he had taken money out of the treasury in the year 1866, and at other times, and had misappropriated it. He then specified certain sums taken, and certain allowances to which the Defendant was entitled, and concluded thus:—"There is a balance against him of Rs. 19,925 14*a*. for the recovery of which I institute this suit. If by the decision of the Court a larger sum should be proved to be payable to me by him under proofs and papers, the prayer is also for recovery of the same."

The HighCourt has said that this is a suit virtually for an account. Their Lordships agree with that view. They think that, though the pleading may not be quite precise or technical, it is impossible to assign any other character to a plaint allegin a continued agency in the Defendant for the purpose of drawing and expending the Plaintiff's money, and praying relief on the ground that the agent had drawn from his principal more than he had expended for him. To such a claim by a principal, the agent may

answer that accounts have been settled between him and his principal, or that, though none have been settled, he has in the course of his agency applied for the principal's benefit as much as he has received or more. Nothing could prevent the Defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the Plaintiff claims it if a larger sum than he specifies should be found due to him. Such a suit is essentially one for account.

In his written statement the Defendant did not set up the defence of settled account, nor that the account when taken would be in his favour. He denied his accountability altogether. He denied the receipts of money which were ascribed to him, and alleged that all the expenditure was effected through the Plaintiff's own treasurer and Poddar, agreeably to his own instructions. As for the papers produced from the treasury to shew drawings of money by the Defendant, he charged that they were false and fabricated. Such a line of defence was perfectly legitimate, if true; but it has been found by both the Subordinate Judge and the High Court to be false. The Subordinate Judge finds the Plaintiff's treasury accounts to be genuine, and he finds further that in the majority of instances the Defendant expended the Plaintiff's money without his authority, meaning, as their Lordships understand, that he expended the money by his own general authority as dewan, and did not take the Plaintiff's orders for each specific payment. As regards amount, the Subordinate Judge finds that, setting aside two smaller sums which have been sufficiently accounted for in the suit, two larger sums, amounting altogether to Rs.40,353 8*a*. are proved to have come into the hands of the Defendant.

Such findings as these establish a relationship between the Plaintiff and the Defendant under which the latter is accountable for his receipts. Their Lordships think that the regular course would have been to order an account to be taken of the Defendant's dealings with the Plaintiff's money as his dewan or agent. In taking the account either party might waive inquiry as to particular periods of time or particualr departments of expenditure, and that is often done. But neither could shut out the other from inquiry into any part of the Defendant's transactions as dewan. In such an account the agent is *primâ facie* liable for what he has received, and is bound to discharge himself; but the evidence which is considered sufficient to discharge him may vary as to different items, and he certainly would be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transactions which have taken place long ago, though under circumstances which prevent any absolute bar by lapse of time.

The Court, however, seems to have thought that its duty was to make a final decree at the hearing upon the items specified in the plaint and the accounts appended to it. And taking a distinction between sums for which the Defendant had marked and papers and other sums for which, though paid to him or to his order, he had not marked, the Court found that a sum of Rs.1,369 was due to the Plaintiff, and made a decree for that amount, apportioning the costs of the suit rateably according to the proportion of the amount claimed to the amount recovered. Both parties appealed to the High Court, who dismissed the suit altogether with costs. The present appeal is from that decree. The Defendant has not appeared, so that the hearing has been *ex parte*, and the evidence bearing on the points now material has been minutely examined. Their Lordships have now to weigh the reasons assigned by the Courts below for their decrees.

It is first necessary to deal with the plea of limitation, which is raised by the Defendant, and which is governed by Act IX of 1871. Both Courts have decided that there is no such bar in this case. The only Articles suggested as applicable to it are those numbered 60, 90, and 118. Their Lordships think it sufficient to say, with both Courts, that time must be counted from the date on

which the Defendant ceased to discharge the duties of dewan by departing from the Plaintiff's service, and, therefore, whether three years or six years be the limit, there is no bar.

The principal reason assigned by the Subordinate Judge for his conclusion is that the Defendant's mark *appear on* some of the sehas which shew advances made to him or to his orders, and does not appear on others. And he cites the Plaintiff's treasurer as saying that he was released from liability for the marked items, but was liable for the unmarked ones, and that the Defendant was not liable for them. The treasurer's evidence shews that the payment of money on the Defendant's orders without his mark was an irregular procedure not giving to the treasurer complete immunity from responsibility. But they cannot find that he has anywhere said that the Defendant was not responsible to the Plaintiff for the money paid out on his orders; and if he had said so it would be a mistake of law. The Subordinate Judge was in error when he held that the Defendant was not bound to discharge himself of all the sums which he ordered to be drawn for the treasury.

The only other reason assigned by the Subordinate Judge is that most of the disbursements in the some lawsuits called the two-anna case were made through *Turini Kant*, the Plaintiff's general mokhtar; that *Turini Kant* had filed accounts in the Plaintiff's treasury which the Plaintiff had not produced; and that the Plaintiff had sued *Turini Kant* for an account, and had claimed against him the sum of Rs.6,725, which again was claimed in the present suit.

It is not quite clear what the Subordinate Judge considered to be the exact bearing of *Turini Kant's* interventions in these matters. He did not apply them so as to discharge the Defendant of any specific items of charge. And If he thought that the Plaintiff was bound to clear up his dealings with *Turini* before he could charge the Defendant with money taken for the two-anna case, it is difficult to see why such an objection as that does not apply to marked items as well as to unmarked. The High Court appear to have so applied it, and they are logical and consistent in doing so. But it is necessary to see whether the existence of unproduced accounts between the Plaintiff and *Turini* supplies any reason why a decree for account should not be made between the Plaintiff and the Defendant. If it does, it appears to their Lordships that the Plaintiff was harshly treated in not being allowed an opportunity to produce them. For the Defendant did not rely upon them in his written statement, did not call for their production, and apparently did not ask the Plaintiff's witnesses any question about *Turini Kant* except a quite general one put in the cross-examination of the treasurer. This is one of the circumstances shewing what miscarriages are likely to occur if the Court attempts to make a final decree at the hearing of a suit for account, instead of the regular decree for account.

The Plaintiff's suit against *Turini* was instituted almost simultaneously with his suit against the Defendant; and both were before the Subordinate Judge of *Rajshahye*. The suit was for an account, and the Plaintiff charged *Turini* with receiving as mokhtar on various accounts the sum of Rs.17,677 7*a*. 6*p*., of which he had properly spent no more than Rs.17,227 6*a*., leaving Rs.450 due from him on those accounts. He also alleged a misappropriation of Rs.800 on accounts of which the items were not specified by him, or which do not appear in the present record. *Turini* admitted the receipt of sum amounts, denied the receipt of others, and claimed a balance due to himself on the account. The suit was compromised in the year 1878, and was dismissed, each party paying his own costs.

With regard to the sum of Rs.6,725 which the Subordinate Judge says the Plaintiff has sought to recover against both *Turini* and the Defendant, their Lordships cannot find not such a sum; but it is perhaps a misprint for the sum of Rs.6,525 which appears in the ac-

counts of both suits. In the *Tarini* suit it is charged as received by him by way of instalment on the 23rd of Aughran, 1280, but it is part of the accounts upon which only Rs.450 is claimed, and therefore it must be almost, if not wholly, written off in the legitimate expenses which the Plaintiff allows to *Tarini*. In the present suit a sum of Rs.6,525 is charged against the Defendant, as a howlat taken in the name of *Tarini* on the 23rd of Aughran, 1277, but it is wholly written off as part of the legitimate expenses which the Plaintiff allows to the Defendant. Even supposing that there is some error in the dates, and that the two sums relate to the same transaction, their Lordships cannot see that it is proved or probable that the Plaintiff is seeking to recover the same amount twice over. It is very likely that both the dewan and the mokhtar are bound to account to the Plaintiff for the same sum of money,—the dewan because he ordered its payment, the mokhtar because he received it and had the application of it. It is very likely that full accounts could not be stated between the principal and his two agents without including some of the same money in both accounts. That might make it expedient for *Tarini* to be joined with the Defendant as an accounting party; a point which need not now be considered, as no objection has been taken to the frame of the suit on that ground. But the appearance of the same items in accounts against two persons both responsible for them does not shew that the Plaintiff is claiming those sums against both. To shew that, it would be necessary to go deeper into the accounts, and to find that the Plaintiff is trying to get the benefit of the same charge twice over by writing it off against a different set of discharges in each case. Nothing of that kind appears on the record. And their Lordships think that the finding is another illustration of the inconvenience likely to result from making a final decree when a decree for account is the proper one.

The High Court considered that the Plaintiff's evidence was defective. The Subordinate Judge thought that the sehas produced, being rough sheets in the nature of a day-book, were written at the time when the work was being done, and were better evidence than anything copied from them could be. The High Court think them only part of the materials for a complete yearly account, such as should be regularly prepared and recorded in a zemindar's office. Yearly accounts of this kind were called for by the Defendant, and none were produced. The High Court attach great importance to the position of *Tarini*; they comment adversely on the non-appearance of the Plaintiff as a witness, and they consider that there must have been some statement of account filed because the word "*adai*" is written over two of the items of charge. Their conclusion is that it is impossible to say how much, if any, of the sums remains unaccounted for, and therefore the suit must be dismissed. So far do they carry their view that the Plaintiff ought to suffer from not having given the best evidence, that they refuse to give him any relief as to the sum of Rs.4,388, though the receipt of it is admitted by the Defendant, who does not shew how it was discharged.

If this were the proper occasion for deciding whether the Plaintiff should recover anything, their Lordships would have to consider long before assenting to the views taken by the High Court. It appears to them that sufficient weight has not been given to the onus thrown upon the Defendant by his fiduciary position. They observe that the teasurer states that there were no such yearly accounts as the High Court suppose. If there are such they may yet be produced, though whether they or the contemporary sehas are the better evidence must depend on circumstances which at present are not known. The Plaintiff excused himself from examination in Court on a plea of ill health, which may have been false. But it was supported by certificates from the civil surgeon of *Rajshahaye*. The Subordinate Judge believed it, and he issued an order for a commission to examine the Plaintiff, which,

as appears from a petition in the Record, the Defendant prayed to have reversed. On the subject of *Tarini* their Lordships have already made observations.

But all their Lordships wish to do now is to avoid prejudice to a proper inquiry by anything falling from either the High Court or this Committee in the course of what they consider to be a premature attempt to make a final decision. Whatever weight may be attributed to the reasons given by the High Court for the disallowance of any item of the charge, they are inapplicable to a decree for account. The Defendant is the Plaintiff's agent, and has drawn from his treasury substantial sums of money to be applied in the Plaintiff's business on the Defendant's responsibility. On proof of those facts there is a clear case for an account, in which the Defendant must discharge himself in some way from the money he has drawn. In taking that account any relevant papers in the Plaintiff's treasury may be called for, evidence may be got as to particular items, it may be ascertained whether, as to any item, the Plaintiff has already got the benefit of it in his account with *Tarini*, the appearance of the word "*adai*" may be accounted for, and its effect determined. Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule.

Their Lordships are of opinion that the High Court should have remanded the suit to the Subordinate Judge to take a general account of all dealings and transactions between the Plaintiff and the Defendant in the character of the Plaintiff's dewan, only not disturbing any settled account, if such there be. And inasmuch as the Defendant has taken the course of denying his receipts, his fiduciary position, and his accountability *in toto*, a defence which the High Court say is shewn to be false by a mass of evidence adduced by the Plaintiff, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. If he had been truthful and honest he would have submitted at once to a decree for account, and thus have saved great delay and expense. Their Lordships will now humbly advise Her Majesty to make such a decree, and the Defendant will be ordered to pay the costs of this appeal.

Solicitors for the Appellant: *Barrow & Rogers.*

17th July 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Watson, the Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court at Madras.

VENKATA NARASIMHA APPA ROW (Plaintiff) ... ... } *Appellant,*

and

THE COURT OF WARDS and others (Defendants) ... ... } *Respondents,*

VENKATA RAMALAKSHMI GARU and others (Plaintiffs) ... } *Appellants,*

and

GOPALA APPA ROW and others (Defendants) ... ... } *Respondents.**

Ex parte RAJAH GOPALA APPA ROW.

Practice—Petition for Rehearing.

In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council:—

Held, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.

* 13 Cowell's Ind. Ap. 155; I. L. R. 10 Mad. 7.

There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard.

Rajunder Narain Rae v. *Bajai Govind Singh* (1) referred to.

This was a petition of *Rajah Raji Gopala Appa Row* for an order that two appeals should be reheard, and that two orders of Her Majesty in Council dated the 15th of December, 1879, and the 3rd of May, 1882, should be varied, and the judgment of the High Court of *Madras* therein restored.

Bompas, Q. C. (*Nandalall Ghose* with him) for the Petitioner.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD WATSON:—

Their Lordships are of opinion that this petition must be refused.

The Petitioner asks a rehearing of the judgment of this Board in these two appeals, which was finally approved by Her Majesty in Council in the year 1883. The ground upon which he makes the application is, that he has discovered certain new matter which would, if it had been produced in these appeals, have materially affected the judgment of the Board. After hearing a very full explanation from counsel at the Bar, it appears to their Lordships to be exceedingly doubtful whether the documentary evidence, which is said to be new, could have had any bearing or any effect upon the decision of the Board. But it is hardly necessary to consider that point, because some of the documents which are alleged to be new are printed at length in the record formerly before this Board; and that which is now represented by the Petitioner to be the most important of them all is a recommendation of the Special Commissioner, approved of by the Governor in Council on the 3rd of December, 1802. That document is fully and correctly described in the record, so that its existence was known to the parties. In short it is certain that most of the documents were well known to the parties, and were actually produced, and that, with reasonable care and diligence, all of them might have been recovered and made evidence, by the ordinary methods of procedure.

Their Lordships are unwilling to dispose of this application on these grounds alone. They are willing to assume, for the purposes of this petition, that a relevant case of *res noviter* is set forth in it,—new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at. But in considering the Petitioner's motion for a rehearing, the following facts must be kept in view. It is no alleged that there was any informality in the conduct of these suits from their inception to their close. Both parties appeared before the Committee; they were fully heard upon the merits of the appeals, the Petitioner being at that time represented by the Court of Wards. It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the Board intended to decide. Then it was reported to Her Majesty, and was confirmed by regular Orders in Council dated the 3rd of May, 1882, and the 19th of July, 1883. No authority has been cited to their Lordships which can warrant them in granting a rehearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord *Brougham* in the case of *Rajunder Narain Rae* v. *Bijai Govind Singh* (1). His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 134 of the first volume of *Moore's*

(1) 2 Moore's Ind. Ap. Ca. 181; S. C. 1 Moo. P. C. 117; 1 P. C. J. 175.

Reports, his Lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard." Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of *Hebbert* v. *Purchas* (1), where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said:—"Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicæ ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Solicitors for Petitioner: *Scott & Spalding*.

(1) 7 Moo. P. C. 468.

13th November, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Petition from the Court of the Judicial Commissioner of Oudh.

MAHARANI INDER KUMARI (Defendant,) } *Appellant*,

and

MAHARANI JAIPAL KUMARI (Plaintiff) ... } *Respondent*.*

Appeal to Privy Council—Security for performance of order to be made by Her Majesty in Council—Civil Procedure Code, 1882, s. 608—Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below.

A party, to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the Judical Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the treasury in obedience to the decree. *Sidhee Nasur Ali Khan* v. *Oojoodhyaram Khan* (1) and *Zeraitool Batool* v. *Hosseinee Begum* (2) referred to.

Petition for special leave to appeal from interlocutory orders (22nd June, 1886) made in execution of a decree (27th March, 1886) of the Judicial Commissioner of *Oudh*, reversing a decree

* 14 Cowell's Ind. Ap. 1; I. L. R. 14 Cal 290.

(1) 10 Moore's I. A. 322; 2 P. C. J. 133.

(2) 10 Moore's I. A. 196; 2 P. C. J. 116.

(25th August, 1886) of the District Judge of *Faizabad*, and also for an order that, pending the hearing of the appeal, execution of the said orders should be stayed.

Sir *Horace Davey*, Q. C., with whom were Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* for the Petitioner.

Mr. *J. Graham*, Q. C., with whom were Mr. *J. D. Mayne* and Mr. *Theodore Thomas*, for the junior widow.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

Their Lordships are of opinion that the interlocutory orders which the petition complains of are such that their Lordships ought to advise Her Majesty to grant leave to appeal from them. It is not competent to their Lordships to make any order as to the stay of execution, but they think it right to say that to them it appears to be the reasonable course that the Plaintiff should not, pending the appeal, be put into possession of the large sums in dispute; and probably it is reasonable that she should not receive more than the annuity of Rs.25,000, which was decreed to her by the first Court; and with that intimation of advice they leave the Appellant at liberty to apply to the proper Court in *India* for the due security of all money paid in to the Treasury in obedience to the decree of the Judicial Commissioner.

Special leave granted: stay of execution refused. Intimation to Court below.

Solicitors for the Petitioner: Messrs. *T. L. Wilson & Co.*

Solicitors for the Maharani *Jaipal Kumari*: Messrs. *Watkins & Lattey*.

8th, 9th, and 10th December, 1886; and 19th February, 1887.

PRESENT:

Members of the *Judicial Committee*:—
The Right Hon'ble Lord Hobhouse, the Right Hon'ble Lord Herschell, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

PIRTHI PAL and UMAN PARSHAD (Plaintiffs) ... ... } *Appellants*,

and

THAKUR JOWAHIR SINGH and others (Defendants) ... } *Respondents*.*

TWO APPEALS AND A CROSS APPEAL CONSOLIDATED.

Hindu Law, Joint family—Rights of members of a joint Hindu family in a talukdari estate—The Oudh Estates Act (1 of 1869) Partition and account against the talukdar—The Oudh Rent Act (XIX of 1868), s. 83, cl. 15, and s. 106—Limitation Act (XV of 1877), Sch. II, Arts. 127 and 120.

A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate, as he has no definite share until partition. He may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account.

A talukdari estate, though entered in the name of one member of a joint family in the lists prepared in conformity with the Oudh Estates Act, I of 1869, may be subject to a trust, implied from the acts and declarations of the talukdar, for the joint family as a joint estate. *Hardeo Bakhs* v. *Jowahir Singh* (1).

In that suit, commenced in 1865 by a member of a joint family for the declaration of his rights, partition not being claimed, the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the members of the family.

The Plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villiages in

* 14 Cowell's Ind. Ap. 37; I. L. R 14 Cal. 493.

(1) I. L. R., 3 Calc., 522; L. R. 4 Ind., Ap. 178; 3 P. C. J. 704.

the register kept under Act XVII of 1876, sect 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits.

Held that, in regard to the order of Her Majesty above mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari estate could not be declared to be impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under proprietor under the talukdar, could not be allowed to stand.

Held, also, (*a*) that the first suit, as one for partition and an account, was not barred by limitation under Act XV of 1877, s. 120, and must be decreed; (*b*) that the provisions of the Oudh Rent Act, XIX of 1868, sect 8, cl. 15, and s 106, precluding proceedings in the Civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate; and (*c*) that the sections of the Code of Civil Procedure relating to mesne profits were not applicable to a suit for partition or for an account of the proceeds of family estate in which a Plaintiff has no specific interest until decree.

The first of these appeals was from a decree (12th September, 1882) of the Judicial Commissioner, affirming a decree (3rd January, 1882) of the District Judge of *Sitapur*. The second appeal and the cross appeal were from a decree (16th July, 1883) of the Judicial Commissioner in another suit, amending a decree (15th February, 1883) of the same Judge.

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, appeared for the Appellants.

Mr. *R. V. Doyne* and Mr. *Theodore Thomas*, for the Respondents.

19th February, 1887.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The parties to the suits, which are the subject of these consolidated appeals, are members of a Hindu family in *Oudh*, being the sons and grandson of three brothers, *Hewanchal Singh*, *Bhawani Singh*, and *Fateh Singh*. One of them, *Hardeo Baksh*, died pending the appeal to Her Majesty in Council, and the Appellants are his sons and representatives. Prior to the annexation of the kingdom of *Oudh* the family was joint, the Respondent *Jowahir Singh* being the head of it and the manager of the family property. The lands which belonged to the family were confiscated to the British Government by Lord *Canning's* Proclamation of March, 1858, and on the 28th of April, 1858, a summary settlement of them was made with *Jowahir Singh*. He was consequently included in the list of talukdars in accordance with the Government letter of the 10th of October, 1859, and a sanad was granted to him. After the passing of Act I of 1869 he was also registered in List No. 1 under s. 8 of that Act, and in List No. 5. On the 28th of August, 1865, *Hardeo Baksh* and *Parbat Singh* brought a suit in the Settlement Court, which then had jurisdiction in the matter, against *Jowahir Singh* by a petition of plaint, in which they stated that since the death of their fathers they had been, according to the old order of things, living together, their expences being paid out of the profits of the estate, the Plaintiffs continuing in possession of the taluka, and the kabuliat standing in the name of the Defendant; that he intended to dispossess them and keep them out of their permanent right to the profits; and they prayed that after inquiry proper orders be passed so that they be not deprived of their rights. In a written statement, dated the 6th of October, 1865, they stated that they had been compelled by an order of the Criminal Court, dated the 15th of September, 1865, to give up possession, but that previously to that time they had held continuous possession. The Defendant in his written statement alleged that he had held possession of the land without any co-sharer, and that a summary settlement had been made with and a sanad granted to him alone. The Courts in *Oudh* decided in favour of

Jowahir Singh, and *Hardeo Baksh* appealed to her Majesty in Council. It is unnecessary to refer to the judgments of the *Oudh* Courts, as the rights of the parties were determined by the final order of Her Majesty in the appeal The case was twice before this Committee, and is reported in L. R., 4 I A., 178 and 6 I. A., 161.

On the first occasion their Lordships, after referring to two previous cases—*Thakurain Sookraj Koowar* v. *The Government* (1); *Shunkar Sahai* v. *Rajah Kashi Persad* not then reported but since reported, L. R., 4 I. A., 198—say:—

"Their Lordships are of opinion that, up to the time of Lord *Canning's* Proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the petitioner and *Parbat Singh* and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case, on the 8th of July, 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Parbat Singh*, who were his partners, should claim, they would get their shares divided: He said. 'They at present live with me, and receive food and clothing.' It does not appear clearly from the latter words whether the estate was held as joint family property or whether the Defendant merely made an allowance to the Plaintiff."

Their Lordships then, after saying that the lower Courts appeared to have decided the case merely upon the ground that the Defendant was protected by the sanad, advised Her Majesty that the Commissioner should be directed to try, or to refer to the Settlement Officer for trial, the issue whether the Respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sanad, or the rents and profits thereof, in trust for the Appellant and *Parbat Singh*, or either of them. Her Majesty's Order in Council was made accordingly.

On the 13th of December, 1877, the Commissioner found that "there is no proof of any fresh act or agreement on the part of the Respondent by which he became bound to hold the villages alluded to in the issue set in trust for the Appellant and *Parbat Singh*, but that they were an undivided Hindu family up to 1865, and that the joint interest extended to the whole estate then in possession, ancestral and acquired."

The appeal came before this Committee again in January 1879, and judgment was delivered on the 1st of March. It is sufficient to quote the following passages from it. Having stated the finding of the Commissioner, and that it was fully warranted by the evidence, it says:—

"Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement, to the effect that *Hardeo Baksh* was his partner, and with his deposition of the 8th of July, 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Parbat Singh*, who were his partners, should claim, they would get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sanad should be held by him in trust for the joint family, and as a joint family estate, subject to the law of the Mitakshara."

Their Lordships then state the reasons for their opinion, that the Act 1 of 1869 did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate, and conclude by saying:—

"The plaint does not allege that the Plaintiffs have been dispossessed of their rights, but merely that the Defendant

(1) 14 Moore's I. A. 112; 2 P. C. J. 705.

intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that they be not deprived of their right.

"Their Lordships must deal with the case as it stood at the commencement of the suit. At that time there does not appear to have been any complete separation or division of the family, and the Plaintiffs do not pray for a partition of the estate. *Hardeo Buksh* was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindu family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal, and to reverse the judgments and decrees of both the lower Courts, and to declare that the Defendant holds the villages in suit in trust for the joint family, and as a joint family estate governed by the rules of the Mitakshara, and to order and decree that the Defendant do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly. . . . . Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit, subsequent to the commencement thereof."

Any member of a joint Hindu family may sue for a partition of the family estate, unless there is a family usage or a special law which makes it impartible. *Jowahir Singh* had himself said in 1859 that the estate was partible, and this is one of the grounds upon which it is said that up to the time of the quarrel in 1865 it was his intention that the villages included in the summary settlement and sanad should be held by him in trust for the joint family, and as a joint family estate. Their Lordships notice that the Plaintiffs did not pray for a partition of the estate, and therefore say they cannot do more than advise Her Majesty to declare that the villages were held in trust for the joint family, and as a joint family estate. The order which followed this was applicable to a joint family property. There does not appear to be any reason for thinking that it was considered that the estate was impartible, and was to be held as such in trust for the family.

The order of Her Majesty in Council is dated the 22nd of March, 1879. In or about May, 1879, *Hardeo Baksh* applied to the Court of the Deputy Commissioner of *Sitapur* for execution of it. The Deputy Commissioner made an order, from which there was an appeal to the District Judge, and from him to the Judicial Commissioner, who, on the 11th of November, 1879, ordered proclamation to be made by beat of drum in each of the 113 villages forming the subject of the suit of what had been declared by the order in Council. On the 2nd of June, 1880, *Hardeo Baksh* applied, under Act XVII of 1876, the Oudh Land Revenue Act, ss. 57 and 58, to have his name entered as a co-sharer in the taluka in the register which the Deputy Commissioner of each district is by the 56th section of the Act directed to keep. And on the 4th of June, 1880, the Deputy Commssioner ordered that—

"The name of *Thakur Hardeo Baksh* will therefore be entered in the register of co-sharers (the extent of his interest being one-third) in the joint family estate, consisting of the villages mentioned in the judgment of the Privy Council.

"*Thakur Jowahir Singh* will remain manager and lambardar.

"This order refers to the following villages:—

"1. Villages comprised in the Summary Settlement ... 78

"2. Villages granted in reward for services during the Mutiny (afterwards demarcated as 12) 20

"3. Villages acquired from the

profits of the estate after Summary Settlement ... 15

113

"Afterwards demarcated as ... 105

"*Thakur Jowahir Singh* will pay applicant's costs."

This order was affirmed on appeal on the 13th of July, 1880, but the Judicial Commissioner, on an appeal from another order relating to the execution, held that, in execution of the order in Council, *Hardeo Baksh* could not obtain an account from *Jowahir Singh* of the rents and profits of the taluk from the commencement of the litigation, but for that purpose must proceed by suit. This was on the 2nd of August, 1880, and on the 14th of December, 1880, *Hardeo Baksh* instituted the first of the suits which are the subject of these appeals.

The plaint, after stating the facts, and that on the 30th of May, 1879, the Defendant refused to determine the amount of wasilat (amount collected), and to adjust accounts of the profits which had accrued during the pendency of the suit, and with which considerable additions had been made to the family estate, and to fix the exact extent of the share to which the Plaintiff was entitled, prayed that a *baz dawa* (petition of withdrawal of suit), dated 5th February, 1874, executed by *Parbat Singh* and *Guneshi Singh* in *Jowahir Singh's* favor, was invalid and of no effect as against a previous agreement of 23rd March, 1870, executed in the Plaintiff's favor, and that the Plaintiff was entitled, as against *Jowahir Singh*, to recover *Parbat Singh* and *Guneshi Singh's* share in addition to his own; that the Plaintiff should be put in separate possession by partition to the extent of the aforesaid shares of the 113 villages, and all the property which had been acquired by *Jowahir Singh*, with the profits of the joint estate and the joint property not included in the former suit, a list of which was attached to the plaint. It also prayed that, to the extent of the above-mentioned shares, the Defendant should be ordered to render accounts of the profits during his management, and to pay all the money that might be found due after deducting all proper charges and costs of purchasing estates, with the exception of so much profits of the third share of the 113 villages for which the Plaintiff's name had been entered in the Revenue Records, and for which he could seek his remedy from the Rent Court, since 1288 F., the time when his name was entered. The lists attached to the plaint contained the names of 144 villages, in addition to the 113, also a number of debts due to the estate on mortgages, a large number of bond debts, and moveable property of various kinds of considerable value.

Jowahir Singh in his written statement said that, by the *baz dawa* of the 5th of February, 1874, and by way of family compromise, *Parbat Singh* and *Guneshi Singh* relinquished all rights and claim to a share in the taluka in his favor, and declared themselves satisfied with and accepted from him certain property as and by way of maintenance which had been awarded to them on the 11th of July, 1869, under an arbitration of the British Indian Association; that the claim to property in his possession at the date of the institution of the suit in 1865 was barred by the law of limitation as well as by sect. 43 of Act X of 1877; that the Plaintiff was not entitled to any accounts from 1865 or any other date, and was in the position of an ordinary sharer suing a co-sharer who would have his remedy in the Rent Courts and in respect of three years' profits only; that the Plaintiff was not entitled to the partition prayed for; and that he, *Jowahir Singh*, held the taluka as an integral impartible estate according to the rule of primogeniture without any trust in respect of such talukdari rights and status, though, as ruled by Her Majesty in Council, subject to a trust in respect of a portion of the profits in favor of the Plaintiff. The plaint was then amended by making *Parbat* and *Guneshi Singh* Defendants, and praying that if the Plaintiff was held to be not entitled to

their full share, it might be decreed that as a joint property it was divisible in equal shares between him and *Jowahir Singh*.

The District Judge in his judgment dated the 3rd January, 1882, held that the suit was not barred by the law of limitation. This, in their Lordships' opinion, was right. The Plaintiff had in 1879 been declared by the order in Council entitled to share in the 113 villages and the proceeds thereof as a joint family estate. It was preposterous to allege, as the written statement did, that his claim to that was barred by the law of limitation. It clearly was not. It was equally preposterous to allege that he had his remedy in the Rent Court for the profits of the estate received by *Jowahir Singh* whilst the suit of 1865 was pending, and that he could only recover three years' profits. The provision in the *Oudh* Rent Act (XIX of 1868) supposed to be applicable is clause 15 of the 83rd section, which gives exclusive jurisdiction to the Courts of Revenue in *Oudh* over suits by a "sharer against a lumberdar or co-sharer for a share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect of such profits." And by the 106th section, suits for the recovery of a share of profits are to be instituted within three years from the date on which the share of profits claimed shall have become due. A member of a joint Hindu family cannot sue for a share of profits, as he has no definite share until partition. These provisions might apply to the profits of the 113 villages after *Hardeo Baksh* had been entered in the register as a co-sharer under the order of the 4th of June, 1880, but they are applicable only to co-sharers, and it seems only where the co-sharers and lumberdar are entered in the register, and therefore they could not apply to the 144 villages, and certainly not to the moveable property of the family. Moreover, this defence is inconsistent with the defence that the taluka is impartible, for by the entry in the register *Hardeo Baksh* was made a co-sharer to the extent of one-third. That entry still remains, and *Hardeo Baksh* may fairly contend that there has been a partition of the 113 villages. This is the reason for his excepting from his prayer for an account the profits of those villages since the entry in the register.

The District Judge, in considering the question of the partibility of the estate, took this view of the entry in the register, and said the Revenue authorities had acted upon an interpretation which they had placed upon the order in Council. He then proceeded to dispute that interpretation, and quoting only the passage in the judgment of this Committee, "and the Plaintiffs do not pray for partition of the estate. *Hardeo Baksh* was not entitled to any definite portion of the estate, but merely to the right of a member of a joint Hindu family," he says: "The Plaintiff could not, therefore, upon the strength of the Privy Council's decision, claim a partition of the estate to the extent of his share in the profits, for the Privy Council has distinctly recorded that the Plaintiff is not entitled to any definite portion of the estate." This seems to their Lordships a rather strange misapprehension, for until partition no member of a joint Hindu family is entitled to a definite portion of the family estate, and if that be a reason for his not being able to claim a partition of the estate, a partition could never be claimed. Independently of the construction which the District Judge thus put upon the judgment of this Committee, he pronounced his own opinion that under the Act I of 1869, or the sanad, the estate was not partible. The District Judge then proceeded, erroneously in their Lordships' opinion, to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the Code of Procedure as to mesne profits. These provisions are intended for and are applicable to suits for land or other property in which the Plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has

no specific interest until decree. He then said that, as there was no doubt the principal parties in the case stand in the position of co-sharer and lumberdar respectively, the claim to any share in the profits of the estate must be preferred in the Revenue Court. So far as regards the 113 villages after the entry of the names this might be true, but the Rent Court had no jurisdiction to take an account of the family property, consisting of the proceeds of those villages and of other property, and to make a partition of the whole. The most it could do would be to make a partition of the 144 villages, or any others that might have been purchased and become family property. Finally, after deciding that the agreement of the 23rd March, 1870, did not give *Hardeo Baksh* a title to *Parbat Singh's* share, he dismissed the suit with costs.

Hardeo Barksh appealed to the Judicial Commissioner, who, on the 12th of September, 1882, gave his judgment. He agreed with the District Judge that *Hardeo Baksh* had not acquired a right to the shares of *Parbat Singh* and *Guneshi Singh*, and he held that *Hardeo Baksh*, having had his name entered in the revenue registers as a co-sharer, showed that he had ceased to be a member of the joint Hindu family, and that his claim to an account for a share of the profits and for a share of the property purchased with the profits was barred by the law of limitation because he had failed to sue to enforce his right to share or for partition in 1865. It is difficult to see how it could be thought that he failed to sue to enforce his right. In their petition to the Settlement Court in 1866, by which the suit was begun, he and *Parbat Singh* prayed that, after inquiry, proper orders might be passed so that they should not be deprived of their rights, and the order in Council declared that *Jowahir Singh* held the 113 villages as a joint family estate, and that they and their proceeds should be applied accordingly. After that there could be no application in the present suit of the law of limitation to those proceeds.

The Judicial Commissioner then held that *Hardeo Baksh* was not entitled to any benefit from the resignation by *Parbat Singh* and *Guneshi Singh*, because he had ceased to be a member of the joint family. The *baz dawa* was executed on the 5th of February, 1874, and their Lordships are unable to understand what ground there was for saying that *Hardeo Baksh* had then ceased to be a member of the joint family as regards the estate, though in other respects there might have been a separation. Finally the Judicial Commissioner held that it was not necessary to go into the question of the partibility of the estate, and dismissed the appeal.

Their Lordships have indicated their opinion that the conclusions of the lower Courts in the first suit, except that of the District Judge on the question of limitation, are erroneous, and it is now necessary to refer to the second suit. This was brought by *Jowahir Singh* against *Hardeo Baksh* on the 4th of August, 1881, and the plaint prayed for a declaration of the share the Defendant was entitled to in the villages named in the schedules, which were said by the District Judge to be identical with the property in suit in 1865, and that it might be further declared that the Plaintiff was entitled to hold the property mentioned in the schedules as an integral impartible and indivisible estate or taluka, subject to the beneficial interest of the Defendant in respect of the profits thereof to the extent of his share as declared by the Court. The District Judge adhered to the opinion he had declared in the first suit, that the estate was impartible, and said that *Hardeo Baksh* was only entitled to one-third of the profits of the property. The Judicial Commissioner, on an appeal to him, had to decide the question of partibility, which, in the first suit, he had left undecided. In his judgment on the 16th of July, 1883, he decided that *Hardeo Baksh* should "be declared entitled to have one-third of the estate separately apportioned to him, the one-third share so alloted to him to be held by him as a sub-proprietor, and subject to the

payment of the Government revenue, plus 10 per cent."

The decree which was passed upon this judgment cannot be allowed to stand. It does not give to *Hardeo Baksh* the right which by Her Majesty's order in Council he was declared entitled to. The villages and the proceeds thereof were by that order declared to be a joint family estate, governed by the rules of the Mitakshara, and one member of the family could not rightly be made a sub-proprietor to another member of his share of the family property. Also the contention of *Jowahir Singh* in this and in the first suit, that he held the taluka as an integral impartible estate to himself and his heirs according to the rule of primogeniture, subject to a trust in respect of the profits, is inconsistent with the estate being governed by the rules of the Mitakshara. The direction that he should cause and allow the villages and the proceeds thereof to be managed and dealt with and applied "accordingly," that is, as a joint family estate, shows that the declaration that he held the villages in trust for the joint family was not intended to give him an impartible estate. He did hold them in trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee, he is bound to allow the partition to be made. Notwithstanding *Hardeo Baksh's* clear right to a share of the profits of the villages, *Jowahir Singh* has pertinaciously refused to give any account of what he has been receiving since 1865, and their Lordships regret to see he has succeeded up to this time in not doing so. The suit for partition and an account stands dismissed by both the lower Courts, and *Hardeo Baksh* has only been declared in the second suit to be a sub-proprietor of a one-third share, against which declaration he appealed to Her Majesty in Council. It is unnecessary to consider whether he became entitled as he claimed to part of the shares of *Parbat Singh* and *Guneshi Singh*, because, in their Lordships' opinion, he was concluded from claiming more than a one-third share in the family property, by obtaining the order for the entry of his name as a co-sharer of one-third in the 113 villages, which order was affirmed on appeal, and is treated in the plaint in the first suit as a subsisting order. The second suit was unnecessary, as the questions raised in it might have been decided upon the issues framed in the first suit. Their Lordships think that the second suit should be finally disposed of by reversing the decrees of both the lower Courts, and ordering the suit to be dismissed with costs in those Courts and that the cross appeal should be dismissed with costs. The first suit should be remanded to inquire what the joint property of the family consists of, including therein the villages held by *Parbat Singh* and *Guneshi Singh*, and for that purpose to take the usual accounts, and when that has been done to allot to *Hardeo Baksh* a third part thereof, and to order that he recover the third part of the moveable property, with the costs of the suit, up to the making of but not including the costs of the inquiry, from *Jowahir Singh*; and to order that the costs of the inquiry, and taking the accounts, and of the partition, be paid out the estate, and also to order that *Hardeo Baksh* be at liberty to apply under sect. 57, Act XVII of 1876, the Oudh Land Revenue Act, to have his name entered as a co-sharer with *Jowahir Singh* in the immoveable property, to the extent of one-third. The Judicial Commissioner may remand the suit to the District Judge to do what is above directed, and their Lordships, under the circumstances, are of opinion that if any application should be made under the provisions of the Code of Civil Procedure for the appointment of a manager or receiver of the estate during the inquiry and taking the accounts, and until the partition, it would be a proper case for granting it. Their Lordships will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to make a decree remanding the suit to the effect and containing the directions before stated. The costs of these appeals and of the cross appeal are to be paid by *Jowahir Singh*.

Solicitors for *Pirthi Pal Singh* and *Uman Pershad Singh*: Messrs. *T. L. Wilson & Co.*

Solicitors for *Thakur Jowahir Singh*: Messrs. *Barrow & Rogers.*

10th and 19th December, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

THAKUR HARIHAR BAKSH (Plaintiff) ... } *Appellant,*

and

THAKUR UMAN PARSHAD (Defendant) ... } *Respondent.**

Custom, Evidence as to—Wajib-ul-araiz—Concurrent findings of Courts below—Construction of a razinama disposing of estate with words "naslan bad naslan."

A custom of inheritance was alleged to prevail in an *Oudh* clan that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without regard to their degrees in kinship to the deceased. This custom was found not proved by the Original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul araiz.*

If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it could be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done.

In cases decided on the construction of documents, in which the expressions *mokurari, istemrari, istemrari mokurari,* have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words "*naslan bad naslan*" had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a *razinama* between parties, dividing family estate, and expressly declaring that the shares should descend "*naslan bad naslan,*" *held*, that the insertion of these words was conclusive in itself; the expressed objects of this *razinama* pointing to the same construction, *viz.*, that the estate taken under it was absolute.

Appeal from a decree 4th April, 1883, of the Judicial Commissioner of *Oudh*, affirming a decree (3rd September, 1881) of the District Judge of *Sitapur.*

Mr. *J. H. A. Branson*, for the Appellant.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the Respondent, were not called upon.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

Their Lordships do not think it necessary to call upon Counsel for the Respondent.

This case has been put before their Lordships by Mr. *Branson* with great fulness, and they consider that he has argued it with great lucidity and force, and said everything that is possible in favour of his client; but it is put before them in so clear and perspicuous a manner that they are able to deal with it on the opening.

There are two questions. The first is how the agreement, the *razinama* or compromise, of the 4th May, 1864, is to be construed; and if it is to be construed as giving an absolute interest to *Bissessur Baksh*, then the second question is, in what shares the inheritance is to be taken by his heirs?

To take the last question first, the Plaintiff alleges that, by a certain custom prevalent among the *Punwar Rajputs*, if a branch of a family has become extinct, the other branches take the estate in equal shares, which means in equal shares as between those branches without regard to their being more or less remote in kinship to the deceased. That question was tried in the Courts below, and both Courts, the District Judge and the Judicial Commissioner, have come to the same conclusion upon it, adverse to the Plaintiff. Two lines of evidence appear to have been

* 14 Cowell's Ind. Ap. 7; I. L. R. 14 Cal 296.

pursued—one consisting of instances of successions in kindred families, and the other of records of rights in *wajib-ul-araiz*. Upon the first line of evidence the Judical Commissioner, who seems to have examined the cases with care, has come to the conclusion that, balancing case against case, there is no certain invariable custom proved on this point. He also states, and the District Judge states, that the *wajib-ul-araiz* do not support the custom. In their Lordships' judgment the *wajib-ul-araiz* to which they have been referred seem to go further. The document appearing in page 126 of the record is a specimen, and it states that brothers or nephews of the deceased are to succeed, regard being had to the nearness of kinship. That is a statement contrary to the statement in the plaint and to the custom which the Plaintiff alleges. Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied, if there had been written documents referred to on which the Appellant could show that the Courts below had been led into error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so.

Then the question comes back to the construction of the *razinama*, and that again is divided into two branches. The Courts below have found that the *razinama* ought to be construed to give an absolute interest, because it has been decided that it should be so construed—in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it.

They rest their opinion upon the terms of the *razinama* itself. After providing that the estate shall be divided into the fractions specified in it, the conclusion of the *razinama* is that the division shall hold good for ever, and to descend from generation to generation—*naslan bad naslan*. Their Lordships have not been furnished with any authority, in fact Mr. *Branson* has fairly said he can find no authority in which a gift with the words *naslan bad naslan* attached has been held to confer anything less than the absolute ownership. On the contrary, in the various cases in which the expressions *mokurari istemrari*, *istemrari mokurari*, have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words *naslan bad naslan* had been added, there would have been an end to the argument, because an absolute interest would have been clearly conferred. Their Lordships think that the insertion of those words in the *razinama* would be conclusive in itself; but, looking at the expressed objects of the *razinama*, they would come to the same conclusion even if words of a less peremptory character had been used. It was for the purpose of settling a dispute which had been going on for several years about the proprietary right to the taluk *Sarora*, and it was agreed that the whole dispute should be set at rest. The dispute was not as to maintenance, it was not as to a temporary interest, but it was as to the proprietary right. That is the dispute to be set at rest; and when their Lordships find that such a dispute is set at rest by a division of the estate to hold good for ever, and that not a word is introduced which of its own force imports less than an absolute ownership, they find it impossible to doubt that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, *viz.*, that absolute ownership which each was claiming for himself in the whole or part of the property.

On those grounds their Lordships agree

with the decision of the Courts below, though not for the same reasons, and the result is that the appeal will be dismissed.

Their Lordships will humbly advice Her Majesty in accordance with that opinion, and the Appellant must pay the costs of the appeal.

Solicitors for the Appellant: Messrs *Watkins & Lattey.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

15th December, 1886.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

MUSSAMAT AMANAT BIBI (Plaintiff) ... } *Appellant,*

and

LACHMAN PERSHAD and others (Defendants) ... ... } *Respondents.**

Specific Relief Act (I of 1877), s. 31—Rectification of instrument.

A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under s. 31 of Act I of 1877 (the Specific Relief Act) to have the instrument rectified was held to have been rightly dismissed.

Appeal from a decree (10th March, 1881) of the Judicial Commissioner of *Oudh*, affirming a decree (5th August, 1880) of the District Judge of *Faizabad.*

Mr. *C. W. Arathoon*, for the Appellant.

Mr. *J. H. A. Branson*, for the Respondents.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The question in this case is whether there are sufficient grounds made out by the Plaintiff for reforming or altering the deed of mortgage which was executed on the 15th October, 1878. The Plaintiff in his plaint declares: "That on the 15th October, 1878, at *Faizabad*, the present Plaintiff, having been deceived by the Defendants, executed, according to the accounts furnished by the Defendants, and without examining them, an instrument for Rs.4,37,376-12 in lieu of the aforesaid decrees, and of the debt due to *Ram Kishen Mahajun.*" Then he says that, looking to the actual accounts between the parties, "Rs.58,688 ought to be deducted from the mortgage money entered in the aforesaid instrument," and so on; and then that the cause of action accrued on the 25th June, 1879, when he found out the mistake.

The Judge in giving judgment at the trial says: "The Plaintiff admits that, previous to the execution of the mortgage deed, an account was produced before him, and that *Uma Persad*, his Dewan, stated that a certain sum was due. *Mir Ghazafur Hosain*, a well-known talukdar and a man of ability, had also been requested by the Plaintiff to examine the account, and the Plaintiff has deposed that he relied on him. A draft of the deed was prepared only after the accounts had been produced; and the Plaintiff says, moreover, that it was discussed for some fifteen days, and altered." In another part of his judgment he says: "The Defendants have not produced clear proof that Plaintiff entered into a special agreement about interest, nor that he authorised them to include other debts in the mortgage deed, or to appropriate payments on account of decrees to the liquidation of other claims, but it is only reasonable to assume that, when the Defendants were entering into such a heavy transaction

* 14 Cowell's Ind. Ap. 18; I. L. R. 14 Cal. 308.

with the Plaintiff, they would make a general settlement of their claims, and not leave small, or comparatively small, debts outstanding." It appears to their Lordships that, putting a correct construction upon the deed, and taking the evidence which was adduced, and the findings of the learned Judge, there is no reason to suppose that there was any fraud or deceit on the part of the Defendants, or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was to be given.

Under these circumstances their Lordships are of opinion that the decision of the Judge, who tried the case in the first instance, and the decree of the Judicial Commissioner who affirmed that decision, are correct, and they will, therefore, humbly advise Her Majesty that the judgment below be affirmed, and that the appeal be dismissed, the Appellant paying the costs of the appeal.

Solicitors for Appellant: Messrs. *Barrow & Rogers.*

Solicitors for Respondents: Messrs. *Watkins & Lattey.*

15th, 16th and 18th December, 1886.

PRESENTS:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of the North-Western Provinces.

AJUDHIA PERSHAD and another (Plaintiffs) } *Appellants,*

and

SIDH GOPAL and others (Defendants) ... } *Respondents.**

Arrangement between firm and its creditors —Giving time—Mortgage security.

A firm, in difficulties, executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period.

Notwithstanding this, two creditors, named in the deed, immediately sued for their debts, and obtained decrees.

Other creditors, named in the deed, afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect, unless all the creditors came in and were bound by it.

Held that the suits above-mentioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage deed.

Consolidated appeal from decrees (14th March, 1883) of the High Court reversing decrees (19th July, 1881) of the Subordinate Judge of *Cawnpore.*

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the Appellants.

Mr. *J. Graham*, Q. C., and Mr. *J. H. A. Branson*, for the Respondents.

18th December 1886.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR RICHARD COUCH:—

The Appellants in this appeal, who are the Plaintiffs in the suit, are bankers at *Cawnpore.* The Respondents are a joint Hindu family consisting of four brothers, the sons of *Dwarka Das*, and carried on business at *Cawnpore, Calcutta*, and *Lucknow*, the business at the different places being managed by some members of the family. It was a family business apparently founded by *Dwarka Das*, the father; and the evidence was that the joint expenses of the family were paid out of the profits of the business. Indeed, on the argument of the appeal, it was not disputed by the counsel for the Respondents that the members of the family would be bound by the deed upon which the suit was brought if it were valid and binding in other respects. In June, 1875, the *Calcutta* firm of the Respondents stopped payment and that brought the firm at *Cawnpore* into financial difficulties. *Hundis* had become due, and other *hundis*, for which the *Cawnpore* firm was liable, were becoming due. It appeared to be

* 14 Cowell's Ind. Ap. 21; I. L. R. 9 All. 330.

the object of the creditors of the *Cawnpore* firm to prevent a stoppage of payment, and, by giving time to that firm, to tide them over the difficulties in which they were placed. For that purpose it seems to have been arranged by some of the creditors that a meeting should take place to see what could be done.

The evidence with regard to this is as follows:—The first witness to which it is necessary to refer is *Kakai Mal*, who was one of the creditors. He said:—"Five or six days before the execution of the mortgage deed I had a conversation with *Ajudhia Pershad*"—that is the Appellant and Plaintiff in the suit—"at his house, to the effect that if all the creditors were willing a deed may be obtained from *Kanha Mal*"—the Defendant, who appeared to have the management of the business at *Cawnpore*—"regarding the property. *Kanha Mal* was then sent for. He said that though the *hundis* had not fallen due, yet he would pay half of the amount of the *hundi* which would fall due, and give a *hundi* for the other half. I and *Ajudhia Pershad* asked *Kanha Mal* to give a mortgage of his property for three months, and that we would settle with the creditors. I had made mention of my Rs.8,000. It was agreed at the time that all the money due to me would be entered. When I came from *Lucknow* I then learnt that only Rs. 300 of the amount due were entered. I got very much displeased with *Kanha Mal* for Rs. 300 only being entered as due to me. *Kanha Mal* had asked me to obtain the consent of all the creditors, and that then he would execute a deed. He had told this to me and *Ajudhia Pershad*. Both of us had agreed to this, that we would obtain the consent of all the creditors." The next witness is *Madho Ram*, who was also a creditor. He said:—"The amount due to me was Rs. 1,500. I said that I was not agreeable"—that is with reference to their asking him to join in giving time.—"*Ajudhia Pershad*, *Puran Chand*, and others, said that I should get my money included in the bond which was to be executed in favour of all persons. Afterwards I said that I was agreeable to what all proposed. Afterwards *Kanha Mal* was asked to execute the deed. He said that as some were agreeable and some not, let the dates of the bills of exchange expire, and he would pay the money as each date expired. *Ajudhia Pershad* told him to execute the deed, and that he would obtain the consent of all."

Another witness was *Lalman*, who was the gomashta of *Kanha Mal*. He said:—"Five, six, or four days before execution of the deed there was some conversation between *Ajudhia Pershad* and *Kanha Mal* at 10 or 11 o'clock at the new house. The former told the latter to write an agreement to all his creditors that they would be paid in proportion to each one's share from the income of the *Benares* and *Lucknow* firms. *Kanha Mal* then replied that the amounts of expired dates would be paid first, and those of unexpired dates would be paid from time to time as their dates of payment expired. *Ajudhia Pershad* then said:—'This arrangement might lead some one to institute a suit whereby you will be put to a loss. I will make them understand that I will pay them proportionately when the money is received.' *Kanha Mal* answered that those who had amounts of expired dates still outstanding would hardly agree to this; whereupon *Ajudhia Pershad* said that he would make settlement with them all. *Kanha Mal* then said:—'If you take the responsibility upon yourself' I will execute the agreement. *Kanha Mal* then executed the agreement, and pledged his property therein."

Kanha Mal was also called as a witness, and after speaking as to the firms at *Cawnpore* and *Calcutta*, he said:—"Five or six days prior to the execution of the document the creditors began to make their demands. *Radhe Pershad*, *Puran Chand*, and *Parmeshri Das* made demands in respect of kutcha and pucca *hundis*. No other creditors made demands. The request made was to have the property made over to them, lest we should hereafter deny, as others had done, and that a suit should be brought, and a proportionate division of any

moneys be paid. *Ajudhia Pershad* and others said that all would be settled up, and I asked how those were to be settled whose dates for payment had fallen due. The first day the conversation was held with me alone, and the next day *Behari Das* was also with me. *Ajudhia Pershad* said that he had prevailed on all to take a proportionate share." Further on he made a statement to which the Subordinate Judge who tried the suit seems to have attached some importance. He said :—"There was no stipulation as to what would be the result if any creditor complained after the document had been written."

There was some evidence given on the part of the Plaintiff which was not altogether in agreement with that which has been read, but the Subordinate Judge took no notice of that evidence, and the High Court appears not to have thought it to be trustworthy. It is to be observed that the principal part of *Ajudhia Pershad's* debt was upon *hundis* which had not become due. He had, therefore, a strong interest in promoting an arrangement which would place him in the same position as the creditors whose *hundis* were due.

It is true that *Kanha Mal* made the statement that there was no stipulation, but the whole of the evidence shews that the parties from the first appeared to have contemplated that all the creditors would join; and it would not be necessary that there should be an express stipulation if, from the nature of the transaction, and their conduct, it is apparent that this was the understanding of the parties, and that they all acted upon the faith that all the creditors would join in the arrangement.

Upon that the deed which is the subject of the suit was executed. It is dated the 22nd of June, 1875, and is in these terms :—"Hypothecation deed, dated 22nd June, 1875, executed by *Kanha Mal* and others. We, *Kanha Mal*, *Benarsi Das*, *Radhe Lal*, and *Sidh Gopal*, the sons of *Dwarka Das*, and proprietors of the firm known as that of *Dwarka Das*, *Kanha Mal*, in *Old Generalganj*, City *Cawnpore*, by caste *Khattri*, and residents of *Cawnpore*, do hereby declare that being sound in both body and mind we agree that a balance of Rs.30,700 is due by us on account book accounts and *hundis* to the following creditors." Here follow the names of all the creditors, with the sums due to them, as in a list given in by *Kanha Mal*, the whole amounting to Rs.30,700. Then it says:—"And at the present time we cannot arrange to meet these liabilities. Therefore in lieu of the Rs.30,700 due to the aforesaid mahajans we mortgage to them collectively three pucca masonry houses, together with the shop in which the business of *Kanha Mal*, *Dwarka Das*, is carried on in *Old Generalganj*, together with all its rights and appurtenances." Then follow some conditions and particulars which need not be read, one being a provision that *Ajudhia Pershad's* firm should collect the debts due to the firm and divide the money amongst the creditors.

Shortly after the mortgage was executed two of the creditors named in it namely, *Sidhari Lal* and *Debi Charan*, brought suits against the Respondent's firm, and obtained decrees. It does not appear that from the time of the execution until the suit of the Appellants was brought, anything was done under the deed, that any of the debts due to the firm were collected by *Ajudhia Pershad's* firm, and apparently the deed was not acted upon in any way.

The present suit was not brought until November, 1880. It was brought to enforce the claim of the Appellants under the mortgage. In their plaint they treated the deed as a mortgage to them for Rs. 6,600, the amount of their debt, and they prayed :—"A judgment to recover the Rs. 6,600, principal and interest, with costs of suit, by enforcement of the mortgage lien against, and auction sale of the mortgaged property entered in the mortgage deed, to the extent of the Plaintiffs' right, and also by holding liable the persons of the Defendants, and the other property owned and held by them."

The Subordinate Judge made a decree in their favour to the effect of what was prayed for in the plaint.

Some questions have been raised upon the form of this decree, and the form of the suit being not upon the whole mortgage, and for the benefit of all the mortgagees and creditors, but for the benefit of the Appellants alone. It is not necessary for their Lordships to say anything upon those questions.

The main ground of defence in the case is that in consequence of the two creditors who brought their suits and obtained decrees not assenting to the deed, it cannot be enforced; that the intention and agreement were that the deed should not take effect unless all the creditors came in and were bound by it. Now it appears to their Lordships, upon the evidence in the case, that this was the intention of the parties, and that, although there was no express stipulation to that effect, it is obvious from all that took place that this is what they meant, and is the agreement which was come to between them. The deed would not have been executed unless there had been that agreement. If the object of the arrangement is looked at, it would appear that this must have been their understanding. What all the parties desired was, that time should be given by the creditors to the *Cawnpore* firm in order that they might not be obliged to stop payment. If any creditor was at liberty to disregard the deed, and to bring a suit and obtain a decree, and get execution of it, he would be able to gain a preference over the other creditors, and in effect to oblige the *Cawnpore* firm to stop payment. It would be proper and right for them, if one creditor was endeavouring to obtain a preference over the others, to stop payment and to see that their property was equally divided amongst their creditors. In fact they did stop payment upon the suit being brought by the two dissentient creditors and the decrees obtained, and the effect was that the mortgage was not acted upon. Nobody appears to have sought to enforce it until this suit was brought; and the conclusion which their Lordships draw from the evidence is much strengthened by the conduct of the parties. The High Court, upon an appeal from the decision of the Subordinate Judge, were of the opinion here expressed, and accordingly they reversed his decree and dismissed the suit. Their Lordships think that was the proper conclusion from the evidence which was given in the case, and that under the circumstances the mortgage did not take effect. They will therefore humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the High Court, and the Appellants will pay the costs.

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Watkins & Lattey.*

16th, and 17th December, 1886, and 5th February, 1887.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Hobhouse, the Right Hon'ble Sir Barnes Peacock, and the Right Hon'ble Sir Richard Couch.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MAHARANI OF BURDWAN, (Defendant) ... } *Appellant,*

and

MURTUNJOY SINGH and others, (Plaintiffs and Dfendants) } *Respondents.*

Sale for arrears of rent—Construction of Regulation VIII of 1819, sect. 8, para. 2—Publication of copy or extract of such part of the notice of sale as may apply to the tenure of the defaulter.

Publication of the notice of sale of a tenure under Regulation VIII of 1819 is required to be in the manner prescribed in sect. 8, clause 2; and personal service on the defaulter is not sufficient. The objects of directing local publication of the notice, *viz*, to warn the under-lessees of

* 14 Cowell's In. Ap. 178; I. L. R., 14 Calc., 365.

the sale proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant kucheree or to serve it personally.

If there is a kucheree on the land of the defaulting putnidar, meaning the land which is to be sold for arrear of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that kucheree, and if there is no such kucheree on the land held by the defaulter, the copy or extract must be published at the principal town or village on the land.

In the description of this in clause 2, as "the notice required to be sent into the mofussil," the word "mofussil" is opposed to the sadar kucheree of the zemindar, and refers to the subordinate estate, which is the subject of the sale proceedings.

Where a zemindar, selling the tenure of a defaulting putnidar under the Regulation, had caused to be stuck up the requisite petition and notice at the Collector's kucheree, and the notice at the zemindar's kucheree, but not the copy or extract which is directed by the regulation to be similarly published at the kucheree, nor had published it at any other place upon the land of the defaulter: *Held* that the zemindar had not observed a substantial part of the prescribed process, and that this was for the defaulting putnidar "a sufficient plea" within the meaning of the Regulation.

Appeal from a decree (6th April, 1883) of the High Court affirming a decree (31st December, 1881) of the Subordinate Judge of *Hooghly*.

The present question was whether there had been before the sale of the Respondent's putni taluk for arrears of rent due to the zemindar, represented by the Appellant, a sufficient publication to satisfy the requirements of Regulation VIII of 1819, s. 8, clause 2 of the notice of the intended sale, and whether the High Court had rightly decreed that the sale should be set aside on the ground that the publication of the notice had not been duly effected.

The tenure sold under the Regulation was mehal *Amerpore* in the Hoogly zillah, within the zemindari of his late Highness *Aftabchand Mahatab Bahadur*, *Maharaja* of *Burdwan*, who, in his lifetime, had made a putni settlement of that mehal with *Ishwarchandra Kur*, now deceased, late husband of *Krishna Kamini Dasi*, the Plaintiff in the suit, and with *Srinarain Kur*, also deceased, and now represented by his son *Radhabullub Kur*.

The sale, which was for default in payment of rent for the half-year ending 1287 B.S. (the end corresponding to 11th April, 1881), the arrears amounting to Rs.6,475. 14. 11, took place on the 1st Jeth 1288 (13th May, 1881); and the putni was bought by *Bijoi Krishna Mukerji*, the highest bidder for Rs.35,500.

The present suit was instituted on the 21st May, 1881, by the Respondent *Krishna Kamini Dasi* against the zemindar, joining with him as Defendants the purchaser and *Radhabullub Kur*, her co-sharer in the putni. It was to have the sale set aside as having taken place "without publication of the notice at the kucheree of mehal *Amerpore* or in some principal village of the said lot." And whether there had been a sufficient compliance with the Regulation was the principal question raised by the issues.

From the evidence it appeared that, as the defaulting putnidars of mehal *Amerpore* had other properties in the neighbourhood, they had a more frequently used kucheree, called "dihi kucheree," at *Mahanad*, distant eight or nine miles from the confines of *Amerpore*. Two darputnidars, who were tenants of the largest sub-tenures that were in *Amerpore*, were always in the habit of paying rent at the "dihi kucheree" at *Mahanad*, while the kucheree within the *Amerpore* limits was only used for the purpose of receiving the rents of the smaller tenants, which, when received, were paid into the "dihi kucheree" at *Mahanad*.

The petition of the zemindar was duly "stuck up" in the Collector's katcheri, and a similar notice at the zemindar's own sadar kucheree. But no notice was taken to the mehal *Amerpore*, nor was any published on it. Instead of being taken there it was taken to the dihi kucheree at *Mahanad*, and at the latter it was personally received by *Radhabullub Kur*, one of the joint putnidars, and he directed *Jodonath Bose*, their joint servant, to sign the receipt for it, addressed to the Maharaja, the zemindar, as follows:—

Receipt of notice.

"Lot *Amerpore* in zillah *Hoogly* included in zemindari pergunnah *Burdwan*, &c., talukdar *Srinarain Kur*.

"The arrears of rent of this lot for the second half of the year 1287 B S., with road cess and public works cess not having been paid, application has been made before the Collector of zillah *Hooghly* for realisation of Rs.6,475-14-11 pie, under the provisions of Regulation VIII of 1819, according to the directions contained in Act V of 1853 and the letter No. 57 of the Honorable the Board of Revenue, dated the 31st January, 1874, and Act IX of 1880 of the Bengal Council, and the 1st of Jeth next has been fixed as the day before which the said arrears must be paid. Now the notice in the name of the talukdar of that lot having been legally served, has reached me in this mofussil place through the peon of your zemindari kucheree, in consequence of which I execute this receipt, having received this notice. The 11th Bysack 1288 B. S."

The Subordinate Judge was of opinion that, as there was a mal kucheree of the defaulter's upon the mehal which was in arrear, and as *Mahanad* was not in lot *Amerpore*, nor a principal town or village on the land of the defaulter, therefore the receipt of notice by the latter at *Mahanad* was not sufficient to satisfy the requirments of the Regulation. The suit was therefore decreed and the sale ordered to be set aside.

The appeal to the High Court came before a Divisional Bench (GARTH, C. J., and MACPHERSON, J.), and the question whether the notice had been sufficiently published was referred to a Full Bench: the referring order and the judgment of the Full Bench, which consisted of *Garth, C. J., Mitter, J., MacDonell, J., Prinsep, J.*, and *Tottenham, J.*, appear in the report of the hearing before the Full Bench (1). In accordance with the opinions of the Full Bench that the requirements of the Regulation had not been satisfied, and that the sale could not be maintained, the appeal was dismissed.

On this appeal,—

Sir *H. Davey*, Q.C., and Mr. *T. H. Cowie*, Q.C., (Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, with them), appeared for the Appellant.

The Respondents did not appear.

5th February, 1887.

The Judgment of their Lordships was delivered by

THE RIGHT HON'BLE LORD HOBHOUSE:—

The only questions on which it is necessary for their Lordships to express any opinion in this case are, first, what is the true construction of the Regulation VIII of 1819, sect. 8, para. 2; and, secondly, whether the *Maharajah* of *Burdwan*, who is the selling zemindar, has done what is necessary for a sale under that Regulation.

The material facts are not in dispute. The requisite petition and notice were stuck up at the Collector's kucheree and the requisite notice at the zemindar's kucheree. The copy or extract which is next directed by the Regulation to be similarly published was not stuck up at the Plaintiff's kucheree at *Amerpore*, or anywhere else in *Amerpore*, which is the putni talook in question. Service of that notice was effected on *Radhabullub*, the Plaintiff's, nephew and co-sharer in the talook, at her kucheree in *Mahanud*, about nine miles from *Amerpore*. The Plaintiff's *Mahanud* kucheree is in the same house with that of *Radhabullub*. It has been strongly urged at the bar that this service must be taken to be service on the Plaintiff herself; but their Lordships do not think it necessary to decide this matter, which, for the purposes of the judgment, they will assume in favor of the zemindar. Would such a service relieve him from giving notice on the lands at *Amerpore*?

The directions of the Regulation are, that a copy or extract of the notice which is stuck up at the zemindar's kucheree "shall be by him sent to be similarly published at the kucheree or at the prin-

(1) I. L. R., 9 Calc., 931.

cipal town or village on the land of the defaulter." It is argued that these terms do not require publication on the land of the defaulter, but that they are satisfied by publication at his kucheree, wherever it may be. And it must be allowed that the grammar of the sentence, taken alone, admits of such a construction.

The High Court have decided four points; first, that if there is a kucheree on the land of the defaulting putnidar, the notice must be published there; secondly, that by the land of the defaulter is meant that land which the zemindar is seeking to sell for default of rent; thirdly, that if there is no such kucheree, the notice must be published at the principal town or village on the land in question; and fourthly, that it must be published in the manner required, and that service on the putnidar is not sufficient. In all four of these propositions their Lordships agree.

To hold otherwise might defeat some of the substantial objects of this Regulation. It appears from the preamble that one of the objects is to establish "such provisions as have appeared calculated to protect the under-lessee from any collusion of his superior with the zemindar, or other, for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure." And immediately afterwards occurs the statement that it has been deemed indispensable to fix the process by which the said tenures are to be brought to sale. The object of directing local publication of the notices is to warn the under lessees of the contemplated proceedings which may result in sweeping away their property, and also to act as advertisements to persons who may bid at the sale. Both these objects might, and in many cases would, be frustrated, if it were sufficient to publish notice at any kucheree which the putnidar may happen to possess, however distant it may be, or to serve it personally on the putnidar.

Moreover, the notice in question is described as "the notice required to be sent into the "mofussil." The word "mofussil" is doubtless opposed to the sudder kucheree of the zemindar. It may be used to signify the subordinate estate which is the subject of the proceedings, and in their Lordships' opinion it does point to that estate.

Then it is suggested that this suit is brought by the putnidar, and that an objection founded on the interests of the under-lessees is not available to her. But that suggestion proceeds on a misconception of the nature and force of the objection. Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the zemindar to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the zemindar. The zemindar has neglected to observe a substantial portion of that process. There is therefore material irregularity in his procedure, and of that irregularity the putnidar is entitled to avail herself as a "sufficient plea" within the meaning of the Regulation. Of course there may be cases in which one, who might otherwise be entitled to avail himself of an irregularity, has so conducted himself as to have waived or forfeited his right. But no such case is suggested here.

It remains to look at some decided cases which were cited as authority against the foregoing conclusions.

In the case of *Looftonisa Begum* v. *Kowar Ram Chunder* (1) the prescribed formalities had not been observed by the zemindar, and the sale by him was set aside. But in the course of their judgment the Sadar Dewanny Adawlut expressed an opinion that the kucheree of the defaulter may be any kucheree in which the collections of the tenure are made. Their Lordships, however, observe that the learned Judges do not cite the words of the Regulation correctly. They appear to mix up the sentence which relates to the mode of publication with the

(1) S. D. A. (1849) 371.

next one, which relates to the evidence of it, two very distinct things. Moreover they rely on the presence of the comma placed after the word kucheree. Even if the punctuation were of the importance ascribed to it, it so happens that as the sentence is pointed the word "kucheree" may be applied to the whole expression "upon the land of the defaulter," just as easily as to the last three words only. But their Lordships think that it is an error to rely on punctuation in construing Acts of the Legislature. They find that the reasons given do not support the conclusion, from which they feel no difficulty in dissenting.

In the case of *Mungazee Chuprassee* v. *Sreematty Shibo* (1) a Division Bench of the High Court decided, with much hesitation, that the Regulation was satisfied by publication at a kucheree of the defaulter, which, though not on the land to be sold, was on adjacent land and was the office at which all the business of the estate to be sold was carried on. If that decision were right it would not govern this case, in which there has been no publication in the mofussil at all. Independently of that difference the decision appears to have been rested on the dictum of the Sadar Dewanny Adawlut in 1849, and on the reason given for that dictum. But for the reasons above given their Lordships prefer the conclusion that the kucheree meant is one on the land to be sold, and that if there is none, as was the fact in the case under consideration, the publication should be in the principal village on that land preferably to a kucheree on other land. If there should be no village at all an adjacent kucheree might be the proper place of publication, but no such case appears to have occurred.

The only case cited which is directly in favour of the contention in this case is that of *Gouree Lall* v. *Joodhisteer Hajrah* (2), where it was decided that the Regulation was satisfied by service of notice at the house of the defaulter. But the authority of that decision is undermined by its being rested mainly on the case of *Sona Beebee* v. *Lall Chand Chowdhry* (3), and the recognition of that case by this Committee in 2 Ind. App. p. 77. The same case has been again recognised by this Committee in 10 Ind. App. p. 20, but it is no authority for the proposition for which it is cited. It has been above pointed out that the formalities which the zemindar has to observe, and the evidence by which that observance has to be proved, are two totally distinct things. All that Sir *Barnes Peacock* decided was that, if the observance of the requisite formality was distinctly proved, it was not necessary to have the mode of proof which the Regulation directs. In the case in 10 Ind. App. this Committee found that the question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir *Barnes Peacock*, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir *Barnes Peacock* decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with. Mr. Justice *Glover* rests his decision wholly on that of Sir *Barnes Peacock*, and its recognition by this Committee. And their Lordships observe that Mr. Justice *Romesh Chunder Mitter*, who adds other reasoning, is a party to the judgment now appealed from, apparently without dissent.

The result is that their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and the judgment of the High Court affirmed.

Solicitors for the Appellant: *T. L. Wilson, & Co.*

(1) 21 Suth. W. R. 369.
(2) 25 Suth. W. R. 141.
(3) 9 Suth. W. R. 242.

APPENDIX

TO

PRIVY COUNCIL JUDGMENTS.

23rd July 1864.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Lord Kingsdown, the Right Hon'ble Sir E. Ryan, the Right Hon'ble Sir J. T. Coleridge, the Right Hon'ble Sir L. Peel, and the Right Hon'ble Sir J. W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

RAJAH SUTTEESHCHUNDER ROY ... ... } *Appellant,*

and

SAMASOONDRY DEBIA and others.... ... } *Respondents* *

Government Securities - Deposit—Annuty—Conversion—Liability for deficit income.

When Government securities deposited in court for meeting certain annuities are converted to a lower rate of interest by the act of the Government and the court independently of the parties, the depositor is nevertheless bound to make good the deficit in the income thus caused to the annuitants.

Their Lordships have looked through the printed papers in this case, and also through the MS. documents handed in by the Appellant for the purpose of showing how the Government Securities for 60,000 rupees deposited in Court, and at the time bearing 5 per cent. interest had been converted into Government notes bearing only 4 per cent. interest. That examination shows that the statement in some of the papers that the 60,000 rupees were originally invested in a single note is mistaken. It appears that they were invested in notes of different amounts; and with respect to the notes for 42,000 rupees, the subject of the present appeal, that they were paid of at different times in the years 1833 and 1837, in pursuance of notices given by the Government Agent to the Registrar of the Court of Sudder Adawlut, and were converted into Government paper bearing only 4 per cent. interest.

This had been done before the division of the notes amongst the parties entitled to the income; and though the delivery out of the notes to the claimants seems to have been irregular, it did not affect the conversion of the 5 per cent. securities, into 4 per cent. securities, which was the act not of the parties but of the Government and of the Court.

Now, that conversion having reduced the 3,000 rupees which the annuitants were entitled to receive by one-fifth, the Appellant under his engagement became liable to make it good; and in this suit he has been charged with the amount found due in that respect upon 42,000 rupees, which seems to have been the only sum on which the Court considered that actual proof had been given of the conversion of the notes. This order does no injustice to the Appellant. We cannot, therefore, advise Her Majesty to reverse the judgment complained of. We think it should be affirmed, without prejudice to any proceedings which the Appellant may take for the purpose of compelling the holders of the notes for the full sum of 60,000 rupees to bring

* From the folio edition of Privy Council Judgments.

them back into Court. The effect, however, of this may possibly be that the Appellant may be found liable to a loss in respect of the conversion of the other notes beyond the 42,000 rupees.

3rd February, 1870.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Joseph Napier, the Right Hon'ble Lord Justice Giffard, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BEER CHUNDER JOBRAJ ... } *Appellant,*

and

THE DEPUTY COLLECTOR OF BHULLOOAH... ... } *Respondent.**

Suit for land—Onus—Possession—Title.

In a suit to recover possession of land admittedly in depot's possession for 11 years, the onus is upon plaintiff to prove possession within twelve years as also title to possession.

The argument in this case has occupied such a length of time, that their Lordships have been able to give it their consideration and are of opinion that it may be disposed of on the following short grounds:—

The Appellant commenced his suit in 1856: he sought the recovery of certain lands as belonging to Pergunnah *Tishnah*. A part, *viz.*, equal to 18 dunes of the lands he seeks by his plaint, was ordered to be restored to him in May 1845. Mr. *Abercrombie* made this order: he ordered that these should be restored to the claimant, and that the detailed particulars of the remaining disputed lands be inserted in the general settlement report.

Possession was given according to the order: from May 1845 till 1856 there has been undisputed possession of the disputed lands by the Government: for the delay in the institution of the suit no reason is given.

There is satisfactory proof of the suit of 1811, and of the proceedings of 1824 having been in respect of part of the lands now in question: there is strong evidence to show that the Government was then in possession.

The Civil Court Ameen of the Sudder division made a report which their Lordships have been asked now to adopt, but it was rejected at the instance of the Appellant as well as at the instance of the Respondents. The Appellant petitioned against it.

The Moonsiff's report was *ex-parte*.

Their Lordships, however, do not consider it necessary to determine whether it ought not to have been received.

It would certainly have been more satisfactory if the Principal Sudder Ameen had recorded his reasons for disagreeing with the Ameen's report; but, be this as it may, as the Government has admittedly been in possession since 1845 and are still in possession, their Lordships are of opinion that it was essential for the Appellant to have proved two things,—first, possession within twelve years before his suit; and secondly, title to possession:—of title to possession there is no proof;—of possession there is not satisfactory proof either.—there is nothing to connect possession with the kuboolouts or any of them. Some of the independent witnesses carry back the possession of the Government for more than twelve years before the suit, and the evidence to the contrary on the part of the Appellant is far countervailed by that of the Respondent. The *res gestæ* from 1811 downwards are all consistent with possession by Government, and inconsistent with possession by the Appellant. The *onus* of proof rests on the Appellant, and he has failed to discharge that *onus*. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

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* From the judgment of Kemp and Campbell, J. J., dated 11th February 1864 in Regular Appeal No. 103 of 1863.

24th November 1871.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Joseph Napier, the Right Hon'ble Sir Montague Smith, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at fort William in Bengal.

WOOMESH CHUNDER ROY ... ... } *Appellant,*

and

GOOROODOSS ROY and others ... ... } *Respondents.**

Mortgage—Bonâ fides—Onus Probandi.

Suit for possession by mortgage in after foreclosure, against part purchaser of mortgaged property impugning the mortgage as a collusive transaction in fraud of creditors:—*Held*, that under the proved and apparent circumstances of the case it was necessary for the plaintiff to have given his own deposition and to have produced other evidence in his own power to establish the reality and *bonâ fides* of his mortgage.

The Respondent in this case brought his suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbrancers whose case it is unnecessary now to consider, and against the present Appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the Plaintiff the Respondent. The Appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bonâ fide*? The Principal Sudder Ameen, the Judge of First Instance, found that issue in favor of the Appellant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are sufficiently before them to enable them to give a judgment upon them, and that there were sufficient circumstances proved and apparent in the case to render it necessary for the Respondent to give better evidence of the *bonâ fides* of the transaction on which he relied than he has given in this case. Their Lordships observe, among other things, that by the petition filed by one of the mortgagors at page 70, the transaction, though spoken of as a real transaction, is spoken of as one of those arrangements under which the parties had every hope and probability of getting back the lands in future from the Baboo "in case we can pay the amount due to him."

Their Lordships also find that the Respondent did so far undertake to prove what the consideration really was that he examined one or two witnesses upon that point. Those witnesses prove no more than that a colorable consideration passed in the shape of certain notes at *Shreedhurpore*, a payment which may easily be explained by the admitted relation between the parties, and is one of those payments which would be ostensibly made before witnesses of that character in order to give color to the transaction. But part of the alleged consideration for the original mortgage was a balance found upon a settlement of account, and no evidence whatever is produced as to the fact of the settlement of that account or to show in respect of what transactions it was settled, or that a balance was really struck and found due to the Respondent upon that occasion.

Then again, the High Court, in its judgment reversing the decision of the Principal Sudder Ameen, relies upon the sum of money which was paid into Court, whether Rs.15,000 or Rs.16,000 does not

* On appeal from the judgment of Loch and Seton-Karr, J. J., in Regular Appeal No. 271 of 1864 decided 5th December 1864.

very clearly appear, in order to stay the first execution of *Punchanon Bose* and another; but that payment throws no light upon the original transaction, certainly does not go to establish that that original transaction in its inception was a *bonâ fide* transaction, or the ordinary transaction of mortgagor and mortgagee, in which the parties would be dealing at arm's length with each other. On the contrary, if any thing, it tends the other way, because if the Respondent had then completed his title by foreclosure, if he was in a position to claim this land against all persons by virtue of a *bonâ fide* mortgage title made absolute by foreclosure, what possible motive was there for advancing a very much larger sum than the sum originally secured by the mortgage?

Their Lordships, considering the whole of the evidence, are obliged to come to the conclusion that the Principal Sudder Ameen was right in finding that, as against the Appellant, this was not a *bonâ fide* mortgage, but one of those transactions into which a friendly party might have been induced to enter in order to protect the young men, the mortgagors, from the demands with which they seem to have been pressed. The case is not presented, perhaps, in quite so satisfactory a way as it might have been in respect to the amount and nature of these demands The Principal Sudder Ameen speaks of them in terms which the evidence, as sent over on this record, hardly supports; but there is, even upon the face of the plaint, an admission of outstanding demands sufficient to show that there may have been a motive that the property should be protected in the way in which it has been attempted to protect it.

Their Lordships think that, had the transaction been what it purported to be, the Respondent, who might have given his own testimony, who might have called the person spoken of as his Moonshee and as having taken a principal part in the original transaction, and who might have examined the mortgagors and others, had it in his power to adduce far better testimony than has been given in this case, in order to make out the reality and *bonâ fides* of the transaction.

Their Lordships therefore are of opinion that the decree of the High Court cannot stand, and that it ought to be reversed. All that the present Appellant asks is, that the decree of the Principal Sudder Ameen should be affirmed. Against that decree, so far as it was favorable to the Respondent, the Plaintiff in the case, there was no appeal to the High Court; and therefore nothing which their Lordships do here will in any degree disturb that decree, or alter or affect whatever relations may under it exist between the mortgagee and the mortgagors or anybody who may hereafter claim under them.

Their Lordships therefore will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the High Court, and to affirm the judgment of the Court below, the Principal Sudder Ameen, with the costs of the appeal to the High Court. The Appellant must also have the costs of this appeal.

The reservation at the end of the Principal Sudder Ameen's decree concerning the right to four annas of the property asserted in another suit seems to be unnecessary, because whether the Appellant held three-fourths by virtue of his execution sale, and one-fourth by virtue of the decree in that other suit or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.

28th November 1872.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James W. Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Smith, the Right Hon'ble Sir Robert Porret Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GUNGA GOBIND MUNDUL and others ... } *Appellants,*

and

BHOOPAL CHUNDER BISWAS ... ... } *Respondent.**

Limitation, Cause of action.

There being a term in a deed of gift that whenever certain properties which were in the possession of others, *viz.*, certain Munduls should come to hand by personal possession, by amicable settlement or by suit, plaintiff is to get 2 annas share thereof. A suit was brought, and decree obtained, and possession taken, and subsequently the properties were sold by the Decreeholder to the Munduls. Plaintiff then brought the present suit for recovery of possession of his 2 annas share under the terms of the deed of gift.

Held that the plaintiff's cause of action arose at any rate, at a period subsequent to the execution of the decree, and that being within the period of limitation, plaintiff's suit is not barred.

Mr. *Leith* and Mr. *Arathoon* for the Appellants.

Mr. *Cowie* and Mr. *J. Cutter* for the Respondent.

The judgment of their Lordships was delivered by

THE RIGHT HON'BLE SIR BARNES PEACOCK:—

The Appellants in this case, the *Munduls*, were the Defendants in the suit below. The Respondent, *Bhoopal Chunder Biswas*, was the Plaintiff. The suit was brought to recover possession of a two annas share of a moiety of the estate left by the late *Hurnarain Mundul*. The Defendants in answer to the Plaintiff's suit set up the plea of limitation. The Court of first instance, as well as the High Court, held that the suit was not barred, and hence the present appeal.

The Plaintiff in his plaint stated "that of the estate left by the late *Hurnarain Mundul*, *Ramonee Dossee*, widow of his son *Digambur Mundul*, became the rightful owner of, and entitled to, a moiety, and *Shumbhoo Chunder Haldar*, father of *Protap Chunder Haldar*, his daughter's son, to the remaining moiety." That was the moiety which had belonged to *Digambur's* brother, *Rajkristo Mundul*. He then states:—"On the 27th Maugh 1252 B.S., the said *Haldar* conveyed to your petitioner by gift two annas out of his eight annas share, and gave him in writing a deed of gift duly registered." It was stated in the deed of gift that, whenever any of the real and personal properties of the said estate, which were in the possession and hands of *Pearyloll Mundul* and others, should come to hand, whether by possession taken personally or by amicable settlement, or by suit in Court, the Plaintiff should get a two annas share, *Nobin Seekaree* a one anna share, and *Shumbhoo* five annas, out of the eight annas share thereof, and that whatever expenses should be incurred by suit in Court in respect of any claim to any of the properties, or in recovering possession of any of the properties, the same should be defrayed by the Plaintiff and *Shumbhoo* in the ratio of the aforesaid shares; that if any amicable settlement should be made regarding any property, the Plaintiff and *Shumbhoo* should do the same with the consent of all; that if there should be occasion to institute any suit in *Shumbhoo's* sole name, or in the joint names of him and *Ramonee Dossee* as Plaintiffs for any property, the Plaintiff should pay the expenses thereof according to the aforesaid shares; and that after decree *Shumbhoo* and the Plaintiff should get the property with mesne profits and interest according to their shares. *Shumbhoo* within the period of limitation commenced a suit against the *Munduls*, No. 76 of 1854, for

* From the judgment of Couch, C. J. and Jackson and Glover, J. J., in Regular Appeal No. 231 of 1869, decided 5th July 1870.

the whole of *Hurnarain's* estate; but pending that suit *Joykristo* was substituted as the Plaintiff under a deed of sale from *Shumbhoo* to him. It was said that *Joykristo* held benamee for the *Munduls*, but whether he did so or not is not material. *Joykristo* proceeded with the suit commenced by *Shumbhoo* and obtained a decree for an eight annas share of the estate. *Ramonee* was a Defendant in the suit against the *Munduls*. She appealed against that portion of the decree which affected her. The High Court modified the decree against her by limiting it to a five annas share. The *Munduls* not having appealed, the decree remained binding upon them for the eight annas share. *Joykristo* executed the decree under which a five annas share was delivered to him in the manner in which delivery is made under executions of decrees for land in the possession of ryots, *viz*, by beat of drum and the affixing of bamboos, and he filed a receipt for the same in the Court of the Principal Sudder Ameen. The decree and execution put an end altogether to limitation. It is immaterial whether *Joykristo* obtained actual possession or not. In the suit No. 79 of 1861, the Plaintiff's title under the deed of gift from *Shumbhoo* was established against *Joykristo*. *Joykristo* afterwards sold to the *Munduls* the five annas share of which he had obtained possession under the execution, and all his right, title, and interest under the decree. Neither the *Munduls* who purchased from *Joykristo*, nor *Joykristo* who purchased from *Shumbhoo*, could have any better title than *Shumbhoo* himself. According to the deed of gift, the Plaintiff was entitled to a two annas share of all the property which should come to hand. A five annas share came to hand under the execution, and the *Munduls* retained possession of the other three annas included in the decree under the deed of sale from *Joykristo*. The *Munduls* being in possession of that three annas share, the Plaintiff was entitled to two annas of the property of which *Joykristo* obtained possession under the execution. The *Munduls* having obtained possession of that two annas share, the Plaintiff is entitled to recover it from them. They obtained that possession after the execution of the decree and within the period of limitation.

It appears then that the *Munduls* got possession of the two annas share of which *Joykristo* ought to have remained in possession in trust for the Plaintiff. The Plaintiff therefore has a right to say,—"these two annas belong to me. You, the *Munduls*, are in possession of my two annas share, and I bring an action against you to recover that share." Then, when was it that this cause of action arose? Why, it accrued, at any rate, at a period subsequent to the execution of the decree by *Joykristo*. That was within the period of limitation.

The High Court certainly do say, "The present suit is brought to carry into execution the decree in that suit," speaking of *Joykristo's* suit "in which the Plaintiff has an interest." Their Lordships do not understand that the High Court in using the words "to carry into execution," meant "to get the decree executed by process of execution according to law," but merely that the present suit is brought to give effect to that decree.

It appears to their Lordships that the suit is not barred, inasmuch as the Defendants have obtained that possession which is wrongful as against the Plaintiff subsequently to the execution of the decree by *Joykristo*.

Without, therefore, entering into the reasons of the High Court, their Lordships are of opinion that the decision to which they came was the correct one, and they will therefore humbly advise Her Majesty that the decree of the High Court be affirmed with costs.

12th December 1872.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James W. Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague E. Smith, the Right Hon'ble Sir Robert Porret Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BETTS and others ...}*Appellants*,

and

ARBUTHNOT and Co. ...}*Respondents*.*

Principal—Agent—Repudiation of the Act of the Agent.

The purchase by agents of Indigo seeds in a rising market under order cannot be repudiated by the principal unless he can show affirmatively that the agents had been guilty of negligence in executing the order which he had given them. The agents could not have experimented at Madras in a rising market by sowing a sample of the seed and waiting 8 or 10 days before they purchased to see whether it would germinate. They were only bound to use proper care and skill and act to the best of their judgment.

This is a suit brought by Messrs. *Arbuthnot and Company*, who are merchants and agents at *Madras*, against Mr. *Betts* and his partners, who are indigo planters in *Bengal*. The suit is brought to recover the price of certain indigo seed which Messrs. *Arbuthnot and Company* purchased as agents for Mr. *Betts* and his partners, under instructions received from them. In one of the earliest letters from Messrs. *Arbuthnot and Company*, they say:—"At the request of Mr. *Herklots*, of *Coonoor*" (Mr. *Herklots* was a friend of Mr. *Betts*) "we write to inform you that indigo seed of this year's growth is now available here, and that supplies will continue to come in for the next two or three months. The present price is Rs.6-4 to 6-8 per maund, but the demand is so great that we expect to see shortly a considerable rise. If you send us an order, we will endeavour to execute it to the best of your interests." It appears that, at first, Mr. *Herklots* inquired of Messrs. *Arbuthnot and Company* whether they could buy 2,000 maunds, which was a much larger quantity than the Defendants wanted to sow in the following October. The probability is that when Mr *Betts* instructed Messrs. *Arbuthnot and Company* to purchase, they were purchasing upon speculation, intending to pay the price of the seed out of the money to be obtained by re-selling it. There is no doubt that the Defendants were not prepared to pay for the seed, and it was unlikely that they would be buying seed in February to sow in October, when they had not the means to pay for it. Mr. *Betts*, by a letter of the 13th February, instructed Messrs. *Arbuthnot and Company* to purchase for him 1,000 maunds upon the most favorable terms. He says, "best fresh indigo seed;" but he sent them a telegram afterwards, instructing them to buy, not the "best," as requested in the letter, but "fresh, good." According to the evidence of Mr. *Betts* himself, what he instructed Messrs. *Arbuthnot and Company* to purchase was, "one thousand maunds indigo seed, fresh, good, on most favorable terms." Having received a letter of the 25th February, informing him that Messrs. *Arbuthnot and Company* had purchased at the rate of 10 rupees per maund, Mr. *Betts* writes on the 6th March, the following letter:—"Yesterday I despatched a telegram to you to the effect that the seed I ordered must be fresh and good." That "yesterday" was the 5th of March. He had received Messrs. *Arbuthnot and Company's* letter on the 2nd, stating that they had actually purchased. Then why should he immediately send off a telegram to say that he hoped the seed would be fresh and good? He had instructed Messrs. *Arbuthnot and Company* to buy fresh and good; why should he suppose that they had not bought fresh and good? And yet he thinks it necessary, on the 5th of March, to send a telegram to them to say that the seed

* From the judgment of Couch, C. J. and Jackson and Glover, J. J., in Regular Appeal No. 51 of 1870, decided 26th July 1870.

which he ordered must be fresh and good, as he needs it for his October sowings. "And I now beg to advise you that if the seed is not of this description,"—Why should he suppose that it was not of that description?—"that is, *fresh*, and such as I sent you an order for, you must be aware that it would be ruinous to sow it. Pray, therefore, kindly exercise your judgment in this matter." How were they to exercise their judgment? They were instructed to purchase, and they had purchased. Mr. *Betts* must have supposed that they had purchased according to their instructions, and he must have known that if they had not purchased according to their instructions or used due diligence in carrying out his order, he was not bound to take it. There was, therefore, no necessity to write that letter if the transaction really was such as Mr. *Betts* would have it supposed. It appears that when Mr. *Betts* found that the price had risen from Rs. 6-4 to 10 he was anxious to get out of his contract. It is clear that he was not able to pay. He afterwards asks Messrs. *Schoene and Company* whether they can sell the indigo for him, and when they tell him that *Madras* indigo is not saleable in *Bengal*, then, for the second time, he asks for a sample. He had originally asked for a sample; but Messrs. *Arbuthnot and Company* had informed him that the indigo had been sent to Messrs. *Thomas and Company* as his agents, and that they would give him a sample. He was satisfied with that answer, and did not ask again for a sample until he was informed by Messrs. *Schoene and Company* that they could not sell the indigo for him to advantage; then he asks for a sample, and a sample is given to him, and then he commences his experiments to see if the seed will germinate.

Three of the Judges of the High Court have found that Messrs. *Arbuthnot and Company* properley discharged their duty as agents. Messrs. *Arbuthnot and Company*, although they did state in their plaint that they were acting as sellers, were really only agents for Mr. *Betts*. Having purchased in *Madras* they had paid or would have to pay the person from whom they purchased; they were, therefore, in the nature of sellers, although they were really only *del credere* agents. It was necessary for Mr. *Betts*, before he could repudiate what his agents had done for him and refuse to take the indigo and to pay for it, to show affirmatively that Messrs. *Arbuthnot and Company* had been guilty of negligence in executing the order which he had given them. He deals with the sample when he gets it by sowing it and testing it. Whether that test was or was not a good one it is not necessary to inquire, for Messrs. *Arbuthnot and Company*, when they were buying indigo seed at *Madras* in a rising market, under an order to purchase on the most favourable terms, could not have experimented by sowing a sample of the seed and waiting eight or ten days before they purchased to see whether it would germinate. They were only bound to act to the best of their judgment and to use proper care and skill as agents in purchasing what they were ordered to purchase, *viz.*, good, fresh indigo seed.

Now, did Mr. *Betts* prove that Messrs. *Arbuthnot and Company* had not fairly and properly executed his order? It appears to their Lordships that there is no evidence to that effect, and they agree with the views which the learned Judges of the Court below have taken that Messrs. *Arbuthnot and Company* did fairly and properly execute the order. The Chief Justice says—"Looking at the evidence, I can see no reason for distrusting the Plaintiff's case, and thinking that they did not perform that which they undertook to do for the Defendants, namely, to purchase good, fresh seed." Mr. *Justice Louis S. Jackson* says—"I have no doubt that Messrs. *Arbuthnot and Company*, as agents of the Defendant, honestly fulfilled the commission intrusted to them, and that the Plaintiffs are entitled to recover the whole of the amount they claim in this suit," with the exception of a small amount for excess. The learned Judge of the first Court did

not try the case upon the evidence. He decided against the Plaintiff on the ground of variance. That ground has, very properly, been given up to-day, and has been admitted that the Judge ought not to have dismissed the Plaintiff's claim upon the ground of the variance. There were three Judges of the High Court, and they were unanimous in coming to the conclusion that Messrs. *Arbuthnot and Company* did properly and honestly fulfil the commission which had been instructed to them.

Their Lordships, therefore, see no reason for interfering with the judgment of the Court below, and they therefore will humbly advise Her Majesty that the decision of the High Court be affirmed with costs.

21st March 1872.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Lord Justice James, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

SHEROOCOOMAREE DEBIA ... ... } *Appellant,*

and

KESHUR CHUNDER BOSOO and others ... } *Respondents.**

Magistrate's Proceeding—Effect of—Nature of right and possession held under a Hindu widow.

Held that the proceeding of the Magistrate in 1841 quieting the possession of the Dur Mokroredars under the widows and remitting the Putnidar to a regular suit, which suit was not brought, is conclusive, unless its effect is altered by some other cogent evidence. A widow or a person claiming under a widow cannot destroy the title of the heir by allowing a friend or relative to have twelve years possession of the estate. In this case there is nothing to show that the possession was other than permissive, and there is evidence to support that presumption. The right of the Plaintiff Appellant, the purchaser from the former proprietor, the husband of the said widows, as Mukroridar, is not affected by the sale in 1849 of the Putni, under which the Mukrori is, such sale and possession by the same family, being perfectly consistent with the Plaintiff Appellant's case.

This is an appeal from the High Court of Judicature at *Calcutta*; and also, by special leave, from two judgments and decrees of the Zillah Judge of West *Burdwan*. As the suit was not heard on the merits by the High Court and as the whole case is open on the decisions of the Zillah Judge, it is only necessary for their Lordships to deal with the latter.

The case is shortly this:—

The Appellant instituted her original suit under these circumstances. She alleged that the property in question was hers by purchase from the person who became entitled to it as heir of a former proprietor, on the death of the last survivor of the four widows left by such proprietor. The widows, she alleged, had made a grant to *Modhoosoodun Bosoo* and *Bhoyrub Chunder Bosoo*, which grant would, of course, determine on the death of the last surviving widow. Upon such death she instituted her suit against the said *Modhoosoodun* and *Bhoyrub Chunder* and others in assertion of her right as purchaser from the heir, and obtained a decree establishing such right as against the Defendants in that suit, and took possession in the usual form by planting bamboos in execution of the decree. The litigation in this suit was very hostile. The heirship of the Appellant's vendor was disputed strenuously, and it was only after appeal to the High Court that her right was finally established. The lands in question were alleged by the Appellant to have been held by *mokurureee* tenure under the Rajah of *Burdwan*, but were included in a part of the Rajah's zemindary, which he had granted in putnee, and the result of that state of things would, of course be that the *mokurureedars* were entitled to the possession of the lands, paying the rents reserved

* From the judgment of Kemp and Markby, JJ., dated 21st February 1867.

by their grant to the putneedar, as middleman between them and the zemindar.

When the Appellant came to take out execution of her decree, other members of the *Bosoo* family who had not previously intervened in the suit objected to such execution, on the ground that they were the persons really in possession under a better title, which was thus alleged :—

Keshub Chunder Bosoo said "that lot *Beesoonundunpore*, &c., seven mouzahs in *Purgunnah Bistoopore* (being the putnee tenure above mentioned), having been sold at auction for the arrears of rent due by *Beer Sing Baboo*, *Khetternauth Bosoo*, and *Hungseswur Bosoo* purchased the same on the 15th May 1849. In the year 1256, *Khetternauth Bosoo* granted the *durputnee* of his half share to me, and *Hungseswur Bosoo* granted the *durputnee* of his half share to *Ram Chnnder Bosoo*, and since that time we have been in *khas* possession of the same."

On this claim being so made, it was put in course of trial as a regular suit between the objectors (the first three Respondents) as Plaintiffs, and the Decree-holder as Defendant, as provided by law in that behalf.

The alleged purchase in 1849 is not disputed, nor is the fact of the actual possession of the property by the *Bosoo* family, or some of them, denied; the Appellant's case being that what was so purchased was the interest of the putneedar, and that the alleged possession was, in truth, a possession under the *mokurruree* title derived from the widows, as above stated, and, therefore, a possession not adverse to, but supporting, her (the Appellant's) title.

The Court of first instance was of that opinion, and gave judgment as follows :—

"I consider the *mokurruree* rights of the Decree-holder to be true. If the Plaintiffs have a putnee right, they can obtain the rent from the female Defendant."

The suit of the objectors was, therefore, dismissed with costs.

On appeal to the Zillah Judge, he at first thought that the suit had not been instituted with sufficient and proper allegations, and decided against the Plaintiffs on that technical ground; but the High Court having remanded it to be tried on the merits, the Zillah Judge proceeded to try it, and gave judgment against the Appellant, on the ground stated in page 96 of the "Record," the substance of which is "the long and undisputed possession of the Plaintiffs gives rise to a strong presumption of their title being good; the *onus* of proving a strict legal title lies on the party seeking to disturb such possession. The Defendant cannot distrub the possession of Plaintiff without proving possession within twelve years. Defendant has given no proof of possession within twelve years. On the contrary, her witnesses prove the Plaintiff's possession. There is no proof, indeed, that Defendant has ever collected the rents, or has ever paid rent to the putneedar. And she produces no title-deeds and no reliable proof that her vendor was ever in possession. It appears to me that the only ground on which the Defendant stands is that the under-tenures subordinate to the putnee is called a *mokurruree* in various old papers, one if not more of which is a copy of a copy. This is quite insufficient to prove a title." And for these reasons the judgment of the Lower Court was reversed and the appeal decreed.

On special appeal, the High Court held that the case had not been really tried on the true merits, that is to say, under what title the *khas* or actual possession had been held, and remanded it for re-trial, and directed that such re-trial should be in the presence of the putneedars and the zemindars, so as to make a final decision.

Such re-trial was had. The Zillah Judge adhered to his former decision. His judgment is contained in a few lines as follows :—

"There is no proof whatever that the possession of the dur-putneedars is the same as the alleged possession of the 'durputneedars' (the grantees of the widows). Defendant's witness acknowledges that a former suit for rent was instituted some seven or eight years ago,

by *Ram Chunder Bosoo*, styling himself dur-putneedar. The putnee title is proved, and the putneedars acknowledge the dur-putnee. But there is no proof whatever of the existence of the *mokurruree*, and, for the reasons given in my judgment of the 9th August 1865, I believe that no *mokurruree* has ever existed as separate from the putnee, though the latter tenure may have been occasionally styled a *mokurruree*. Therefore, clearly, the dur-putneedar is entitled to his claim."

It appears to their Lordships that the Judge must have overlooked the most material evidence in the case. The title alleged by the dur-putneedars was a title acquired in 1849 to the putnee which had previously been *Beer Singh's*.

Now, in 1841, there was a proceeding before the Magistrate, in which the above named *Modhoosoodun* and *Bhyrub Chunder Bosoo* were Plaintiffs, and the same *Beer Singh* and one *Christoprosaud*, his Mookhtear, were Defendants, in which the whole title and the respective rights of the parties, as they then stood, were gone into and investigated.

Modhoosoodun and *Bhyrub Chunder* then expressly alleged their title as grantees of the "dur-mokurruree" right under the widows, and their possession under such title, and then insisted, as the Appellant now insists, that the putneedar's right was only to the reserved rent.

As the result of that investigation the Magistrate found in favour of the then Plaintiffs that they were and had been in possession as dur-mokurrureedars under the widows, and he accordingly, by his order, quieted them in such possession, and remitted the putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought.

It appears to their Lordships that this proceeding, unless its effect can be altered by some other cogent evidence, is conclusive of the present case.

In the year 1841 the actual possession was clearly in the grantees of the widow; and any subsequent possession by other members of their families must be presumed and taken to be a possession by their permission and with their consent, unless the contrary is very clearly shown. If a widow or person claiming under a widow could destroy the title of the heir by allowing a friend or relative to have twelve years' possession of the estate, no heir would be safe.

In this case there is nothing to show that the possession was other than permissive, and on the other hand there is very strong evidence confirmatory of the presumption that it was permissive.

There is, moreover, considerable parol evidence that the possession was a joint family possession, and important documentary evidence to the same effect. Amongst these documents are a bond and a suit upon that bond showing that the purchase of the putnee, although made in two names only, *viz.*, *Khetternauth Bosoo* and *Hungseswur Bosoo*, was really made on behalf of themselves, and of *Modhoosoodun*, *Ram Chunder*, *Bhyrub Chunder*, and *Keshub Chunder* (*Modhoosoodun* and *Bhyrub Chunder* being the two dur-mokurrureedars). There are also on record a petition purporting to be a petition of *Khetternauth's* and filed as far back as 1858, claiming to be a co-sharer in the dur-mokurreree taken from the widows in the name of his brother *Modhoosoodun*; and a similar petition, of the same date of one *Eshan Chunder Bosoo*, claiming in like manner to be a co-sharer in the dur-mokurruree taken in the name of his uncle, *Bhyrub Chunder*.

All the probabilities of the case lead to the same conclusion. It is in the highest degree improbable that *Modhoosoodun* and *Bhyrub Chunder*, having established their possessory right against *Beer Singh*, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same *Beer Singh's* right. And it is equally improbable that, if they were not in possession, but the possession was in their relatives (the putneedars), they would have litigated the original suit in the way in which it was litigated.

Their Lordships are clearly of opinion that the family or families of the *Bosoos* were in joint possession, that such posses-

sion was obtained and continued under the widows' title, and is to be referred solely to the title which is now vested in the Appellant, and that right of the Appellant can in nowise be affected by the acquisition of the putnee title in 1849.

The Zillah Judge seems to have thought throughout that the mere production of the purchase of title acquired in 1849, and the possession by the purchaser subsequent to that year, were sufficient to establish his right. If he had rightly apprehended (as was clearly pointed out to him by the High Court) that such purchase and possession were perfectly consistent with the Appellant's case, if that case were true—if he had considered the proceeding in 1841, and ascertained in whom the possession then was and under what title, and had enquired whether any change had been made in such possession between 1841 and 1849; or whether their had been any change in the possession consequent on the purchase in the latter year, and how that change, if any, had been effected—there would not have been what their Lordships cannot but consider a serious miscarriage of justice.

Their Lordships will humbly recommend to Her Majesty that, notwithstanding the decree of the High Court of Judicature at Fort William in Bengal of the 21st February 1867 on the special appeal, the judgments and decrees of the Zillah Judge of *West Burdwan* dated respectively the 9th August 1855, and the 2nd August 1866, ought to be reversed, and that the decree of the Princial Sudder Ameen of *West Burdwan* of the 21st July 1864 ought to be affirmed with a declaration that the Appellant is entitled to possession of the property claimed, and that the suit ought to be remanded to the High Court of Judicature, with directions to cause the decree of the Principal Sudder Ameen, of the 21st July 1864, to be executed in due course of law, and to take an account of the mesne rents and profits of the property claimed, to be repaid to the Appellant by the Respondents, *Keshub Chunder Bosoo*, *Redaynatt Bosoo* and *Ahladince Dossee*; and their Lordships will further report to Her Majesty that the said Respondents ought to pay to the Appellant her costs of the proceedings before the Principal Sudder Ameen and before the Judge of the Zillah Court of *West Burdwan*, and that the costs (if any) paid by the Appellant in the Zillah Court be repaid to her by the Respondents.

And the Respondents are also to pay to the Appellant the costs of this appeal.

10th May 1872.

PRESENT:

The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

WISE ... ... } *Appellant*,

and

BROJENDRO COMAR ROY and others. ... } *Respondents*.*

Evidence—Title—Possession—Delay.

Held, upon the whole case, reversing the High court's decision, that the Plaintiffs (Respondents) had failed to prove either title or possession entitling them to disturb the Defendant's long possession.

The High Court having originally treated the Plaintiffs' title as depending upon a release by the commissioner, and finding that release not made out, fell back upon the Deputy Collector's proceeding, which they had not sufficiently considered as also the manner in which they had been dealt with by the Deputy Collector's official superiors.

The Appellant in this case has purchased the title of the Defendants in the suit to the land in dispute. The Respondents were the Plaintiffs in that suit, which was brought for the recovery of what may now be taken to be the 2,092 beegahs and 13 cottahs of land, comprised in Dag No. 39, as laid down in the large map of *Chur Bhudrasun Talimabad*, which is in evidence in the suit, and which was made in 1847 upon the Government survey of 1846. In dealing with the case it will be

* From the judgment of Trevor and Campbell, dated 27th January 1866.

convenient to speak of the parties as the Plaintiffs and the Defendants.

The Plaintiffs were the owners of a zemindary called *Ramnugger*, and the Defendants were the owners of a zemindary known as *Chur Mokoondeah*. Both zemindaries have, since their settlement at the time of the perpetual settlement, suffered much from the invasion of the river; but the *Chur Bhudrasun Talimabad*, which was at some time before 1832 thrown up in the river, and of which the land in dispute forms part, must be taken to have been a chur formally and regularly decreed to be the property of the Government, to no part whereof could either party have shown title against the Government as of right as an accretion to or a reformation upon their original property. That seems to be the effect of that decision in 1832, in the first resumption suit which is the starting point, so to speak, of the case.

Again, the land in dispute is admitted to have been in the Defendants' possession for upwards of ten years before the commencement of the suit. A question has, however, been raised whether by the award in the Act IV case of the 11th of July 1848, the reversal whereof is one of the objects of the suit, that posseesion was affirmed to be a possession then existing in point of fact; or whether the Defendants wrongfully and under colour of that order, and shortly after its date, succeeded in obtaining possession of the disputed land. And, as something may turn upon the nature and the commencement of the Defendants' possession, their Lordships think it will be desirable to determine in the first instance what was the effect of the Magistrate's proceeding of the 11th July 1848.

In order to do this, it is necessary to advert to some of the earlier proceedings. It has been already stated that the whole of *Chur Bhudrasun* was found in the resumption suit, some time in 1832, to be the property of Government. The Government appears, however, to have dealt liberally with the neighbouring proprietors who had suffered from the ravages of the river, and it is admitted that by way of compensation, portions of this *chur* were re-leased to the proprietors, both of *Mokoondeah* and *Ramnugger*. It is beyond dispute that the latter, the proprietors of *Ramnugger* had previous to 1846, acquired 1,961 beegahs and 17 cottahs of land, the position of which is indicated on the map of 1847 by Dags 10, 7, and 8—at all events by dags on the north of what is marked on the map as a nullah which has elsewhere been called the "Gung:" and that the Defendants, the proprietors of *Mokoodeah*, had also acquired portions of land lying to the north of the same nullah, the position of which or of part of them is indicated by the letter X upon the smaller map, which has been reduced from the larger map.

It appears that, subsequently to these assignments of land, a further change in the course of the river took place. The nullah is said to have become suddenly a very large stream; to have swept away a good deal of land to the south of the original chur; to have afterwards receded towards what in 1846 was the main channel of the river further south; and in doing so to have cast up and left a considerable portion of alluvion, forming the chur or portion of a chur in which are situated the two dags which have been so much mentioned in the argument on this appeal, *viz*, Dags Nos. 38 and 39, and some land to the west of Dag No. 38. In 1846 this land, or at all events some portion of it, became the subject of another resumption suit before Mr. Deputy Collector *Fletcher*, between the Defendants, or those who then represented the Defendants, and the Government. The end of that suit was, that, in conformity with a general order of the Sudder Board of Revenue, it was, on the 28th December 1846, struck off the file without prejudice to any further claim on the part of the Government, but leaving the Defendants in possession of the land which they claimed in that proceeding for the present, and subject only to such future liability to revenue as the Government by some subsequent suit might establish against them.

The learned counsel for the respondents have strenuously argued that the

subject of that proceeding did not include Dag No. 39, but was limited to Dag No. 38, and possibly to other lands to the westward of Dag 38. It appears, however, to their Lordships, that what was claimed is shown by the report and map of the *Ameen Kristomungul Gooho*, and, looking to them, their Lordships are of opinion that the claim must be taken to have comprehended the land laid down in the survey map as Dag No. 39.

The report of the Ameen is on pages 117-8 of the record. He says that he proceeded to the spot, accompanied by the witnesses, and "mapped and measured consonantly to the identification, and in the presence of those witnesses, the chur on the immediate south of the Wagoojesta lands of the Defendant *Kahtoon*, deceased, by a line 56 yards in length, which was the standard current in the pergunnah." The map is lying before me, and it seems to their Lordships, comparing it with the other map, that it clearly includes the whole of that southern chur, as I may call it, as it then existed. The Ameen goes on in his report to say, "As the evidence of the said witness disclosed that the said lands were restorations of the diluviated lands of the original mouzahs and kistmuts belonging to the Defendants, and increments to her Goojesta lands, your humble servant has measured the said lands;" and the 2,277 beegahs of land on the contiguous south of the Goojesta lands under No. 3, and the 102 beegahs of land under No. 1, on the south of No. 3, and the 384 beegahs of land under No. 2, and 810 beegahs of land under No. 4, are all laid down and marked in the map as lands of which *Mahommed Jokee Chowdhree* was then in possession, which were treated as the subject of the pending contest between that person and the Government.

As to No. 4, the 810 beegahs, it is impossible, their Lordships think, to come to any other conclusion than that, rightly or wrongly, they were placed towards the eastern extremity of the chur, and that they formed part of that which was afterwards put down in the larger map as Dag No. 39.

Their Lordships omit, for the present, to consider the subsequent proceedings of the Revenue Authorities, because these relate rather to the title of the Plaintiffs; but have dwelt upon the proceedings before Mr. *Fletcher* because they seem to their Lordships to be in a great measure the foundation of the decision of the Magistrate in July 1848, and, therefore, to be material with reference to the question now under discussion, *viz.*, the possession then awarded to the Defendants.

The Magistrate's proceeding is at page 187 of the record. The Plaintiffs, or rather the petitioners, in that proceeding were *Mahomed Ishmael* and *Mahomed Israel*, who claimed under a third title; but the Chowdhries who represented *Mokoondeah* were originally made the opposite parties, and *Nund Coomar Roy*, who then represented the Plaintiffs' interest and the zemindary of *Ramnugger*, appears to have come in as a claimant, and to have been afterwards treated as one of the opposite parties. It is remarkable that this proceeding seems to have been the first in which the Plaintiffs and the Defendants, or those whom they represent, were really litigating any question concerning this land face to face or in presence of each other.

The subject of the proceeding may be taken to have been an accretion only to the land now in question or the larger part of it; but it seems to their Lordships that if the proceeding is examined and the reasons for the Magistrate's decision are looked at, it will be found that he clearly proceeded upon the finding that the Defendants and not the Plaintiffs were then in possession of the land now in question. He says at page 118, line 33, "Therefore the points to be resolved in this case are as to how, and as an annexation to whose estate, is the disputed accretion formed, and in whose possession the said accretion is:" he then says, "The evidence oral, and the exhibits, adduced on both sides, have been considered, and it appeared, on inspection of the map prepared by the *Ameen Kristomungul Gooho*,

appointed by the Collector of this place, dated the 26th December 1846, and other documents, that the sota, or water-course, which existed on the south in contiguity with the wagoojesta lands given in release as an exchange for the diluvion of the said *Chur Makoondeah*, the zemindary in possession of the Defendant, and on the north of the settled mouzahs of that pergunnah, gradually gained strength and carried off the original mouzahs *Bisteepore* and others, and then threw up an accretion partly in contiguity with the south of the said Wagoojesta land;" "that in respect of this new formation a suit under Regulaton II of 1819 was brought and struck off consonantly to the letter of the Sudder Board No. 1, dated January 2nd, 1846, and that the said chur then came into possession of the Chowdhry Defendant." Then he says, "It is clear that the disputed land was formed on the immediate east of the 810 beegahs of land indicated under No. 4, on the east of the map prepared by the Ameen, as in the possession of the *Chowdhry* Defendant and within the land specified in the alleged roboocarry. Further, on inspection of the map filed by the *Chowdhry* Defendant, which quite tallies with the map prepared by the Ameen," and so on, "and from the oral evidence of his witnesses, the disputed accretion is proved to have been formed on the immediate east of the 810 beegahs of land indicated on the Ameen's map as being in a northerly direction of the pepul tree which stands on the kutcherry, at the main chowdarussie, and on the immediate west of the gong in the possession of the Defendant, and that the Chowdhry Denfendant had been in possession of the same by cultivating it through ryots, &c., on the allegation that it was a reformation of the diluviated lands and kismuts of *Bisteepore*, *Alumpore*, and other mouzahs and kistmuts within the said Chur *Mokoondeah*," and upon these grounds he gave the land taken in dispute to the Chowdhries as a further accretion to that of which they were already in possession. Reading this judgment by the light thrown upon it by the Ameen's map, and the position thereby assigned to the 810 beegahs, their Lordships think it is impossible to say that the Magistrate did not find, and intend to find, that the possession of the whole eastern part of the new chur, and therefore of the land now in dispute was in the Defendants, or that the fact so found was not the real grounnd of his determination.

It may be further observed that it is admitted even by the witnesses, whose depositions were read to-day by Mr. *Bell*, that from the time of that proceeding the Plaintiffs lost the possession of that of which they said they were previously in possession, and it seems to their Lordships that there is no independent or trustworthy evidence of any act of dispossession other than the ordinary execution of the Magistrate's order. Therefore, considering this, and also the great improbability that if anything had been done inconsistent with or in excess of the Magistrate's order wrongfully by the Defendants, the Plaintiffs would have slept upon that wrongful act as long as they have slept upon the order, their Lordships are fortified in the conclusion that the effect of the proceeding of the Magistrate was to treat the Defendants as in possession of the land in dispute and to make that possession one which could be disturbed only by a regular suit.

Now, if that be so, the cases cited by *Sir Roundell Palmer* were hardly required to show that the long possession of the Defendants under the order of the magistrate cannot be disturbed, and ought not to be disturbed unless upon proof, by the most cogent evidence on the part of the Plaintiff's, of a superior title.

Then what is the title which the Plaintiffs have alleged and proved in this case? As their title was originally stated, it was this. After stating how they got into possession of the 1,961 beegahs and 17 cottahs, and referring to an Act IV case, with another party *Ramruttun Bose*, they say, "The Uncovenanted Deputy Collector proceeded in the year 1846 to the spot, but did not release to us the said lands, though they had before been released in our favor. He measured the

said new reformed chur, and found it to contain an area of beegahs 2092-13, whereupon he issued notice to us requiring us to enter into a settlement for the said chur, at a total assessment of Rs. 30, and to pay Rs. 998-9½, on account of mesne profits for the lands on the north bank of the river which had been released to us; upon this we appealed from the said order of the above Deputy Collector to the Revenue Commissioner, who, on the 17th September 1847, passed an order based on the finding that no original lands, except what had before been released, remained in our possession, remised in our favor the amount measured by the Uncovenanted Collector, who, on the 17th February 1848, carried that order into execution, and from that time we held possession of the said lands and the subsequent alluvials formed contiguously to them." They afterwards go on to mention the Act IV case of July 1848, and say that they were dispossessed under colour of the beforementioned award.

Therefore, it is clear that the title they originally relied upon was a release by an order of the Revenue Commissioner of the 17th now admitted to be a misprint for the 27th, of September 1847, an order dealing both with the demand against them of 998 rupees odd, for arrears in respect of revenue upon the 1,961 beegahs, and with the attempt to assess the Rs 30 upon the land in dispute, and that they treated the order of the Deputy Collector of the 17th February 1848 as merely an order which carried that order of the Commissioner into execution. The replication relies still more strongly upon the order of the Deputy Collector; but it does not seem, nor does it appear ever to have been understood, to treat that as the foundation of the title or to give up the alleged effect of the order of the Commissioner.

The following is a short history of the proceedings in the suit. The Principal Sudder Ameen found upon the evidence before him in favour of the Plaintiffs, there was an appeal from that to the High Court, and that Court, apparently understanding the pleadings in the sense in which they have been stated, and treating the order of the Commissioner as the substantial foundation of the title of the Plaintiffs, remanded the case for an enquiry upon one point. The judgment says, "The main contention between the parties is whether the land in dispute is identical with that released to Plaintiff by the Revenue Authorities on the 17th September 1847; if it is, Plaintiffs are clearly entitled to it." It then directs a local investigation by an Ameen; and says, "The Ameen will then, in the presence of both parties, ascertain whether any or all of the lands in dispute are identical with any or all of the lands released to the Plaintiffs in 1847, and report the result of his enquiry to the Principal Sudder Ameen. Immediately on the receipt of his report, the Principal Sudder Ameen should, regardless of the number on his file, again take up the case; and give Plaintiff a decree for so much of the land as is found to be identical with that released to the Plaintiff; should none of the land in dispute be identical with that released to Plaintiff, the Principal Sudder Ameen should dismiss the suit with costs." The Ameen made this investigation, and his report is consistent with what is now admitted to be the fact, namely, that the order of the Commissioner which had been pleaded had not dealt with the land in question, or with the assessment upon it of the Rs.30; but was entirely confined to the claim of the Rs.998, and to the rights of the Plaintiff in the 1,961 beegahs; and the Principal Sudder Ameen, dealing with the issue sent down to him by the Superior Court, as he understood it, and perhaps as it is literally to be taken, dismissed the suit. There was then a second appeal; and the High Court on that occasion seems to have misunderstood the nature of the admission which had been made by the Defendants. They treated it as an admission not that the land in dispute was Dag No. 39, but that Dag No 39 had been released to the Plaintiffs, and held that the Appellant was changing his ground when he contended that there was no sufficient evidence that those lands had been released. They no doubt found that altough the lands had

not been released by the Commissioner's order of the 27th February 1847, they had been released by the order of the Deputy Collector of the 7th February 1848. But acting very much on the notion that the Defendant was shifting his ground, and departing from an admission by which he was bound, they do not seem then to have given much consideration to the question, whether the order of the Deputy Collector was such an effectual release of the land as would confer a title on the Plaintiffs.

There was then an Application for a review, and further documentary evidence, including the report of Mr. *Latour*, was filed. The review was granted, and the Court upon the hearing of the cause on review adhered to their former judgment; and in a very short judgment said. 'After hearing the petitioner, we are satisfied that, as a matter of fact, Dag 39, being the 2,092 beegahs in dispute, was released to the petitioner by Mr. Deputy Collector *Johnson*, and that the subsequent report, relied on by the petitioner, while impugning the propriety of that proceeding, by no means shows that it was reversed. On the contrary, the report goes entirely to show that the petitioner had succeeded in obtaining release and possession of the disputed land. We therefore reject this application."

There was then an application for a second review, and that was refused.

The result, therefore, of the decrees, or rather of what took place upon the remand, was to reduce the case to a very narrow compass, namely, to the question whether the proceedings of Mr. *Johnson* did operate as such an effectual release of the land to the Plaintiffs as to constitute in them a title which ought to prevail against the possession of the Defendants.

Accepting that as the issue which ultimately became the material issue in the cause, their Lordships have now to consider what is the effect which ought to be given to those proceedings. It would seem that contemporaneously with the proceedings before Mr. *Fletcher*, which ended on the 20th of December 1846, the settlement of the whole *Chur Bhudrasun* was proceeding under Mr. Deputy Collector *Johnson*, and the earliest document we have relating to that is the survey chittah which is set out at page 274, dated 2nd December 1846. The second column of that document states the names of the parties in possession of the different dags. The whole chur is divided into the dags which appear upon the larger map, and the survey paper begins by giving the holdings of *Nundo Coomar Roy*, and sums them up as containing 1,675 beegahs 19 cottahs.

It then goes through the other proprietors, and it gives Dag No. 38 as in the possession of *Mohurrum Khatoon*, that is, of those whom the Defendants represent. Then comes Dag No. 39, which is described as "parcel on the east side" (that is of Dag 38), "north of the following river, southof *Nundo Coomar*, with water." In the column of the persons in possession there is nothing but two dots; and their Lordships are of opinion that it would not be a fair construction, considering that "ditto" is put in many other places when the column goes on continuously with the same possessors to treat those dots as implying that *Mohurrum Khatoon* are treated as in possession of Dag 39.

On the other hand, it is clear that from those dots it would be impossible to infer that the possession of Dag 39 was then recognized as being in the Plaintiffs; and the fair conclusion which their Lordships would draw from the document is that the dag was therein treated as an accretion still belonging to Government, of which no person was certainly in occupation, and in respect of which no settlement had been made.

Then, at page 42, there are two extracts apparently from that measurement chittah to which I have just referred. No. 122," copy of chittah dated the 2nd December 1846," contains a description of Dag No. 39, which corresponds almost entirely with that in the larger chittah. The one at the top of the page having given 2,092 beegahs 15 cottahs as the dimensions of Dag No. 39, and treated it as unfit for cultivation, has written on its

back the words "*Nundo Coomar Roy*." Again, at page 41, we find a paper headed "particulars and amount of Jummabundee settlement of Khas Mahal;" and in the column containing the names of the parties in possession, *Nundo Coomar Roy* is put down as in possession of 1,675 beegahs 19 cottahs; and then these words follow, "Parcel 39 chur, not fully formed, on aggregate jumma 2,022 beeghas 15 cottahs," with a jumma or rental of Rs.30. We have no precise account how that jummabundee, which is not dated, but which is said to be for the year 1846, was made. If genuine, it must have been prepared after the last survey chittah, in which this land was treated as not being in any person's possession or subject to any settlement, was made, and therefore between the 2nd and the 31st day of the month of December 1846.

The next document is the Sheristadar's report, which is dated 15th February 1848; and appears to have been made with reference to a proceeding before the Deputy Collector which took place upon a petition or objection of the Defendants' party. It is very difficult to see why it was brought into a proceeding to which the Plaintiffs were not parties. But the document is in these words, "Before this, in accordance with the order of the Commissioner, from *Chur Bhudrasun Talimabad* land was released to *Nundo Coomar Roy* by raising mounds as directed in Act IV. Order has been passed to put a stop to the realization of rent on account of the same." That seems to refer to the land to the north of the *nullah*. Then it goes on, "Incarnation of Justice, 2,092 beegahs 15 cottahs of land of the new chur, in the possession of the aforesaid *Roy*, have been measured, and a total rent of Rs. 30 being calculated, has been included in the jummabundee. Whether that rent is to be struck off or demanded? What is to be done? Incarnation of Justice, is the Master. For Incarnation I represent this."

Then two days afterwards the Deputy Collector, Mr. *Johnson*, made an order on the objection of the party who then represented the Defendants, and that is the order which is now supposed to be the principal foundation, if not the sole foundation, of the Plaintiffs' title. The first paragraph of that (at page 253) deals with the objection of the petitioner, which seems to have included or to have related to all the lands that were the subject of the suit before Mr. *Fletcher*, which was struck off. If, therefore, their Lordships are right in supposing that that suit included the land in question, the objection would relate to the land in question. It would seem that the Deputy Collector did not so understand it; but, however that may be, he dealt with it in this way: he said, "The abovementioned petitioner filed a petition to the effect that for these lands which have accreted to his released lands he had instituted a suit in my Court, and that that suit has been struck off in consequence of a letter despatched by Government, and that the lands found by *Kristo Mongul Gooho*, the Ameen appointed in that case, to be in his possession, and who drew a map accordingly, were the released lands belonging to his zemindary. That petition being rejected by me" (we have not, I think, the order rejecting it), "the petitioner preferred an appeal to the Collectorate; but the learned Collector, on 17th November of the year 1847, recorded a proceeding to the effect that a suit, No. 106 under Regulation II, being instituted by *Mohurrum Khatoon*, wife of petitioner (*Mahomed Jokee Chowdhry*) in that Court with respect to the disputed land, and he did not settle them since they were the lands of Mouzahs *Bishnopore*," &c. That order we have; and that no doubt reversed the order of the Deputy Collector. Then he says, "The order to refund the collections reached my Court on the 1st February last." There he leaves the claim of the Defendants; the effect of his order being afterwards to release whatever he had claimed in respect of those lands. Then he says, "The Sheristadar of this Court measured 2,092 beegahs 15 cottahs of *Nundo Coomar Roy's* land among the newly re-formed churs in the last year; for which a settlement was made on a

total fixed revenue of Co.'s Rs. 30, and it was included in the jummabundee. A report had been sent by him for an order, whether that revenue should be collected or not. Whereas it is my duty to obey the roobakarree and the circular made by the Board of Revenue, on account of which the lands were released from the claims of Regulation II, and to fix the boundaries of these lands which are held by *Nundo Coomar Roy*, after releasing them from the claim of that jumma, and it being requisite to prepare papers for ascertaining what amount of jumma is deducted on account of the released lands, and how much land is left to Government: Ordered, that in accordance with this proceeding of the Deputy Collector, lands of the aforesaid persons be released, after striking off Regulation II case, and the revenue be remitted."

There has been some contest as to what was the effect of that, whether it might not be a release to the Defendants rather than to the Plaintiffs; but their Lordships upon the whole, and particularly on looking to the next proceeding, have come to the conclusion that what the Deputy Collector meant to do was to release whatever might be claimed in respect of lands held by the Defendants, without determining what those lands were; and that he also intended to treat the lands in dispute as being in the possession of *Nundo Coomar Roy*; and (though it seems an extraodinary thing to do this by an order made upon a petition of another party) to release the revenue assessed upon them to *Nundo Coomar Roy*.

This next proceeding is his general report concerning the settlement of the whole *Chur Bhudrasun Talimabad*. Their Lordships without going through that lengthy document, desire to state that, in their opinion, its general effect as to the matter in dispute was to carry out the intention of the order of the 17th of February by treating the Rs. 30 as revenue assessed, but to be remitted, and to be remitted to *Nundo Coomar Roy*; and that it is impossible to suppose that that was not Mr. *Johnson's* intention.

This report, however, is obviously and on the face of it a mere recommendation, for the final sentence of it is this: "That this proceeding, with a statement praying for his approval of the settlement, and all the papers, after a comparison thereof with the list, be submitted accordingly," that is, to the Collector of the district for his approval. It accordingly then went before Mr *Latour*, the Collector, and we have his order of the 16th September 1848. He therein states that the proceeding related to the settlement of *Chur Bhudrasun Talimabad*; and that the papers had come up to him; and then he takes objections to that proposed settlement. He says, "It is not unknown that he" (the Deputy Collector) "has unjustly released some lands on the south side of the said mehal to *Nundo Coomar Roy* and *Mohurrum Khatoon*, and some lands on the north side to *Ramruttun Bose*," &c. He also says, with respect to the land immediately in question, "The 2,092 beegahs 15 cottahs of land in the possession of *Nundo Coomar Roy* ought to be reversed, and these lands ought to be included within the settlement of the lands decreed to Government." And his final order is, "That having included the whole of the particulars of the said mehal in an English report, the papers of the settlement be forwarded to the Revenue Commissioner for confirmation of the settlement for three years," and notice is to be served upon a party named.

The effect of that order was, as far as it goes, to express the dissent of the superior officer, the Collector, from the recommendation that the 2,092 beegahs 15 cottahs should be treated as released to the Plaintiffs; but no doubt it does that, not as dealing with any question of title between the Plaintiffs and the Defendants, but in assertion of what that officer considered to be the rights of the Government, and the result of his proceeding was to send the whole of the proceedings to a higher authority for further consideration.

With them Mr. *Latour* sent the elaborate report, which was produced for the first time before the High Court

upon the review, and is at page 297. In paragraphs 16 and 17 of that paper he treats the Plaintiffs as having got a great deal more from Government than they ought to have got; and, after going through other matters, he says that *Nundo Coomar Roy* has obtained a relinquishment of 2,092 beegahs 15 cottahs fresh formation, and in the margin refers to Mr. *Johnson's* order, adding the words "overruled, however, by me," clearly treating that as a thing that had not been finally determined. Then, in the 73rd paragraph, he says, "On reference to the map it will be shown that one portion of that new formation 2,092 beegahs 15 cottahs has formed opposite the lands released to *Nundo Coomar*, and on a representation of Mr. *Johnson's* Sheristadar, couched in the language rather of an *advocate* for *Nundo Coomar* than that of a Government servant, these lands, on which an aggregate jumma of Rs. 30 had been imposed, have been released to *Nundo Coomar*. If the Sheristadar had any legitimate doubts, he could have asked Mr. *Johnson* orally what orders were necessary."

It is not necessary that their Lordships should express any opinion about the Sheristadar's conduct. It is not clear how the jummabundee came to show that these lands were in *Nundo Coomar's* possession; but if that jummabundee were regularly drawn up, it would not be unnatural for the Sheristadar to address an enquiry concerning the realization of the revenue to his superior.

The final recommendation of Mr. *Latour* was that the case of *Nundo Coomar* should be revised and considered. Therefore he clearly was so far from treating by that report the land as finally released to the Plaintiffs that he considered it ought to be made matter for subsequent investigation, and that the rights of the parties in it ought to be ascertained.

Now, it is a singular thing that the revenue officers should have been, as undoubtedly they seem to have been, ignorant of the fact that while these later proceedings were going on, the Act IV suit had been decided, and that *Nundo Coomar* had lost, if he ever had, the possession of the land in question. That circumstance may, however, account for the absence of any evidence in this record that action was afterwards taken with respect to *Nundo Coomar's* holding pursuant to the recommendation of Mr. *Latour*. And this view of the case seems to their Lordships to be in a considerable degree confirmed by what afterwards took place between the Government and the Defendants in the course of the settlement proceedings of 1851 and 1856. It appears upon the face of those proceedings that they were taken in pursuance of Mr. *Latour's* suggestion, that further investigation of the rights of the Government as against the parties in possession was necessary.

The first of those proceedings, which is at page 192, does not mention expressly the particular Act IV case, which treated the Defendants as in possession of these lands. It refers to another Act IV case, which they seem to have had with a person named *Hur Coomar Thacoor*; but at page 193, line 29, there is this passage, "The said fact was reported to the Commissioner by the former Deputy Collector, Mr. *Edward Latour*, in his letter No. 269 of the 25th September 1848, in connection with the settlement report, whereupon a fresh investigation was ordered;" and that, it appears, was the investigation which was then taking place. The previous paragraph refers again to the land measured by *Kristo Mungul Gooho*, and to the resumption suit before Mr. *Fletcher* which was struck off.

On this first proceeding, Mr. *Reid*, the Deputy Collector, seems to have thought that the Government might be entitled to revenue; but he says, at line 65, "as he" (the *Chowdhry*) "has been in possession of the said lands under the orders contained in the decision in the suit struck off," (that is, the suit before Mr. *Fletcher*,) "and in the Act IV case, the said lands cannot be at once resumed or settled; therefore I maintain it necessary to draw up a report in English on the matter as directed by the Commissioner

in his letter No. 41 of 6th March 1849." Then he orders, "That for the time being the petitioner be retained in possession of all the new formations in the manner he has been holding them; that all particulars connected with the matter at issue be embodied in an English letter, and sent to the Cimmissioner for the proper orders," and so forth.

It is clear upon the admitted facts of the case that at that time, in 1851, the Defendants were in possession of the land in question, and therefore it seems clear that what Mr. *Reid* intended his order to operate upon was the whole of that new chur including the Dag. No. 39, and that that was the subject of the investigation.

This is made even more clear by the final and longer proceeding at page 200, where there is a distinct reference to the Act IV case, in which *Ismail* was one of the Plaintiffs; and the nature of the investigation is clearly stated at page 202, line 10: "By the papers it appears that this case, having been instituted in accordance with the tenor of the letter No. 120½ of the Revenue Commissioner, dated the 2nd July 1851, has been in abeyance up to this time on account of the investigations, &c., not having been completed;" and the final order is, "That the objections of the claimants being rejected, the quantity of 27.459 15 1½ dhoors of land, measured by *Gooroodass Sen*, Amlah, as new accretions adjoining the petitioner's Wagoojustee be released to the petitioner free from the Government claim, and that the record be kept among the decided cases." It is to be remarked that though other claimants had come in to dispute the Defendants' right to a settlement, the Plaintiffs had failed to do so.

Reviewing the whole of these proceedings, their Lordships have come to the conclusion that Mr. *Johnson's* proceedings gave only what may be called at most an inchoate title to the Plaintiffs; that that title was never confirmed; on the contrary, that the propriety of giving that title was disputed at the earliest opportunity by Mr. *Latour*; that in the meantime the parties themselves came into conflict; that the possession of the lands was awarded to the Defendants; that Mr. *Johnson's* proceedings were never followed up by any further investigation as regarded the Plaintiffs, because in fact they had ceased to be (if they ever were) in possession; and that, although the Government officers still asserted for a time a right to assess revenue on this land, they ultimately determined that it should be held free from assessment, and made a final settlement to that effect with the Defendants.

If their Lordships had been sitting as a Court of first instance, they would have deemed it impossible upon such proof of title as the Plaintiffs have given to disturb an admitted possession of upwards of ten years, and though they feel the force of the objections urged by Mr. *Bell*, and the difficulty of setting their judgment against that of Indian Judges who have had so much more experience of these revenue proceedings, they are unable to find in the judgments of the High Court any grounds upon which they think that the decree in favor of the Plaintiffs can be supported.

It seems to their Lordships that the learned Judges having originally treated the title of the Plaintiffs as depending upon a release by the Commissioner, and finding that that release was not made out, fell back upon the proceedings of the Deputy Collector, Mr. *Johnson*; and that they have not given sufficient consideration to the nature of the proceedings of that subordinate officer, and the manner in which they were dealt with by his official superiors. Upon the whole case, therefore, their Lordships have come to the conclusion that the Plaintiffs have failed to prove either title or possession which can entitle them to disturb the long possession of the Defendants; and that this appeal ought to be allowed. The recommendation, therefore, to Her Majesty will be that the appeal be allowed; that the two last decisions of the High Court be reversed; and that the appeal to the High Court against the second decision of the Principal Sudder Ameen be dismissed, and his decree dismissing the suit be affirmed.

The Defendants, of course, will be entitled to their costs in the Indian Courts, and the Appellant to his costs in this Court as against the Respondents.

7th November, 1873.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James W. Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

BISHESHUR BHUTTACHARJEE and another ... ... } *Appellants,*

and

GEORGE HENRY LAMB and others. ... } *Respondents.**

Old document—no witness—Proof of possession under it necessary.

A document is not proved in a suit brought in 1853, because it was more than thirty years old, and there being no witness to prove it, it is necessary to prove that possession had accompanied the document, *viz*, a Merasi Pottah, and such possession was not proved in the case.

This is a suit brought, as far back as the 1st of July 1853, to recover certain talooks, or zemindaries, from a person who claims under and stands in the position of a purchaser at a sale in execution of a decree against the zemindar. When the Plaintiff took measures to get into possession of the estates which he had purchased, two leases, called merasi leases, were set up against him; and it was contended that, having purchased only the rights of the zeminder, he had purchased subject to those two leases, and that he was entitled only to the rents under them. The rents amounted to about Rs.17 more than the Government revenue; so that the Plaintiff, if the leases are up held, instead of purchasing, as he expected, the zemindaries free from incumbrances, purchased the value of about Rs.17 in excess of the Government revenue.

Their Lordships will take one of those documents as an example. On the face of it, it appears to be very suspicious. *Chunder Narain Ghose* was the zeminder; he states in the pottah that, having purchased the talook *Gooroo Dass Roy*, and having fixed the annual rent at Rs.301, "you being my grand-daughter—my son's daughter—and I having received 15 gold mohurs of the value of Rs. 20 each from you, which were received as jotook at the ceremony of unnoprashon, do grant the same talook to you by meras lease;" so that he is to be supposed by this document to have sold to his grand-daughter for 15 gold mohurs, which she received at a certain religious ceremony, a merasi lease at the rent of Rs. 301, which was only Rs. 13 more than the Government revenue which he had to pay. That that is the value is admitted by the Defendant in the answer. Indeed, it has not been disputed.

Now the Judges have found that this document had never seen the light from the time when it was granted on the 11th of Srabun 1213 (the year 1806) up to the time when the purchaser under the execution sought to get into possession of the zemindary in 1854; and that from 1806 to 1854 no public notice, no mention, had ever been made of this lease. When an execution is put in, notice is given at the execution, and any persons claiming rights in the property seized under it have a right to set them up. No claim of that sort was made in the present case. One of the Defendants is the son of the grand-daughter, and claims to be entitled to his mother's right, but he never set it up when the execution was put in.

Now, in order to satisfy the Court that such a document as this was a valid document, intended to operate as a merasi tenure, it would be important to prove that possession had accompanied it. The

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* From the judgment of Trevor and L. S. Jackson, JJ., in Regular Appeal No. 125 of 1860, decided 17th January 1863.

document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it. In order to corroborate the lease, another document was put in, which is called a bundobust, signed by the sons of the grand-father, who were the zeminders in 1817. Now this is an unusual document, and it does not appear for what reason it was executed. If the merasi tenure was a valid one, the grand-daughter had the right to the lease, at a rent of Rs. 301, payable yearly. The bundobust is signed by the representatives of the zemindar, and by it they make the rent of Rs. 301 (which in the pottah was payable yearly), payable by six-monthly instalments. What reason could there have been, if the grand-daughter had got the tenure at a rent of Rs. 301 payable yearly, for her agreeing to pay it by six-monthly instalments, or for the zemindar's granting her this document making it payable by instalments? One can hardly see what the object of this could have been, except for the purpose of making it appear that the lease was treated by the representatives of the zemindar as a genuine document, and thus giving it the appearance of authenticity.

The question then turns upon the point as to whether possession was taken under the document. The Principal Sudder Ameen has found that there was no possession taken under it. He says that the few jumma-wasil-bakees, chittahs, kuboolents, and evidence of ryots and low casts servants which had been adduced by the Defendants, were all unreliable, the documents being prepared, and the witnesses tutored.

The Judges of the High Court agreed with the Principal Sudder Ameen as to the absence of possession. They said :—"Nothing but the most complete and satisfactory evidence of good faith, coupled with reasons for the previous absence of all mention, could enable the Defendants to get over so strong and significant a circumstance. Not once in half a century do these merasdars appear in Court, not once have they been sued for rent, not once have they found occasion to assert or to protect their tenure until it is brought forward as the last of a series of measures to prevent the talooks passing into the hands of the purchasers." Then they say:—"In *Chunder Kant's* case there is a bundobust paper of the 25th Maugh 1224, which is said to be a confirmation of his meras, but neither the authenticity, nor the occasion of this document, is sufficiently made out." Here, then, are two concurrent findings of the Lower Courts upon the question of fact, whether possession did accompany the documents; and both Courts have found distinctly that the possession was not in accordance with the documents; that the zemindars remained in possession from the time when those meras leases were alleged to have been granted up to the time when the purchaser sought to obtain possession under the sale in execution. But then certain mouzah-waree papers were produced. The Principal Sudder Ameen made certain observations with regard to those papers. The Judges of the High Court, speaking of them, say:—"They produce what are called quinquennial or mouzah-waree papers from the Collector's office of the Bengalee year 1217, in which the meras tenures are specified. And in the case of *Jugul Kishore* a register book is produced, in which these papers are referred to. But the Appellants fail to show for what reason these mouzah-waree papers, filed by the zemindar in the Collectorate, should contain a specification of under-tenures with which the Collector had no concern; and as to the so-called register book, we are not informed under what regulation or rule of practice it was kept; nor have the Defendants taken the evidence of the Collectorate officers to throw light on the subject." Now it is contended that the Judges were wrong in making these remarks; but the fact of the Judges making a mistake, even if they did make a mistake, with reference to the mouzah-waree papers, does not affect the other part of their finding, viz., that the leases had never been made

public; that they had never seen the light; and that possssion had never accompanied them. Even if they did make a mistake with regard to the mouzah-waree papers, it would not be a sufficient reason for their Lordships reversing the finding upon the other question of fact. One of the Judges who gave judgment, upon a motion for review of judgment, says :—"The sole ground taken, and ably argued at the hearing by Mr. *Plowden*, was that the Court had come to an erroneous conclusion with respect to the mouzah-waree papers, which had been relied on to prove the existence of the talooks. I am now inclined to believe that the papers in question, though not precisely in the form prescribed by the Regulation, were nevertheless prepared in accordance with the instructions of the Board of Revenue." Therefore he admits they were mistaken, but he says :—"Even if this be fully conceded, the fact will not outweigh the other considerations which led us to disbelieve the real existence at the present time of the tenures in dispute. And with that feeling of disbelief upon our minds, produced by a review of the whole evidence, we certainly could not reverse the judgment of the Court below, simply because it had assigned reasons for its judgment which did not appear to be extremely cogent."

The Principal Sudder Ameen's judgment is also objected to. It is said that he has given certain reasons which are not borne out by the evidence, and it must be admitted that there are mistakes in the judgments both of the Principal Sudder Ameen and of the High Court, and that they are perhaps not so satisfactory as they might have been; but the question is whether their Lordships are satisfied that they have come to a wrong conclusion upon the evidence.

Now, so far from that being the case, their Lordships are of opinion that if they had been reviewing the judgment of the Principal Sudder Ameen, they would have arrived at the same conclusion as the High Court did, that, the documents were not genuine documents intended to operate in the way in which they professed to operate.

Under those circumstances, their Lordships are of opinion that the rule by which they are usually guided in not overturning the decision on a point of fact of the Lower Court, when that decision has been affirmed by the High Court, must apply in the present instance.

They, therefore, will humbly advise Her Majesty that the decision of the High Court be affirmed, together with the costs of this appeal.

15th February, 1873.

PRESENT :

Members of the *Judicial Committee* :—The Right Hon'ble Lord Justice James, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Lord Justice Mellish, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at fort William in Bengal.

CHAND HURREE MAITEE .. .. } *Appellant,*

and

RAJAH NORENDRO NARAIN ROY and another. ... ... } *Respondents.**

Hindu Law—Joint Family Property—unity of title—Benami purchase—Presumption—Receipt by one member.

R obtained a decree establishing his title as brother by adoption to L and co-sharer in the family property, which however directed possession to be actually given only of the zemindari which was the principal family estate. Subsequently the Appellant an execution creditor of R took possession of two lots, no part of the zemindari proper; the one having been acquired as a separate inheritance by an ancestor and the other purchased by L *Benami* in the name of the family priest :

Held, under the circumstances, that R's title to the two lots was precisely the same as that

* From the judgment of Bayley and Macpherson, JJ., in Regular Appeal, No 166 of 1867, decided 27th February 1867.

in the zemindari, and the burden of proof lay upon those who alleged the contrary.

The receipt by one member of a joint Hindu family of one part of an estate may be quite consistent with the title of the whole family thereto.

In this case their Lordships are of opinion that the decree of the High Court cannot be sustained, and that the decree of the officiating Principal Sudder Ameen ought to be affirmed.

The property in question consisted of two small lots of land apparently of considerable value at the present time, which had been taken possession of by the Appellant as an execution-creditor of one *Roodro Narain*, which *Roodro Narain* was by adoption the brother of *Lukee Narain*, the predecessor in title of the Respondents. It appears that *Roodro Narain* and *Lukee Narain* as far back as the year 1845 had litigation for the purpose of establishing the title of *Roodro Narain* as a brother and co-sharer in the family property. He succeeded in that litigation. His title was established as a brother and co-sharer. But it appears, as far as there is any evidence before their Lordships, that in the decree establishing his right no possession was actually directed to be given to him except of the zemindary, which was the principal family estate. It appears that the two lots in question were no parts of the zemindary proper, but one of them had been acquired as a separate inheritance by the ancestor, and the other was purchased by *Lukee Narain* himself before the title of *Roodro Narain* was established. It was purchased benamee in the name of the priest of the family. The Sudder Ameen decided in favor of the Appellant. Their Lordships are of opinion that under the circumstances *Roodro Narian's* title to the two lots was precisely the same as his title to the zemindary; that the family property with regard to the one lot would be exactly in point of title the same as the zemindary itself; and with regard to that which was purchased in the name of the priest the presumption of law and the presumption of fact would be that the property acquired in that way by the managing representative member of the joint family would be joint family property. The burden of proof, therefore, lay upon those who insisted that these two lots did not form part of that joint family estate. If they did form part of that joint family estate, then the title of the execution-creditor so far as it was affirmed by the Principal Sudder Ameen (which was only to one moiety) was a good title. It was, therefore, on the Respondents to show that there had been anything which amounted to adverse possession so as to be an ouster of the co-tenant.

Their Lordships, having looked through the evidence, are satisfied that there is nothing like trustworthy evidence that amounts at all to proof of such adverse possession or ouster. It is perfectly well-known to all persons conversant with these matters in India that the receipt by one member of a family may be quite consistent with the title of the whole. One member of a family may be in receipt of one part of an estate, and another may be in receipt of another part of the estate, and they may have afterwards to account the one to the other in respect of the excess of receipts over their respective rights. Moreover, there being no evidence of the adverse possession, except the receipt of rents on behalf of *Lukee Narain* and *Lukee Narain's* descendants, there is on the other side evidence of very nearly the same character, evidence not amounting to much, but evidence of the same character and description showing *Roodro Narain's* occupation or possession of part of the property, his personal dealing with it, and also receipts of rent on his behalf.

Under those circumstances their Lordships will humbly recommend to Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen be affirmed; that the Appellants receive back all the costs which they have paid under the order of the High Court; and that having regard to the arrangement entered into by the Appellant with the Respondent *Norendro Narain Roy*, that each party was to bear his own costs in the Lower Courts and all

subsequent Courts, their Lordships will recommend that one-half the costs of the Appellant in the Courts below, and one-half the costs of this appeal be paid to him by *Ranee Treepoora Soondoree*, the second Respondent.

5th March 1873.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

LUCHMUN CHURN GEER GOSSAIN and others, } *Appellants,*

and

KALLI CHURN SINGH and others. ... } *Respondents.**

Hindu Widow—Stridhun—Right to sell—Estoppel—Heirs of husband bound by his representation.

A Hindu Widow can sell her Stridhun property except land given to her by her husband. She can sell property acquired by her Stridhun. Misrepresentations of her husband that the property was acquired by her Stridhun, bind his heirs, and estop them, from claiming the property from the hands of a *bonâ fide* purchaser from her.

Mr *Doyne* and Mr. *John Cutlar* for Appellants.

Mr. *Leith*, Q. C., and Mr. *Bell* for Respondents.

This was an appeal by the Defendants in the suit from a judgment and decree of the High Court of *Calcutta*, dated the 15th April 1868, affirming in part, and reversing in part, a judgment and decree of the Principal Sudder Ameen of *Rajshahye*, dated the 16th of March 1867.

The facts appear from the following which are the material portions of the judgments of the said Judges:—

Glover J.—"This was a suit by one *Kalli Churn*, the adopted son of *Ubotar Singh*, for himself and as guardian of his minor brother *Rajcoomar Singh* to set aside a deed of sale made in 1270 B. S. by his mother *Ulpa Burmoneeah*, on the ground that the property (a durputnee mehal called *Turuff Boalea*, &c.) belonged to his father's estate, and as such descended to him (*Kalli Churn*) and to his minor brother, and was never the separate property of *Ulpa Burmoneeah*, who had in consequence no right to sell it. Certain other parties to whom *Kalli Churn* is said to have sold half of the mehal (in anticipation) for the purpose of defraying the costs of suit were made co-plaintiffs. The *Gossain* Defendants, after taking several objections to the age and adoption of *Kalli Churn*, allege that the mehal was bought by *Ulpa Burmoneeah* with her own funds; that she was the recognized proprietress, and had power to dispose of the property in any way she liked; that she did dispose of it to them (Defendants) on the 8th Falgoon 1270 for a consideration of Rs.12,000, and that they have been since in undisturbed possession. *Ulpa Burmoneeah* field a somewhat similar reply; she admitted the sale to the *Gossains*, but instead of claiming the estate as purchased with her own stridhun-money, pleaded that her husband had bought it and made it over to her in gift. The Principal Sudder Ameen considered that the conveyance to *Ulpa* by her husband was merely nominal; that he furnished the money for the purchase, and retained the management of the property up to his death; that *Ulpa* had consequently no interest in the mehal, and no right to sell to the *Gossains*. He therefore decreed for the Plaintiffs. The *Gossains* appeal, and Mr. *Doyne* on their behalf contends, first, that the money for the purchase of the durputnee is proved to have been *Ulpa's*; second, that if it were not, the husband *Ubotar Singh* gave out to all the world persistently to the

* From the judgment of Macpherson and Glover, JJ., in Regular Appeal No. 143 of 1867, decided 15th April 1868.

day of his death that the estate was his wife's, and that therefore the *Gossains*, being innocent purchasers for value without notice, must be confirmed in possession; third, that the Plaintiff *Kalli Churn* consented to the sale, and if not already concluded by his adopting father's acts is concluded by his own. Other objections were taken at the hearing as to the adoption of *Kalli Churn*, which were however not pressed. On the first ground of appeal, I find for the Respondent there is a large quantity of oral evidence adduced on either side to prove the source of the purchase-money, but none of the witnesses for *Ulpa* can speak decidedly as to the way in which she obtained funds for the purchase, whilst it is admitted by all, and indeed by *Ulpa* herself, that she was the child of poor parents, and had no stridhun when she was married. Her evidence as to the purchase is moreover distinctly opposed to that of the witnesses examined to prove her ownership. They describe how the money was taken from *Ulpa's* strong-box, and how the balance was made up by the pledging of her ornaments, whilst *Ulpa* herself owns in her written statement that her husband bought the estate, though he afterwards gave it to her, and had the title deed made out in her name; either *Ulpa* or her witnesses have clearly perjured themselves. It seems to me established by the other evidence in the case that *Ubotar Singh* was a man of some means, a petty zemindar at the least, whilst *Ulpa* is admitted by all to have had nothing at all at the time of her marriage, and to have had no means afterwards of amassing a sum so considerable as the purchase-money (Rs. 3,200), of the mehal standing in her name. I have no doubt, after carefully going through all the evidence, that *Ubotar Singh* purchased the durputnee with his own money in his wife's name, and that at the time of his death, there being no direct evidence to support *Ulpa's* averment of gift. After marriage it formed part of his estate. The question then arises, did *Ubotar Singh* by his conduct give all the world to believe that the property was not his, but his wife's? And can the Appellants, who are *bonâ fide* purchasers without notice, be made to lose their money on account of a latent defect in their vendee's title which they could not by any amount of care have discovered for themselves? It appears to me that *Ubotar Singh* did from first to last give every one to understand that his wife *Ulpa Burmoneeah* was the real, as well as the nominal, owner of the estate, not only did he tell many persons who asked him about the matter that such was the case, but he made statements to the same effect in certain judicial proceedings in which he was involved, and whenever the question was mooted, either publicly or privately, denied most positively that he had any interest in the property. I observe that not one of the witnesses, now called upon to prove his ownership, are able to give decisive opinions on the point. Some of them suppose it was *Ubotar's* because he had consulted them about the purchase, others think it was *Ulpa's*, but all admit that that the ostensible acts of ownership were performed by *Ulpa*, and the most they are able to say is that they do not know who was the real owner, *Ubotar* or *Ulpa*. I do not lay much stress on the fact that all public documents and all collection papers are in *Ulpa's* name, because that would be equally consistent with either theory, but so far as common report could go, it was undoubtedly published to the world that the wife, and not the husband, was the proprietor of *Boalea*. Then as to the documentary evidence of ownership. There is a record of a suit under Act IV of 1840 in which *Ulpa* as first party sued for possession as against an ijaradar who had been put in by the zemindar. The Magistrate retained the former in possession, but the Judge on appeal reversed his order and gave possession to *Ulpa* as the durputneedar. On the 9th of July 1850, *Taramonee Dassee*, the putneedar, got a decree in the Collector's Court against *Ulpa* the durputneedar for rents due in *Turuff Boalea*, and afterwards *Ulpa* herself recovered from the ijaradar set up in the Act IV suit above noticed the amount of his

illegal collections. There is then the record of the suit brought by *Russoo Bewah*, in which *Ubotar Singh* was charged with cutting and carrying off a quantity of bamboos, and was by the orders of the Magistrate made the second party in the suit, *Russoo Bewah* being the first. In that case he filed a kyefeut (23rd November 1857) in which he disclaimed all liability on the ground that *Turuff Boalea* belonged to his wife *Ulpa* and that he had no concern with it. Again, in the case brought by *Meajan Khalifa* under Act IV of 1840 for ouster from 2½ beegahs of land, *Ubotar Singh* took the same course and declared his wife to be the sole owner of the property. *Ubotar Singh* died in 1266 B. S., and up to that time there was on his part a persistent declaration both by words and action that the durputnee estate was his wife *Ulpa's*, and not his own.

Such declaration moreover coming from one who had no apparent object in deceiving the world by a false statement, he being admittedly in easy circumstances and holding several other properties in his own name. It was suggested rather than directly argued that *Ubotar Singh*, being a jemadar in the jail at *Rajshhye*, was afraid of holding land situate so near the jail buildings, as that was in his own name, but it is admitted by the witnesses who give this as a reason for the benamee purchase that there was no prohibition against Government servants of *Ubotar's* class holding land within the district in which they were employed, and that *Ubotar's* dismissal from his jemadarship was not caused by his being discovered to be the real owner of the durputnee is proved by the record of the Magistrate's proceeding in the case. *Ubotar Singh* lost his place, not because he was the purchaser of *Turuff Boalea*, but because he had committed a riot on the land, and had taken with him a *posse* of jail burkundazes to make his side the stronger. If their case went no further than this, I should be inclined to hold that the Appellants would be fairly entitled to the position of innocent purchasers for value without notice. The result of enquiry on their part could not have given them more precise information than that which appears on this record, and could it be said that, in the face of such direct evidence, both oral and documentary as to the ownership of the land, that Respondents were not justified in purchasing from *Ulpa*. But, besides the persistent statements of *Ubotar Singh* during his life, there is to my mind strong evidence that *Kalli Churn* after *Ubotar's* death assisted those statements by his own acts."

After stating what those acts were, the Judge proceeded as follows :—

"Everything was done to induce the Appellants to consider *Ulpa* as the owner of the estate, and *Kalli Churn*, although he had many opportunities, never took any steps to reveal what he now states to be the true position of the parties, but corroborated as well by his acts as by his omissions the public avowals made by *Ubotar Singh*. So far as regards *Kalli Churn's* personal claim, therefore I think that the Lower Court's decision should be reversed, and the suit dismissed with costs. Then remains that portion which *Kalli Churn* sues for on behalf of his minor brother *Rajcoomar Singh*. And so far I think that the Principal Sudder Ameen's decision should be confirmed, for *Rajcoomar* occupies a very different position from that of *Kalli Churn*, and cannot be concluded by any statements made by *Ubotar* or by *Ulpa*. Indeed, *Ubotar* died long before the Appellants purchased, and it is nowhere contended that they were induced to come forward by any misrepresentation on the part of the father, and by those of his mother, *Rajcoomar* would not be in any way bound. For, if the finding above come to, namely, that *Ubotar* was at the time of his death the real owner of the mehal be correct, it proves *Rajcoomar* as heir would be entitled to succeed to his portion of his father's property. As regards this portion of the claim, the purchasers' only remedy would be an action against their vendor to recover such part of the purchase-money. The Appellants must pay the costs on this portion of their appeal."

Macpherson, J.—"Under these circumstances, I am of opinion that, so far as the share which *Kalli Churn's* claims in this durputnee is concerned, the decree of the Lower Court ought to be reversed, and the suit ought to be dismissed with costs in proportion. For a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person. Nor will the fact that *Kalli Churn* attained his full age only shortly before the date of the sale avails him in any way. (See *Nicholson vs. Hooper*, 4 Mylne & Craig, p. 186, and the cases collected in *White* and *Tudor's* Leading Cases, 2nd edition, p. 20). But as regards the share of the minor Plaintiff, I think the decree of the Lower Court must be confirmed. I do not think that the mere fact of *Ubotar's* and *Ulpa's* having given out that the property was the property of *Ulpa's* alone, is sufficient to prevent the minor from having his rights declared in this suit. The minor certainly is not bound by the Representations made by his mother: and as *Ubotar* died long before the sale of the 8th Falgoon 1270, there is no evidence to show that it was by Representations made by *Ubotar* that the *Gossains* were induced to purchase. As regards the share of the minor, the decree of the Lower Court is confirmed with costs in proportion."

The following are the material portion of the deed of sale:—"To the ever to be remembered. *Ulpa Burmoneeah*, wife of *Ubotar Singh*, of good manners, this durputnee kubalah is executed in the year 1262 (twelve hundred and sixty-two). I execute this kubalah having concluded with you a durputnee talook settlement according to your prayer at a rent of Rs. 1,791, and for the proper consideration of Rs. 3,200 of the whole of my rights in *Boalea* proper of *Turuff Boalea* of *Dehee Boalea*.

"You and your heirs shall have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof in putnee keeping entire the rents, but you should give me notice of the same. And as power has been given to me to avoid and set aside the engagements of the former proprietor in my right as auction-purchaser, I make over to you the like power. But you shall not interfere with ancient lakheraj (rent-free) tenures confirmed by law, and the aforesaid debuttur (granted for the worship of idols) and bruhmuttur (granted for the support of brahmins) tenures. You shall carry out whatever orders are or shall hereafter be directed, or are or shall hereafter be usual to be complied with, issued by the Civil or Criminal Court, the Collecterate, the Commissioner, the Survey, Thakbust, or the like authorities. Whatever processes shall be issued by the authorities in respect of the aforesaid mehals in my name or in that of the proprietor zemindar, you shall give me notice, accompanied with a copy thereof, and carry out the orders. Whatever information it is usual to give as regards the Police, you shall furnish according to law at the proper place. You shall comply with whatever orders are issued by any of the authorities, or when necessary from my office through peons calling for any papers, and without any objection carry out the same and file the papers. In the event of my being held answerable, or any fine being imposed on account of your default or laches in carrying out the orders of the authorities, you shall be responsible for the same. I shall have no concern therewith. You too having agreed to the aforesaid fixed rent, and the above terms have voluntarily filed the kuboolent (counterpart of the lease). To this effect I execute this durputnee kubalah (deed of sale), having received the full amount of the consideration-money aforesaid from your stridhun fund, through your husband *Ubotar Singh* by my husband."

The following judgment of the Judicial Committee of the Privy Council was delivered by Sir Barnes Peacock:—

The Appellants in this case were the Defendants in the suit below. The suit was brought against them by *Kalli Churn*

Singh on behalf of himself and as guardian of his minor brother *Rajcoomar Singh*, to recover certain property from the Defendants, upon the ground that it had descended to the Plaintiffs as the sons of *Ubotar Singh*, their deceased father. The Defendants set up in answer to that suit that they had purchased the property from *Ulpa*, the wife of the father, and that that property had been bought by *Ulpa* out of her own stridhun. The Lower Court found in favor of the Plaintiffs. Upon appeal the High Court reversed the decision as to one moiety of the property, namely, the share belonging to *Kalli Churn*, upon the ground that he had represented that the property belonged to his mother *Ulpa*. It is admitted that the property was purchased under a deed of the 14th Assar 1262 from *Turamonee Dassee*, who was the putneedar. The purchase-money was Rs. 3,200, and it was stated in the deed of sale to *Ulpa* that she and her heirs should have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof in putnee. It also contained the following Clause :—"I execute this durputnee kubalah, having received the full amount of the consideration-money aforesaid from your stridhun fund through your husband *Ubotar Singh* by my husband." Nothing could be clearer on the face of that deed than that the property was purchased by *Ulpa* out of her own stridhun. The purchase being of a durputnee, a mutation of names would be effected in the sherishta of the putneedar. and that mutation would be into the name of *Ulpa* as the owner of the property by purchase. It has been contended at the bar that *Ulpa* had no power to sell this property, even if it had been her own stridhun, inasmuch as it is laid down that a wife cannot sell immoveable property which has come to her from her husband as her separate property. The deed of sale, however, does not represent that the immoveable property conveyed by the deed had been given to *Ulpa* by her husband, but that *Ulpa* was the purchaser of the immoveable property by means of moveable property, namely, the Rs. 3,200 which were her stridhun. According to the authority which has been cited by Mr. *Bell* from *Macnaghten's* Treatise on Inheritance, the Rs. 3,200 being the wife's stridhun were disposable according to the wife's pleasure. The passage from *Macnaghten* is at page 40. This is the passage :—"It may be here observed that the Hindoo law recognises the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure." Now, this deed represents that the Rs. 3,200 were her stridhun, of which, according to the authority cited, she was at liberty to make any disposition, and she did make a disposition of it by purchasing the property conveyed to her by the deed for the Rs. 3,200. If the property was purchased by her with Rs. 3,200, her own stridhun, she had a right to sell that property to the Defendants, and she did sell it to them for a much larger sum than the Rs. 3,200, *viz*, for Rs. 12,000, the actual value which the Plaintiffs themselves have put upon it by the valuation of their suit. But it is said that, although the property was purchased by means of Rs. 3,200 represented to be the stridhun of *Ulpa*, it was not really her stridhun, but that the Rs. 3,200 were advanced by the husband, and that the property was purchased by him in the name of *Ulpa*. It has been found by the Court below, and also, on appeal, by the High Court, that the Defendants were *bonâ fide* purchasers of this property ; that on the face of the deed it appeared that the property was purchased with the lady's stridhun, and that the husband during his life-time had in every way, both publicly and privately, whenever he was called upon to make any representation on the subject, always represented that this was his wife's property. The Defendants having purchased the property from *Ulpa bonâ fide* for a valuable consideration, and for the full value of the property, it appears to their Lordships that it would be con-

trary to every principle of equity that they should be turned out of the property in favor of the heirs of the husband. The High Court held that the elder of the two Plaintiffs, the elder brother, was not entitled to recover his share of the property, inasmuch as he had lent himself to the representations which had been previously made by his father; and that having joined in a misrepresentation of the real state of facts, he was not at liberty to recover his share of the property, even though it might really have been the father's. But the learned Judges held that the minor brother was in a different position. One of the learned Judges says:—"I think that the Principal Sudder Ameen's decision should be confirmed, for *Rajcoomar*"—that is, the younger brother—"occupies a very different position from that of *Kalli Churn*, and cannot be concluded by any statements made by *Ubotar*"—that is the father—"or by *Alpa*. Indeed, *Ubotar* died long before the Appellants purchased, and it is nowhere contended that they were induced to come forward by any misrepresentation on the part of the father, and by those of his mother, *Rajcoomar* would not be in any way bound." Mr. Justice *Macpherson* says:—"I do not think that the mere fact of *Ubotar's* and *Ulpa's* having given out that the property was the property of *Ulpa* alone, is sufficient to prevent the minor from having his rights declared in this suit. The minor certainly is not bound by the representations made by his mother." Now, although the minor could not be bound by the representations made by his mother, if he really inherited this property from his father, still the question is whether he was not estopped by the representations of his father in his life-time, from saying that this property was his father's, and consequently that it had descended to him. It is said that the misrepresentations were made by the widow when she sold the property after the father's death, but were there not misrepresentations also made by the father in his life-time? If the property were purchased by him, and the Rs. 3,200 which were paid as the purchase-money were the property of the father, did he not represent and hold out to the world that the property was purchased out of the Rs. 3,200, which were the stridhun of his wife? That was a misrepresentation of the father by means of which the widow after his death was enabled to sell the property. It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold this property to the mother, and had made a misrepresentation by a deed of sale, would not the minor son have been bound by that deed, although the father might have had some secret understanding with the mother that it was purchased in her name benamee for the father? It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her stridhun, and in all his acts, both public and private, during his life-time, representing that the property was his wife's. After that representation on the part of the father, his heirs were no more entitled to recover than the father would have been in his life-time. The heirs were as much bound by the misrepresentations made by the father, as the father would have been if the wife in his life-time had actually sold the property to a *bonâ fide* purchaser. In such case the father could not have recovered the property from the purchaser; and it appears to their Lordships that the minor claiming by descent from the father is equally bound by those misrepresentations, and that he cannot, as heir to the father, set up that that property belonged to the father, when the father could not in his own life-time, under similar circumstances, have set up that the property belonged to him.

But, then, it is contended that the pleadings in this case have not raised the real question in dispute. The suit was brought to set aside an illegal deed of sale executed by the Defendant No. 2, the mother. It is thus stated:—"The properties have been left by *Ubotar*

Singh deceased, the father of your petitioner Plaintiff No. 1. That on the 14th Assar 1262 B. S, he had acquired the durputnee rights of the said mehals, from their putneedar *Taramonee Dassee*, the wife of *Kashinath Shaha*, for a consideration of Rs. 3,200, and that having then acquired a lease of the same, in the name of the Defendant No. 2, he continued to hold and enjoy them both in the Sudder and Mofussil," and that afterwards he died and that this property descended to his two sons. Now the Defendants had purchased under a deed representing that this property had been purchased out of the wife's stridhun. They knew nothing as to the real facts of the case; they stated what they believed the facts to be, taking the facts as they were represented at the time of the purchase. They believed the deed which represented that the purchase-money was the wife's stridhun, and they believed the representations which had been made by the husband in his lifetime. In answer to the plaint, which says that the property was the husband's, and that he died possessed of this property purchased in the name of his wife, they say :—" *Ulpa Burmoneeah* acquired through her husband *Ubotar Singh*, a durputnee settlement of the disputed mehal from the putneedar thereof, *Taramanee Dassee*, on payment of a bonus of Rs. 3,200 out of her own 'stridhun' funds." They stated in their defence what they found represented upon the purchase-deed of the wife. They merely stated what they were led by the representation to believe, namely, that the property was purchased by means of the stridhun funds of the wife, and that, consequently, it did not pass to the sons upon the death of their father, but that the wife having purchased the property out of her stridhun was entitled to sell it. It appears, then, to their Lordships that the pleadings were sufficient to raise the question. Then the issues were raised and they are to be found at page 138 of the record :—" Is it true that the *Ubotar Singh*, the late father of the principal Plaintiffs, acquired the durputnee of the disputed property in the name of the Defendant No. 2 with his own funds, and remained in possession of the same during his lifetime, or that the durputnee was obtained by the said Defendant with her own 'stridhun' and she herself held possession of it?" If the Defendants were entitled to avail themselves of the estoppel in consequence of the misrepresentation of the husband, they are entitled to use that estoppel as matter of proof, and they use it to prove that the durputnee was not purchased out of the father's own property, but that it was obtained by the mother *Ulpa*, with her own stridhun, and that she herself held possession of it. So they prove the issue on their part by means of the estoppel. The written statement is the only pleading of the Defendants in this case. There is no pleading now in India by way of confession and avoidance. It was not necessary, therefore, to plead the estoppel on the part of the heirs arising from the misrepresentation of the father. The Defendants allege the facts as they find them represented in the deed which was their title-deed. They go to trial upon those facts, and they put in evidence the misrepresentations of the father and the title-deed founded upon those misrepresentations as proof of their case, which was that the property was purchased out of the separate estate of the wife.

Under these circumstances, their Lordships are of opinion that the High Court ought to have reversed the decision of the Lower Court, not only as regards the share of the elder brother, but also as to the share of *Rajcoomar*, and they will humbly recommend to Her Majesty that the decree of the High Court be reversed as to the share of *Rajcoomar*, that the decrees of both the Lower Courts be reversed as to the share of *Rajcoomar*, and as to the costs in respect of that share, and that the suit be dismissed as to that share, and that the Respondents do pay to the Appellants the costs in both the Lower Courts calculated on the value of that share, and also the costs of this appeal, and that the said decree of the

High Court be affirmed as to the share of the Plaintiff *Kalli Churn* and as to the costs calculated upon the valuation of that share.

Agents for the Appellants: Messrs. *Barrow* and *Barton*.

Agent for the Respondents: Mr. *Oehme*.

10th December 1872.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Robert Porrett Collier.

On Appeal from the High Court of Judicature at Fort William in Bengal.

GOPEE KISSEN GOSSAMEE ... ... } *Appellant.*

and

BRINDABUN CHUNDER SIRCAR and another } *Respondents.**

Interpretation of order—Interest—Legal rate—Compound interest.

Held, upon the construction of the words "the Plaintiff is to have judgment with interest at the full legal rate," in Her Majesty's previous order, that it was intended to award simple interest at 12 per cent. from the date of suit till realization.

The order did not authorise the Plaintiff in execution of his decree to make a rest at the date of the first Court's decree and calculate interest from that date upon the consolidated amount of principal interest and costs.

Sir James Colvile.—Their Lordships cannot but regret that the litigation to which the former order of Her Majesty might reasonably have been expected to put an end, has been prolonged by the proceedings which have led to the present appeals.

Their Lordships are first called upon to construe the order of Her Majesty of the 7th August 1869 in respect of what may be termed the principal sum thereby awarded. The words of the order are that the Plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below. The first question is, what is meant by his moiety? Upon that point their Lordships entertain no doubt that the order intended to give to the Plaintiff the moiety claimed by him of the large sum of Rupees 69,000 odd, which he alleged to be due for principal and arrears of interest equal to the principal upon the kurarnamah and bond. That that was what the Plaintiff was suing for is shown by his plaint and by the account in the nature of particulars of demand which is annexed to the plaint. We therefore start with a decretal order awarding to the Plaintiff Rs. 34,865-6-7 as the principal sum recoverable in the suit.

Their Lordships may observe with reference to the question whether the kurarnamah carried interest, which the Respondents have tried to raise on the present occasion, that it would be impossible for their Lordships, whatever view they might entertain, to go behind the former order, and to allow any matter concluded by that order to be reargued on this appeal. Nor does there seem to be any reason to doubt but that it was properly decided on the former appeal that the kurarnamah did bear interest.

Her Majesty's order, then, awards Rs. 34,865-6-7 with legal interest, that is, interest at the Court rate of 12 per cent. And looking to the course of the Courts in India, their Lordships are of opinion that it was the intention of the order to give that sum with interest at that rate from the date of the institution of the suit up to realization.

The question then arises whether, in the account which was taken by the Appellant as the foundation for his proceeding in execution, and which is embodied in the petition for execution, he was warranted in making a rest at the date of the order of the Principal Sudder Ameen which originally dismissed the

* From the judgment of Kemp and E. Jackson, JJ., in Miscellaneous Appeal, No. 80 of 1870, decided 7th July 1870.

suit, and in assuming that inasmuch as that sum with interest ought then to have been awarded to him with costs, interest should run upon the consolidated sum from that date. Their Lordships are of opinion that, notwithstanding the passage which has been cited from Mr. *Macpherson's* book, they are not warranted in giving that interpretation to the present order, considering the terms in which it is expressed. They have the benefit of being assisted on this occasion by Sir *Barnes Peacock*, who has had so much experience in the High Court in administering the present code of procedure. And although the Appellate Court might have the power, if it thought fit, to make such an order as it is suggested would have been made according to the former practice, it is now, we understand, quite as common to give, on appeal, merely a decree for the principal sum awarded, with interest from the commencement of the suit to the realization of the sum. And, in the absence of any special directions, it cannot be presumed that there was an intention to make an order *nunc pro tunc*, which would have the effect of making a rest at the date of the decree of the Court of first instance and of giving compound interest awarded from that date.

Their Lordships therefore think that upon that point the petition of the Appellant sought for too much. In other respects they are with him, and they are with him upon the principal question which has led to these appeals.

The order which their Lordships propose humbly to recommend Her Majesty to make will be the following: "Declare that the Appellant, under the order of Her Majesty of the 7th August 1869, was entitled to the sum of Rs.34,865-6-7 with interest at 12 per cent. from the commencement of the suit to the date of Her Majesty's order, with the costs in the Courts below. Also declare that he is entitled to interest at the rate of 12 per cent. on that consolidated sum from the date of the order to the date of realization; and declare that he is further entitled to the sum of Rs. 3,289-2-4 for the costs of the former appeal, and also to the costs in the Indian Courts incurred in the proceedings for execution, and to the costs of this appeal. And let the cause be remanded to the High Court, with directions to cause execution to issue accordingly." Their Lordships have not thought fit to recommend that the Appellant should be allowed interest on the costs of the former appeal, since they understand that, according to practice, costs given here do not carry interest unless the contrary is expressed in the order.

With regard to the cross-appeal of the Respondents *Brindabun Chunder Chowdhry* and *Sreesh Chunder Sircar Chowdhry*, their Lordships will humbly report to Her Majesty that their appeal ought to be dismissed with costs.

8th May, 1873.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

MAHARANEE BROJOSOONDERY DEBIA ... ... } *Appellant,*

and

RANEE LUCHMEE KOONWAREE and others ... } *Respondents.**

Property purchased in the name of an Idol —Right of widow to alienate.

A property was purchased by a person at a revenue sale in the name of his own idol, whom no one except himself has the power or right to worship. The property was dealt with by the person as his own.

Held that there was no real endowment and there was nothing therefore to deprive the purchaser of the power of alienation, or his widow of that power to discharge his debts.

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* From the judgment of Norman and E Jackson, JJ., in Regular Appeal No. 132 of 1868, decided 5th January 1869.

The property being out of the possession of the Plaintiffs' family for upwards of 47 years, Limitation bars that Plaintiffs' claim for possession after setting aside the alienation

The High Court Circular No. 9, dated 20th February 1867, about the reception and printing of account books &c., directed to be enforced.

This suit was commenced on the 11th November 1867. It was brought by Maharajah *Govindnath Roy*, who was the grandson and heir, through adoption, of Maharajah *Ramnauth, alias Biswanath Roy*.

The suit is against *Ranee Luchmee Koonwaree* and others. It was brought by the Plaintiff as the Shebaet of the idol *Shyamsoonder Thakoor*, to recover a certain zemindary in Zillah *Rajshahye*, which, he contends, was improperly assigned and sold by his grandmother Maharanee *Kristomonee*, the widow of *Biswanath Roy*.

The two important questions in this case are, first, whether the property was endowed for a religious purpose; and in the next place, whether the suit is barred by limitation.

With reference to the endowment, it appears that, on the 17th of Joistee 1206, about the year 1799, the zemindary was sold for arrears of Government revenue. It was purchased for Rs.5,005, and the name of the purchaser was entered as *Shyamsoonder Thakoor*, that is the idol, "by the pen of *Rughoonath Nundee*." It does not appear who *Rughoonath Nundee* was, but he merely signed on behalf of the idol as the purchaser. Where the Rs. 5,005 came from does not very clearly appear, but there can be no doubt from the whole of the case that the money was supplied by the Maharajah *Biswanath*.

On the 18th August 1802 there was a bill of sale executed by *Brojokishore Shaha*, said to be a purchaser of the zemindary, in favor of *Rughoonath Nundee*, but how *Brojokishore Shaha* got the property does not appear. How the idol, who had purchased at the auction, transferred his property, or by whom the property was transferred on behalf of the idol, does not appear; but it appears that *Brojokishore Shaha* reconveyed or conveyed the property to *Rughoonath Nundee* as the gomastah. *Rughoonath Nundee* is described (I do not know whether it is very material) merely as the gomastah of the idol, whereas the Maharajah is described as shebaet. Whether there is any material distinction between a gomastah and a shebaet, I am not aware, nor is it, I think, very important. Now the bill of sale says:—"In the course of business by *Brojokishore Shaha*, son of" &c., "in favor of *Rughoonath Nundee* (gomastah of the most worshipful *Shyamsoonder*)," that is, the idol. "Having failed to clear and prepare, and pay the Government revenue of our purchased zemindary Pergunnah *Soojanuggur Sirkar Bhuggo Korat*, within *Chakla Bhadorea*, the sudder land revenue of which said pergunnah, as per allotment, is recorded at Rs. 4,742 4 annas 14 gundas; and whereas there is no possibility of our doing so next year, we do of our own will and accord, in full possession of our reason and senses, in health of body, and without compulsion, sell to you," that is, to *Rughoonath Nundee*, "the pergunnah aforesaid, for a full consideration, of Rs.5,901." Where that money came from does not appear, but there is no doubt that it was the money of the Maharajah. A certificate of that sale was put in evidence, which does not carry the case any further, and the deed was registered.

On the 24th of Choitro 1211, a deed was executed by *Rughoonath Nundee*, conveying the property to the idol and the Maharajah shebaet. He says:—"This deed of agreement is executed in the course of business. Being appointed in the office of gomastah,—there he calls himself again "gomastah"—on the part of the idol, I have purchased in the name of the god pergunnah *Soojanuggur*, from *Tikhum Roy* and *Brojokishore*. I having myself caused the bill of sale to be executed, my name is recorded in the bill of sale, certificate of sale, and bill of mutation of names as gomastah on the part of the god. And I now present the bill of sale, &c., under the hand of the *Roy* and *Shaha* before you, to enable you to present a petition

to have the said pergunnah entered as a zemindary in the name of the god and your own name recorded as the shebaet thereof; and I accordingly agree and write this to the intent that you may have the names of the Roy and Shaha struck off from the Collectorate in respect of the said pergunnah, and have your own inserted in the office as a zemindary in the name of the god, and yourself as the shebaet thereof." That document was also registered, and therefore anybody could have discovered that the deed had been executed.

But the question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmins, for the purpose of performing religious service for the benefit of any Hindoo who might please to go there. It is simply an idol set up by the Maharajah, apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favor of the idol.

In the case of *Mahatab Chund* and another, in the 5th volume of the Sudder Dewanny Adawlut Reports, 268, which was a very similar case, it was held that when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindoo law.

It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments, that this was not an endowment by the Maharajah in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever and that nobody could alienate it. Suppose the Maharajah had established the idol in his house, would anybody pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house, notwithstanding he had put an idol there; and what would become of the idol itself? Here there was no endowment, no priest, no public, no one legally interested in the worship of this idol, except the Maharajah himself, and nothing to show that the Maharajah intended to establish it for the benefit of his sons or heirs, or anybody else, in perpetuity.

If there was not an endowment, the case appears to be very clear. The Maharajah having purchased the property in the name of the idol, mortgaged it to *Komul Lochun Nundee* for a sum of Rs. 32,000. *Komul Lochun*, not having been repaid, took steps to foreclose the estate, and the period of foreclosure was about to elapse when, the Rajah having died, and having appointed his widow, *Kristomonee*, the manager and owner of the property, she came in and made an arrangement with *Komul Lochun* to extend the period; and she afterwards borrowed from Rajahs *Woodmunt Singh* and *Janokeram Singh* Rs. 46,400, with which *Komul Lochun* was paid off. The conditional sale was to pay off a debt due from her husband to *Komul Lochun*. Now, as a widow, she was entitled to alienate the property for the purpose of paying and discharging her husband's debts. After that the period for the

repayment of the money to *Woodmunt Singh* and *Janokeram Singh* having elapsed, they foreclosed the estate against the widow *Kristomonee*, and brought a suit and recovered possession of the land, and were put into possession 47 years before the commencement of this suit.

The Defendants claim under Rajahs *Woodmunt Singh* and *Janokerum Singh*. Rajah *Janokeram Singh* died, leaving Rajah *Woodmunt Singh* his heir; and the whole property then became established in him. He died, leaving two sons, and the sons conveyed the property to the Defendants. It is unnecessary, however, to enter into the title of the Defendants.

The question is, has the Plaintiff any right to recover this property? The widow made a valid sale of it; and, even without the statute of limitations, the Defendants are entitled to it.

The Courts below have both held that there was no actual endowment. The Principal Sudder Ameen (although possibly all his reasons may not be correct) says:—"It is simply this, that the grandfather of the deceased purchased the property claimed in the name of the idol." Then he held that there was not an endowment, and that the property was the private property of the grandfather. The High Court say:—"No evidence has been given to show that there ever was any formal dedication of the property to the idol. It is a mere purchase in the name of the idol. From the time of the purchase of the property, Rajah *Biswanath Roy* appears to have dealt with it as his own."

In the case of *Gossain vs. Gossain*,* 6 Moore's Indian Appeals, it was held that if a Hindoo purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it. The High Court say:—"From the time of the purchase of the property, Rajah *Biswanath Roy* appears to have dealt with it as his own. In 1802 it was conveyed or mortgaged to one *Bheekum Roy*, and in 1812 it was mortgaged apparently for the Rajah's purposes. There is no proof that either the first or the second mortgage was executed in any way for the purposes of the worship of the idol, or for the performance of any trust connected with it. For all that appears the money was raised for the private purposes of the Rajah. No evidence has been given to show that the revenue of the property was expended for the purposes of the idol, and the pleader for the Appellant, when arguing the case before us, was not prepared to go into evidence upon that point. We do not mean to rest our decision of the case on that point. But we may observe that we do not see any reason to doubt the correctness of the decision of the Principal Sudder Ameen that there was no real endowment."

Now both the Courts below have found that there was no real endowment, and their Lordships entirely concur in that finding. There was, therefore, nothing to deprive the purchaser of the power of alienation.

It is scarcely necessary to advert to the question of limitation. In this case 47 years have elapsed since those under whom the Defendants claim purchased the property *bonâ fide*, under the belief that the foreclosure in favor of Rajahs *Woodmunt Singh* and *Janokeram Singh* was a valid title in those parties, and they purchased the property for a valuable consideration. The property has been out of the possession of the Maharajah's family for upwards of forty-seven years, and limitation is clearly a bar to the suit.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the High Court with the costs of this appeal.

Their Lordships desire, in disposing of

* 4 W. R., P. C., 46.

this appeal, to advert to the very large portion of the printed record which is occupied with unnecessary papers. From page 16 to page 360 the record consists of mere entries in books, the principal part of which have, nothing at all to do with the case. A large expense must necessarily have been incurred in printing all that matter, not one item of which has been referred to in the argument before us. It was wholly unnecessary, and merely encumbered the case, encumbered the Court, and brought a heavy useless expense upon the parties.

A circular order was issued by the High Court in 1867,* before this suit was commenced, pointing out to the Judges of the subordinate Courts their duty in this matter. And I will read a portion of the order of the High Court, because it is essential, in their Lordships' opinion, that the subordinate Courts should act according to this rule, so that all such unnecessary expense may be saved to the parties. Speaking of the Code of Civil Procedure, the rule says :—"Section 132 repeats the direction contained in Section 39, that if the exhibit (or document) be an entry in any shop-book or other book, the party on whose behalf such book is produced shall produce a copy of the entry, which copy shall be endorsed as aforesaid and be filed as part of the record, and the book shall be returned to the party producing it; and the Court ought, doubtless, in these cases, as under Section 39, to mark the document, *i.e.*, the entry in the book, for the purpose of identification, before returning it. It will be observed that the words as to the return of the book are imperative, and that the party has not the option (as under Section 39) of delivering the book to be filed instead of the copy of the entry. From inattention to this rule it has been matter of frequent occurrence for great numbers of account and other books to be received and actually filed in the subordinate Courts, and to be afterwards sent up to the Appellate Courts, to the serious inconvenience of the Courts themselves, and probably of the parties, except in those cases where the books have been prepared *pro re natâ*, a thing which occasionally happens. But the inconveniences reaches a climax when the importance of the suit and the determination of the parties bring about an appeal to England. It then becomes *primâ facia* necessary to translate and to print the whole of the contents of these voluminous books and other papers, and the resulting costs are frequently enormous. This Court is occasionally, at very great trouble to itself and to the pleaders engaged, able to apply some check to the evil; but in many cases the check has not been applied, and in consequence the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from this country. The answer of this Court on these occasions has been, that the evil is one with which the Appellate Courts can but imperfectly cope, and that the effectual remedy must be applied in the Courts of first instance. And it is very much with a view to obviate these paticular complaints, and to remove this just reproach from the procedure of the Courts in India, that the present instructions are issued."

Those instructions were sent to all the subordinate Courts before this suit was commenced. Their Lordships think it will be highly beneficial if the High Court will take care that this Circular Order is enforced, and that similar unnecessary proceedings shall not continue to form part of the records transmitted to Her Majesty in Council.

* Circular Order No. 9, dated 26th February 1867,—7 W. R., Civil Cirs., 4.

26th June, 1873.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Case No. 40 of 1869.

RANEE SURNOMOYEE ... } *Appellant,*

and

JARDINE, SKINNER & Co. and others ... } *Respondents.**

Case No. 44 of 1870.

RANEE SURNOMOYEE ... } *Appellant,**

and

ROBERT WATSON & Co. } *Respondents.**

Dried up bed of river—Right of Government.

When the bed of a river is not gained by Government by right of accretion or reformation, but is formed by the river being dried up, the dried up bed as such does not belong to Government.

These appeals, which were consolidated and have been heard together, arose out of four suits instituted by the Plaintiff; two of them against Messrs. *Jardine, Skinner* and Co. and others, and two against Messrs *Robert Watson* and Co.

One of the suits against Messrs. *Jardine, Skinner* and Co., No. 87 of 1866, was to recover possession of 2,428 beegahs 6 cottahs and 4 gundahs of land, claimed by the Plaintiff as a part of a khas mehal, called Chur *Doomreah Jazeerah*, No. 560 on the rent-roll of the Collectorate of *Moorshedabad*, purchased by her at a Government sale in the year 1864, and also to set aside an order of the Joint Magistrate, made on the 14th October 1865, under Section 318 of the Code of Criminal Procedure, for maintaining the Defendants in possession of a portion of the said lands.

The other suit against Messrs. *Jardine, Skinner* and Co., No. 88 of 1866 (Record, page 955), was to recover damages for crops alleged to have been sown by the Plaintiff on 1,918 beegahs of the said lands, and to have been wrongfully taken possession of by the Defendants.

The two suits against Messrs. *Robert Watson* and Co. were similar to those against Messrs. *Jardine, Skinner* and Co., No 86 of 1866, being to recover possession of 752 beegahs of other land, alleged by the Plaintiff to be a portion of the same khas mehal, and also to set aside an order of the Joint Magistrate, made on the 21st of December 1865, for maintaining the Defendants in possession of the said land; and the other of the said suits, No. 89 of 1866 (Record, page 133), being to recover damages in respect of crops alleged to have been sown by the Plaintiff on 569 beegahs of the said land and to have been wrongfully taken possession of by the Defendants.

The lands which form the subject of these appeals, so far as they relate to the suits numbered 86 and 87 of 1866, are portions of the dried-up bed of the River *Budma*, and the main question to be considered is, did they form any part of the khas mehal Chur *Jazeerah Doomreah* purchased by the Plaintiff from Government.

The principle upon which the High Court acted in the two suits for possession was to exclude from the decrees in favor of the Plaintiff all the lands which formed the bed of the river, and were not included in the measurement made by *Bissonath Dutt*, prior to the ijarah granted to Mr. *Dalrymple* (see page 977). Their Lordships are of opinion that the High Court was right in acting upon that principle.

If the lands in dispute had been annexed by gradual accretion to the estate granted by the ijarah to Mr. *Dalrymple*, they would, by virtue of the Bengal Regulation II of 1825, have become part of his

* From the judgment of Loch and Mitter, JJ., decided 12th and 30th April 1869.

tenure, and would have passed to the Plaintiff under her purchase of the khas mehal. But it was held by the High Court that the lands were not gained or annexed to the island by gradual accretion caused by the recess of a river, but consisted of the dried up bed of the river which formerly flowed to the south of the island, and which gradually dried up, in consequence of its having become closed at the east and west ends thereof. Their Lordships concur in that view. Indeed, it was scarcely contended by the learned Counsel for the Appellant that the land was gained by gradual accession to the island by the recess of the river.

The Plaintiff must recover upon the strength of her own title, and cannot turn the Defendants out of possession upon the ground that they have failed to prove their title.

The Government survey of Mouzah Chur *Jazeerah Doomreah*, made in 1853, included not only the land, but the river on the south of the island; and on the map the southern bank of the river was shown as the northern boundary of the zemindaries to the south, and the whole of the mouzah was stated at the foot of the map to be "No. 306 of the former, and No 560 of the present, Chur *Jazeerah*." In the same statement, however, the quantity of land included in the mouzah was represented to be 28,974 odd beegahs.

It was contended that the map of 1853 proves that that part of the bed of the river, which was then covered with water and has since dried up and now forms the lands in dispute, formed part of the khas mehal Chur *Jazeerah Doomreah* purchased by the Plaintiff. It is clear, however, that the lands in dispute in this appeal were not included in the survey or measurement made by *Bissonath Dutt** prior to the renewal of the ijarah to Mr. *Dalrymple* on the 29th April 1856.

Their Lordships have already held, in appeal No 16 of 1868, that nothing was sold to or purchased by the Plaintiff beyond what was included in the ijarah granted to Mr. *Dalrymple* on the 29th April 1856, at the sudder jumma or annual revenue of Rs. 2,409-13-11, the amount stated in the certificate of sale to the Plaintiff. Acting upon that principle their Lordships held in that appeal that the 15,000 beegahs to the east of the *Chilmaree Dara*, and which formed part of the 28,974 beegahs included in the map of 1853, and were claimed by the Plaintiff in her suit No. 89 of 1866 against the present Defendants, formed no part of the khas mehal purchased by the Plaintiff. The opinion expressed by the High Court is in entire accordance with the view taken by their Lordships in that case.

The argument of the High Court, with reference to the survey map of 1853, appears to their Lordships to be unanswerable. They say (page 950) :—

"There can be no doubt that the lands in dispute were thacked, or surveyed, in 1853 as within the boundary of *Jazeerah Doomreah*; but it may be observed that that survey included not only those lands, but also a large chur to the eastward, and separated from *Doomreah* by a running stream as part of the *Jazeerah*. This chur clearly formed no part of the lands settled with Mr. *Dalrymple* in 1855; and by a judgment of this Court, dated 11th February 1868, reported in IX W. R., page 259, it has been definitely settled that it was not included in the Plaintiff's purchase, and that she had no claim to that land. So in the present case it is evident that, though at the time of the survey the bed of the river was included within the boundary of the *Jazeerah*, yet, when the subsequent survey was made by *Bissonath* Ameen, on whose inquiry the settlement was made, the bed of the river, though partly dried up and in the possession of the Defendants, was excluded from that settlement; so that there is no better reason to conclude that these lands are part of the island, on the ground that they have been surveyed as part of it, than there was in the other case."

The judgment to which reference has

* 20 W. R. 211; post p 820.

been made by the High Court in the passage above quoted, is that which formed the subject of the appeal to Her Majesty in Council, No. 16 of 1868, * and in which their Lordships have already expressed their entire concurrence.

It appears that, in point of fact, a portion of the bed of the river which had dried up before *Bissonath Dutt's* survey was included in his measurement; but that does not affect the argument of the High Court as to that portion of it that had not then dried up and was not included in his survey or field-book.

Their Lordships remark that in these suits, as in the suit in which Appeal No. 16 of 1868 was preferred, the khas mehal held by Mr. *Dalrymple* under the ijarah, and the mehal which the Plaintiff purchased, are shown by the plaint to be identical. The Plaintiff says:—"During the khas possession by Government, Defendants held the said mehal on an ijarah settlement. The term of the ijarah settlement expired on the 30th April 1865" (Plaint, Record, page 1).

The island itself, as appears from the proceeding of Mr. *Toogood* (page 123 of the Record, in Appeal No. 16 of 1868) was resumed by Government under the provisions of Regulation XI of 1825 Section 4 Clause 4. That Section, however, vested in the Government only the island which was thrown up, or, in other words, the land surrounded by water, and not the unfordable channel of the river by which the island was formed. Though an island, or land thrown up and surrounded by a river, may be vested in Government, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of the first Clause of Section 4 of Regulation XI of 1825.

Their Lordships have not sufficient materials before them to enable them to determine whether that portion of the bed of the river which was covered with water and was not included as part of the khas mehal granted by the ijarah to Mr. *Dalrymple*, became the property of Government upon its subsequently drying up. Nor is it necessary to do so for the purpose of these appeals, for in the opinion of their Lordships it was not included in the sale to the Plaintiff.

It was, however, contended that the bed of the river was included in the ijarah to Mr. *Dalrymple*, and was part of the khas mehal sold to the Plaintiff. It was argued that the words of the ijarah, "You are entitled to the revenue which you will be able to assess on the waste lands of the said mehal up to the end of the period of the ijarah," were sufficient to entitle Mr. *Dalrymple* to the waste land subsequently formed by the drying up of that portion of the river which was not included in *Bissonath Dutt's* survey of the khas mehal.

Their Lordships cannot assent to that view of the case, for, at the time of *Bissonath Dutt's* survey and measurement, that part of the bed of the river which has since dried up and is now in dispute was under water, and no part of the revenue of Rs. 2,409 reserved in the ijarah to Mr. *Dalrymple*, and in the sale to the Plaintiff, was calculated or assessed in respect of it.

The quantity of land in dispute in the suits under appeal is, no doubt, very much less than the 15,000 beegahs which were the subject of the decree from which the appeal No. 16 of 1868 was preferred. But the construction of the ijarah to Mr. *Dalrymple*, and of the sale to the Plaintiff, cannot depend upon the quantity of the land claimed in excess of *Bissonath Dutt's* measurement. Even if the bed of the river upon its drying up became the property of Government, a point upon which their Lordships are unable upon the evidence in the cause to form an opinion, it would be an innovation in the manner of construing grants of this nature to hold that that part of the bed of the river which was not in the possession of Government, and had

* *Post*, p. 820.

not even been resumed or assessed to the Government revenue, and was not included in the survey and measurement made preparatary to the grant of the ijarah, was intended to be included in the ijarah or in the sale of the khas mehal, under each of which the revenue reserved was fixed upon the basis of the survey.

It should be remarked that the words of the ijarah are "the waste lands of the said mehal." Those words can not include waste lands which were no part of the mehal and were excluded from the survey measurement and report upon which the revenue settlement was made. It must be borne in mind, as remarked by their Lordships in Appeal No. 16 of 1868, that what was granted in ijarah to Mr. *Dalrymple*, and what was sold to the Plaintiff, was a khas mehal, a term which could not include lands which had never been in the possession of Government, or ever resumed or included in the estate which was assessed to the public revenue.

The proceedings of Mr. *Toogood*, and the field-book of *Bissonath Dutt*, contain a complete description of the lands included in the khas mehal. The proceedings are headed "particulars of the origin and reason of the settlement of, and the right which the Government has, in the said mehal" (page 124 of the Record, in Appeal No 16 of 1868). They contain a description of the lands of the mehal, and amongst other things, a statement of lands at present not fit to pay, &c; and under this head there is the following statement:—

"Within this mehal there are beegahs 120-6-0-16½ gundahs of road land, and beegahs 372-12-0-3¾ gundahs of sandy unculturable waste lands, and beegahs 255-8-0-7¼ of unculturable land covered with water; in all beegahs 748-7-0-17½ gundahs of land on which no rent has been assessed, the reason being that those lands are not fit to be assessed" (pages 126 and 128 of same Record).

Those 748 odd beegahs were included in the 11,381 odd beegahs upon which the annual revenue of Rs. 2,409-13-11 was assessed; and are sufficient to satisfy the words "the waste lands of the mehal" as used in the ijarah, by the terms of which Mr. *Dalrymple* was to have the benefit of all waste lands included in the estate which was assessed and granted to him in the same manner as every zemindar under the permanent settlement has the benefit, without any increase of revenue, of all waste lands which at the time of the settlement were included as part of the zemindaree.

The proceedings then contain a statement of the rates prevalent in the mehal for each description of land (page 126), a statement of the various descriptions of cultivators, and finally, under heading No. 2, a statement of the jummabundee, according to the rates recommended by the Ameen, and the particulars thereof, showing the description, quality, quantity, rate of assessement and amounts of jumma in respect of all the lands in the mehal, giving a total of 10,632 odd beegahs, assessed at a gross jumma of 2,667 odd Rs. and 748 beegahs of land unculturable, and not fit to pay, making a grand total of 11,381 odd beegahs of land included in the mehal. The field-book of *Bissonath Dutt* gives the particulars of each dag in the mehal, and of the quantity and quality of land contained in it, and the name of the occupier.

The result of the proceedings before *Mr. Toogood* appears from the following passage in his report, page 125. Referring to the Report of *Bissonath Dutt*, he says:—

"From the papers filed by the Ameen it appears that the said Ameen, having measured beegahs 11,381-6-12½ of land, and fixed Rs. 2,677-10-1 as the hustabood jumma thereof, filed the papers accordingly Hence it is deemed proper to enter into an ijarah settlement with *Mr. Dalrymple*, the former ijaradar, for a term of ten years, commencing from the 1st of May 1855, at an annual rental of Rs. 2,409-13-11, being the balance, after deducting Rs. 267-12-2 on account of collection of charges, at the rate of 10 per cent. on the said jumma (hustabood)."

The proceedings were forwarded to the Commissioner of Revenue for his orders

(page 129), and on the 15th March 1856, an order was made by the Commissioner to the effect that the said ijarah settlement, for a terms of ten years, from the 1st May 1855, at an annual rental of Rs. 2,409-13-11 should be entered into with Mr. *Dalrymple*. The ijarah was accordingly granted, and shortly before its expiration the khas mehal was sold to the Plaintiff, subject to a revenue of Rs. 2,409-13-11, the same amount as that reserved in the ijarah. The document signed by the Plaintiff upon her purchase of the mehal stated the quantity of land in the mehal to be 10,377 odd beegahs, the same as in the measurement of *Bissonath Dutt*. (See No. 11, Supplemental Record in 162, 1868, page 8).

It cannot be disputed that the Plaintiff has got possession of the 10,377 beegahs of cultivable land, and the other lands, making up 11,381 beegahs, included in *Bissonath Dutt's* survey and field-book; but she claims, in addition, that part of the bed of the river which was not included in *Bissonath Dutt's* survey, but was at the time of that survey covered with water, and has since dried up.

In support of the argument that the Plaintiff is entitled to those lands, it is said that part of the bed of the river, which dried up after the first ijarah to Mr. *Dalrymple*, was included in *Bissonath Dutt's* survey and measurement in the second ijarah to Mr. *Dalrymple*. That is so. But there is a great distinction between that part or the bed of the river which was included in the second ijarah to Mr. *Dalrymple* and that part which has since dried up and is the subject of the present appeals. The former portion was resumed by Government, and whether they were in strictness entitled to it or not, it was included in the revenue settlement, treated as part of the khas mehal, and included in the second ijarah to Mr. *Dalrymple*; whereas the land now in dispute, being that part of the bed of the river which dried up after *Bissonath Dutt's* survey, has never been resumed by Government, or assessed to the public revenue, and has never been included in the khas mehal. Whether Government was entitled to resume that part of the bed of the river which was included in the second ijarah to Mr. *Dalrymple*, is not a question in the present appeal. The Plaintiff is in possession of it, and her title to it is not disputed in the suits under appeal. As to the lands in dispute, she is not in possession of them; she seeks to turn out the Defendants who are in possession of them, and she has therefore to prove that they were the property of Government, and were included in the sale to her. In both of these respects she has failed to make out her case.

It was contended on behalf of the Plaintiff that even if the land in dispute was not part of the khas mehal, either originally or as an accretion to the island, within the meaning of Regulation XI of 1825, she was still entitled to it upon the general principles of equity and justice according to the provision of Clause 5 Section 4 Regulation XI of 1825.

It appears to their Lordships that the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that Clause. Furthermore, the Plaintiff did not, in her plaint, rest her case upon the provisions of that Section, or upon the general principles of equity and justice. Her claim was based upon an alleged title to the land as part of the khas mehal purchased by her from Government, of which, after the expiration of Mr. *Dalrymple's* ijarah, she had obtained actual possession, and from which she had been afterwards ousted by the Defendants. But even if she were entitled to rely upon the 5th Clause of Section 4 of the Regulation above referred to, their Lordships fail to discover upon the facts disclosed any general principles of equity or justice in her favor.

As to the suits for damage to the crops, it is clear that the Plaintiff must fail as to the crops alleged to have been sown upon that portion of the lands in dispute to which she has failed to prove title. As to the crops alleged to have been sown upon the lands in respect of which decrees have been given in her favor in suits Nos. 86 and 87 of 1866, their Lordships con-

cur in the view taken by the High Court. The suit is founded upon an assumed possession and actual ouster; but the Plaintiff has failed to prove that she was in possession of the land when she sowed the crops, and that Defendants ousted her from possession as alleged in her plaint; on the contrary, it appears that the Defendants were then in possession of the lands.

It becomes unnecessary, therefore, to consider upon what portion of the lands in respect of which the Plaintiff has succeeded crops sown by the Plaintiff were destroyed or appropriated by the Defendants, or what was the value of such crops. This decision will not prejudice the Plaintiff's right, if she has any, to sue for the mesne profits of the lands to which she has established her title, and for which she has obtained decrees in the Lower Courts. The result is that their Lordships will humbly recommend Her Majesty to affirm the decisions of the High Court with the costs of these appeals.

22nd May, 1873.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porret Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.

RANEE SURNOMOYEE ... *Appellant*,

and

WATSON AND CO., and others ... . } *Respondents.**

Suit for possession—onus of proof.

In a suit to recover possession of land from a person in possession, Plaintiff must recover upon the strength of his own, and not on the weakness of his adversary's title.

* From the judgment of Seton-Karr and Macpherson JJ, in Regular Appeal No, 66 of 1867, decided 11th February 1868.

If ever there was a clear case, this is one which falls within that description. The suit is brought to recover 15,000 beegahs of chur land to the east of *Chilmaree Dara*. It is claimed by the Plaintiff as part of a khas mehal purchased by her from the Government of Bengal on the 15th January 1864.

The Defendants are in possession of the land, and were found by the Magistrate in a proceeding under the Code of Criminal Procedure to be in possession. The Plaintiff seeks to turn them out. The suit is in the nature of an ejectment suit and the plaintiff must recover upon the strength of her own title, and not upon the weakness of that of her adversary. It is immaterial, therefore, in this case to consider whether the land is the property of the Defendants or not, because whether it is their property or not, unless it is proved to be the property of the Plaintiff, she is not entitled to turn them out; nor is it necessary to consider whether it ever was the property of Government or not, because unless the Plaintiff can make out that, being the property of the Government, the Government conveyed it to her, she is not entitled to recover. The question depends upon what was sold by Government, and what was bought by the Plaintiff. The certificate of sale is in these words, signed by the Collector:—"I do hereby notify that the undermentioned Government khas mehal in the district of *Moorshedabad*, at a public sale held in the Collectorate of *Moorshedabad* under orders of the Board of Revenue, has been purchased on the 15th January 1864 by Ranee *Surnomoyee*," that is the Plaintiff, "as sebait of *Luckee Narain Deb Thakoor*." The description is: "Number of towjee, 560;" "name of mehal, Chur *Doomreah Island*, Pergunnah *Goas*," "sudder jumma, Rs. 2,409-13-11." That is, whatever the Plaintiff bought as Chur *Doomreah Island* was to be subject to a sudder jumma payable to the Government of Rs. 2,409.

It is important to remark that what the Government sold and what they professed to convey by the certificate was a khas mehal. The question is whether the khas

mehal which the Government sold included the 15,000 beegahs which the Plaintiff claims in this suit. It was necessary to go into evidence to show of what the khas mehal "Chur *Doomreah Island*, towjee No. 560." Mentioned in the certificate of sale, consisted.

Going then into the evidence, we find that in the agreement which the Plaintiff signed for the purchase of the estate (page 8 of the second supplemental record, No. 11) the land is described in the same way as it is in the certificate of sale, but with this addition, *viz.*, that the quantity of land is stated to be beegahs 10,377-10 2. Now it is not disputed that the Plaintiff has got as much as 10,377 beegahs; but she claims to have 15,000 beegahs to the east of *Chilmaree Dara* in addition as included in her purchase. It would require very strong and very clear evidence to satisfy the minds of a Court of Justice that, under a description of an estate said to contain 10,377 odd beegahs of land, the Government officers were so negligent of their duty as to sell, and the Plaintiff so fortunate as to purchase, 25,000 beegahs, more than double the quantity expressed. If the Plaintiff could satisfy us that she did buy, and that the Government did sell, and had the right to sell, that quantity, she would make out her case.

Now, the way in which the Plaintiff attempted to make out that she did purchase the 15,000 beegahs of land claimed is this. It is said that the number of the towjee is described as 560, and that the survey map of 1853 includes the whole of the land claimed as the 15,000 beegahs and that at the foot of the map there is an entry "No. of the towjee 306 of the former resumption, and No. 560 of the present:" consequently it is said that the lot sold to the Plaintiff being No 560 in the towjee included the whole of the land claimed, and that it cannot be cut down by showing that in the agreement signed by the Plaintiff she admitted that what she purchased was 10,377 beegahs odd.

But let us see whether the entry in the map shows that No. 560 of the towjee at the date of the conveyance on the 5th February 1864 did include the 15,000 beegahs of land claimed. Assuming for the sake of argument that No. 560 of the towjee in 1853 did include the land claimed, it does not necessarily follow that No. 560 of the towjee on the 5th February 1864, when the certificate was signed, also included it.

Now, in order to see what was included in the certificate of sale as *Chur Doomreah Island* we must refer to the proceedings which took place before Mr. *Octavious Toogood*, the Officiating Deputy Collector of Zillah *Moorshedabad*, on the 30th January 1856. He says:—"It is evident from a perusal of the papers of the settlement record of *Chur Doomreah* resumed by the Government, comprised within Pergunnah *Goas*, that, from the investigation held by the former Collector of this district, it was found that 25,000 beegahs of land having been thrown up in the vicinity of *Doomreah*, by the rivers *Pudma* and *Mohanunda*, were held possession of by Rajah *Oodwund Singh*, the zemindar of *Hoodda Anyepore*, when the said Collector, in conformity with the directions of the members of the Sudder Board, dated the 24th January 1826 A.D., preferred a claim to the said lands on behalf of Government under Regulation II of 1819. Upon which an itlanamah having been served on the possessor, Defendant, calling upon him to adduce evidence, and the said Defendant having produced his documentary evidence, &c., the claim of the Government was dismissed on the 26th September 1828, and the papers of the record forwarded to the said Board. Subsequently the duties of the Revenue Board having become dischargeable by the Revenue Commissioner, the Revenue Commissioner dissatisfied with the decision of the said Collector, preferred an appeal therefrom to the Court of the Special Commissioner at *Calcutta*. Whereupon the said Special Commissioner having found that out of the lands in dispute, beegahs 6,723, all around which the rivers *Pudma* and *Mohanunda* flow,

were regarded as new accretions under the designation of jazeera, reversed the decree of the Collector, and gave a decree in favor of Government, forwarding the resumption decree to the Commissioner of Revenue." From this it appears to have been found that, out of the lands in dispute, 6,723 beegahs formed an island, which, under Regulation XI of 1825, belonged to the Government. It then went on to show that 6,179 beegahs of the said land were settled in ijara or lease to Mr. *Dalrymple*, at an annual jumma of 2.294 rupees, for a term of ten years, and that before the expiration of the said term, Mr. *Abercrombie*, the Collector, went into the mofussil, and that he then found that a portion of the lands which had existed at the time of the lease to Mr. *Dalrymple* were diluviated; that new accretions had formed, and that some portion had been settled with ryots. It goes on thus:—"The former ijaradar (that is Mr. *Dalrymple*) having been desirous of entering into an ijara settlement at the old rate, a report was submitted to the said Commissioner, asking for specific directions as to whether a settlement of the said mehal should be entered into with the former ijaradar at the old rate, or whether a settlement thereof should be made *after making a fresh measurement and assessment of rent*. In reply thereto the said gentleman forwarded a letter, No. 50 of the 18th December 1854, *directing a fresh measurement and jummabundee (rent-roll) to be made*, and the said Collector, accordingly, with the sanction of the Commissioner, conveyed in his letter of the 27th January 1855, appointed *Bissonath Dutt*, ameen, together with a mohurrir, to make a fresh measurement and jummabundee."

There was an express direction that the land to the east of the *Chilmaree Dara* was not to be measured or included in the ijara. It appears that the ameen subsequently measured the mehal and found it to contain 11,381 beegahs odd, including waste, land under water, roads, &c., and that a fresh ijara settlement was entered into with Mr. *Dalrymple*, the former ijaradar, for a term of ten years, commencing from the 1st of May 1855, at an annual rental of Rs 2,409-13-11.

It is perfectly clear from the proceeding referred to that the ijara to Mr. *Dalrymple*, which was to commence from the 1st of May 1855, did not include the land to the east of the *Chilmaree Dara*. It is also clear from the Plaintiff's own petitions and from her plaint that she never considered that she had purchased anything more than what was included in Mr. *Dalrymple's* ijara.

In the petition which the Plaintiff presented to the Collector after the expiration of Mr. *Dalrymple's* second ijara, she says, by her agent, "I purchased the above mehal," that is, the mehal called Chur *Jazeera Doomreah*, "on behalf of the above-named thakoor," that is the idol, "in the month of Pous, 1270 B.S., and I did not receive possession thereof till the 30th April 1865, on account of the ijara settlement of Mr. *Dalrymple*. On the expiry of the term of this settlement I prayed for possession." She never thought of claiming possession of anything until Mr. *Dalrymple's* ijara came to an end, and then she thought her title had accrued to receive possession of the land included in the ijara to Mr. *Dalrymple*. Then, again, in the petition presented under Section 318 of the Criminal Procedure Code, the Plaintiff, by her agent, said, "Mr. *James Dalrymple* took a conditional ijara *of the said mehal* from the Collectorate of this zillah on the part of Government." There, again, showing that what she was seeking to recover was the mehal of which Mr. *Dalrymple* took an ijara.

Then in the plaint she says:—"The *Island* Chur *Doomreah*, a Government khas mehal, recorded No. 560 in the rent-roll of the Collectorate of this city of *Moorshedabad*, was purchased by me at a Government sale on the 15th January of the year 1864, in the capacity of a sebait of the aforesaid idol, and I have obtained the bynamah (certificate of sale). The Government concluded successive temporary farming settlements of the said mehal with Mr. *Dalrymple*. The term

of the farming lease expired on the 30th of April in the year 1865. I held the proprietary right from the date of my auction-purchase up to the expiration of the ijara lease, and on the expiry of the term of the ijara lease I obtained khas possession through the nazir and ameen under orders of the Collector of this district."

It is clear that the Government merely intended to sell, and that the Plaintiff intended to purchase, the khas mehal which was held by Mr. *Dalrymple* under the ijara, and that on the measurement of the lands included in the ijara those to the east of the *Chilmaree Dara* were expressly directed to be excluded. The Plaintiff can have no title to those lands whether they belonged to Government or to the Defendants. The authorities which have been cited are not applicable to the facts of this case The Plaintiff has made out no title to the land which she has claimed.

It is said that the question was never raised on the pleadings, but it is clearly raised, not only in the pleadings, but in the issues. In the written statement of the Defendants, *Robert Watson* & Co., at page 3, paragraphs 2 and 3, the question appears to be raised distinctly. They say:—"As to the claim to obtain possession of about 15,000 beegahs of land lying within the boundaries specified in the thak map of the year 1853, on the allegation that the said lands are *jazeera* (island) Chur *Doomreah*; those lands are not included in the said island." The same defence was also set up in the written statement of Messrs. *Jardine Skinner* & Co. in the third and fourth paragraphs at page 5.

There was also a distinct issue whether the 15,000 beegahs were part of the *jazeera*, and whether the Plaintiff, in virtue of her auction-purchase, could claim and obtain possession of the disputed land or not. The defence set up was that the Plaintiff, by virtue of her auction-purchase, was not entitled to the 15,000 beegahs, and distinct issues were raised as to whether she was entitled to them or not. The High Court came to the conclusion that she was not entitled, that she never intended to purchase, and never did purchase, and that the Government never intended to sell, and never did sell to the Plaintiff any portion of the 15,000 beegahs to the east of the *Chilmaree Dara*.

Their Lordships entirely concur in the opinion of the High Court. It is not necessary to go into all the reasons expressed in the judgment of Mr. Justice *Seton-Karr*, which have been commented upon in the argument at the bar, but their Lordships concur entirely in the opinion at which the learned Judges arrived, namely that the Plaintiff, by reason of her purchase, never got a title to the 15,000 beegahs which she claims on the east of the Sota.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, with the costs of this appeal.

27th February, 1874.

PRESENT:

Members of the *Judicial Committee*:—The Right Hon'ble Sir James William Colvile, the Right Hon'ble Sir Barnes Peacock, the Right Hon'ble Sir Montague Edward Smith, the Right Hon'ble Sir Robert Porrett Collier, and the Right Hon'ble Sir Lawrence Peel.

On Appeal from the High Court of judicature at Fort William in Bengal.

THE ADMINISTRATOR-GENERAL OF BENGAL } *Appellant,*

and

ANUNDO CHUNDER BOSE ... ... } *Respondent.**

Manager—Settlement at an unusually low rate—no presumption of fraud—Subsequent Ekrar and receipt of rent operate as a recognition.

The mere fact that the land was let at an unusually low rate by the Manager to the Defendant

* From the judgment of Couch, C.J., and Mitter, J, in Special Appeal No. 1016 of 1871, decided on the 20th February 1872.

who was the Naib, was not sufficient to show that there was a fraud practised on the proprietor By a subsequent Ekrar by the proprietor in 1866 the former lease must be taken to have been recognised by the Proprietor, and it has further been confirmed by the receipt of rent from the Defendant to the present time.

This was a suit brought by Mr. *Hogg*, the Administrator-General of Bengal, and joint executor of the estate of Mr. *Henry Adams*, deceased, and also in his capacity as attorney for Mrs. *Adams* the widow of Mr. *Adams*, against *Anundo Chunder Bose*, the holder of a certain mokururee pottah. The suit seeks to set aside that pottah upon these grounds: first, that it was obtained by the Defendant *Anundo Chunder Bose*, who was a naib of the estate acting under Mr. *Shaw*, who was agent or attorney for Mrs. *Adams*, by collusion between the Defendant and Mr. *Shaw*; and secondly, for the reason that Mr. *Shaw* had no authority to grant any such lease. It was not a suit for reforming the lease, but simply for setting it aside; and the effect of it would be to turn the Defendant out of possession, and to put the Plaintiffs in it, without any recompense to the Defendant of any kind for any improvements he may have made, if he made any.

The facts necessary to make the suit intelligible may be very shortly stated. Mr. *Adams*, the owner of a considerable tract of land in the *Soonderbuns*, died in the year 1845, leaving a will, made not long before his death, whereby he devised his estates to his wife for life, with remainder to her children, and appointed her and Sir *Thomas Turton*, who was then acting as Administrator-General of Bengal, joint executors of the will. Mrs. *Adams* has ever since resided in England, giving authority from time to time to various persons, to Mr. *Steers*, and Mr. *Vos*, and Mr. *Shaw*, at different times, in 1847, 1861, 1862, and 1868, under powers-of-attorney to manage the estate and collect the rents, though not in terms to grant leases. The lease in question was a mokururee lease granted to the Defendant, who was the naib of the estate, in December 1862. He obtained this lease upon the terms of paying no rent at first, but the rent to be increased until it rose to the maximum of ten annas per beegah.

It has been contended that the rate of rent in this case was lower than was usual in leases of a similar character in the neighbourhood, and that the Defendant, who acted as a naib, obtained it improperly, and in collusion with Mr. *Shaw*.

The issues, which it is not immaterial to look at, were these:—"I. Had the agents who used to be appointed and who were appointed on behalf of Mrs. *Adams* in the *Soonderbuns* lots left to her by her husband, any authority to make mouroosee settlements? Had the agent, Mr. *Shaw*, any such authority?" Then the next is—"The said agent, Mr. *Shaw*, created, on the 15th Pous 1269, a mouroosee jumma in favor of the Defendant; did he act collusively in settling it at an inadequate rent, or act in a *bonâ fide* and straight forward manner?" Then the third issue is—"After taking the said land did the Defendant enhance its value?" Upon that, their Lordships understand, there is no specific finding; and that may be put out of the question. The fourth issue is—"Were Mrs. *Adams* and her agents, subsequently appointed, cognizant of the pottah granted by Mr. *Shaw*, or not? Did they by their conduct confirm the Defendant's jumma, or not? If they did, then, can the Plaintiff now bring the present action?" Those were the issues.

The case in the first instance came before the Subordinate Judge of the 24-Pergunnahs; and their Lordships understand him to have found in favor of the Defendant on the first issue:—"Had the agents authority to make mouroosee settlements? Had the agent, Mr. *Shaw*, any such authority?"

With respect to the second issue, namely, whether there was collusion between Mr. *Shaw* and the Defendant, that case was withdrawn, and a totally different case was set up, which is not pointed to by any of these issues. The case set up,—what may be called the substituted case,—was, not that Mr. *Shaw* and the Defendant colluded, but that the Defendant, the under agent, imposed upon Mr. *Shaw*, the

superior agent, and induced Mr. *Shaw* to grant this lease without Mr. *Shaw* being aware of its contents. Now their Lordships understand the Subordinate Judge to have found that there was no misrepresentation; that the Defendant did not impose upon Mr. *Shaw*.

With reference to the fourth issue,—"were Mr. *Adams* and her agents, subsequently appointed, cognizant of the pottah granted by Mr. *Shaw*, or not? Did they, by their conduct, confirm the Defendant's jumma, or not?"—their Lordships understand the Subordinate Judge to have found that they were cognizant of it, and that they did confirm it. It appears to their Lordships that there was evidence upon which all of these findings might have been properly supported.

The case then came before Mr. *Beaufort*, the Judge of the 24-Pergunnahs, upon appeal to him, the case not being of sufficient magnitude and value to admit of its being taken by way of appeal to the High Court. Mr. *Beaufort*, as their Lordships understand his decision, did not reverse the finding in point of fact of the Subordinate Judge, that Mr. *Shaw* granted this lease, acting within the general scope of his authority as agent. He certainly does not find that the lease was granted without authority. Upon the fourth issue,—whether or not this grant was subsequently confirmed by Mr. *Shaw* and Mr. *Steers* (who acted with him) with cognizance of the facts,—there is no specific finding on the part of Mr. *Beaufort*; but he does not, upon that either, reverse the decision of the Lower Court.

Their Lordships may observe upon this, that that decision does appear to them to be in a great degree confirmed by an ikrar executed in 1866, whereby the former lease to the Defendant, in their Lordships' view, must be taken to have been recognized, and by recognition confirmed by Mr. *Steers* and by Mr. *Shaw*; and their Lordships understand that it has been further confirmed by the receipt of rent from the Defendant to the present time.

The Judge of the 24-Pergunnahs differs from the finding of the Judge of the Court below, and reverses his findings upon these grounds. With respect to the substituted issue, as to whether the Defendant imposed upon Mr. *Shaw*, he finds that the Defendant did impose upon Mr. *Shaw* in obtaining this lease; and he states the ground upon which he comes to that conclusion. These are his words:—"As he obtained it at an unusually low rate and at a russudi jumma, the maximum rate of which is this unusually low rate, I must presume that he fraudulently misled the manager for his own benefit." That, as far as their Lordships are able to understand it, is the ground of Mr. *Beaufort's* judgment.

Upon this there was a special appeal to the High Court; and the High Court in effect reversed the judgment of Mr. *Beaufort*, and confirmed the judgment of the Subordinate Judge, upon this ground:—that Mr. *Beaufort* was not justified in presuming, as he appears to have done, from the mere fact that the land was let at an unusually low rent, that therefore the Defendant had obtained it by a fraud practised upon Mr. *Shaw*.

It appears to their Lordships that the High Court were right in that view, that there was no such legal presumption; and that is the main ground, if not the only ground, upon which the High Court appear to have reversed the decision of Mr. *Beaufort*. They also refer to one matter which is alluded to in the grounds of appeal, namely, that Mr. *Beaufort* had not dealt with the question of subsequent ratification by Mr. *Steers* and Mr. *Shaw* and their Lordships are unable to say that the remarks which have been made by the High Court on that subject are open to any substantial objection.

On these grounds their Lordships are of opinion that the High Court was justified in point of law in reversing upon special appeal the judgment of Mr. *Beaufort*; and consequently they think it their duty humbly to advise Her Majesty that the judgment of the High Court be affirmed, and the appeal dismissed.

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PART I.—GENERAL.

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ACCOMMODATION ACCEPTOR.
See "PRINCIPAL AND SURETY."

ACCOUNT.
Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties, for damages for the detention of property which had belonged to the estate of the deceased. In the first, the Plaintiffs appealed; and in the second the Defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits

Held, that as the first suit was for an account only and not for the recovery of money, rendering it at least doubtfull whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the Defendant to raise it on this cross appeal. *Nan Karay Phaw* v. *Ko Htaw Ah* 702

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ACCRETION.
Accretion by Gradual Accession—Riparian Proprietors—Effect of Sudden Change of the Course of a Boundary River—Regulation XI. of 1825, *sect.* 4, *cl.* 1, 2; *sect.* 2.

The lands in dispute were in 1837 settled with the predecessors of the Plaintiffs. In 1847 the settlement was renewed and the predecessors of the Plaintiffs continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1857.

Prior to the renewal of that settlement in 1857, the river Gunduck which was to the south of the Plaintiff's zemindary (in district Tirhoot) and to the north of the Defendant's (in district Sarun), had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it. A question arose as to whether the Plaintiff's were entitled to a renewal of the settlement in 1857 or whether the Defendant was entitled to it. —

Held, upon the construction of Regulation XI. of 1825, Sec. 4 cl. 1 and 2. that in the absence of evidence of a clear and definite usage that the river Gonduck was to be the boundary, not only between the two districts, but between the zemindaries on either side the lands still belonged to the Plaintiffs. [*Raghoobur Dyal Sahoo v. Maharajah Kishen Pertab Sahee*] 64

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— ANCESTRAL PROPERTY, 2.

ACT XIV OF 1859, S. 20.
See LIMITATION 6, 8.

XIV OF 1859, S. 22.
See LIMITATION 14.

XV OF 1859, SS. 22, 34.
See JURISDICTION, 3.

XXIII OF 1861, S. 11.
See MORTGAGE 3.

XXII OF 1864, S. 11.
See PUBLIC SERVANT.

VIII OF 1865, MAD. SS. 3, 8, 9, 11.
See REGISTRATION 1.

X OF 1865, S 243.
See PROBATE.

XVI OF 1865.
See LIMITATION 5.

XX OF 1865.
See PLEADER.

XIII OF 1866.
See LIMITATION 5.

XVI OF 1866, SS. 1, 2.
See LIMITATION 5.

XX OF 1866, S 2.
See REGISTRATION 1.

XX OF 1866, S. 53.
See LIMITATION 14.

XXVI OF 1866, (OUDH SETTLEMENT ACT)
See TENANCY UNDER TALUKDAR'S SETTLEMENT.

XIX OF 1868, (OUDH RENT ACT), S. 83. CL. 15, AND S. 106.
See II L JOINT FAMILY.

I OF 1869, SS. 8, 9, 10.
See TRUST 2.

I OF 1869.
See JOINT FAMILY 1, 2.
— RES-JUDICATA 4.

(I OF 1869), OUDH ESTATES ACT, S. [illegible]
See PRIMOGENITURE 1, 2.

I OF 1869, OUDH ESTATES ACT, S. 10.
See TRUST 1.

I OF 1869, OUDH ESTATES ACT, S. 13, SUB. S. 1.
See REGISTRATION 2.

II OF 1869.
See WILL 3.

VIII OF 1869, (B. C) S. 14.
See KABULYAT.

VIII OF 1869, (B C) S. 29.
See LIMITATION 11.

X OF 1870, SS. 38, 39.
See RES JUDICATA.

ACT XXIV of 1870.

Act XXIV of 1870 (*The Oudh Talookdars' Relief Act*, 1870)—*Hypothecation of lands under management.*

A talookdar, the management of whose talook at the time was vested in an officer appointed under s. 3 of Act XXIV of 1870, made an instrument purporting to hypothecate the talook to secure payment of money borrowed by him.

Held that, as the document contained no personal contract to pay out of personal estate, or any estate other than the talook, it was unnecessary to consider whether a talookdar, whilst his talook is under management in pursuance of the provisions of the above Act, is competent to make a personal contract: this being only an hypothecation of the property falling within s. 4, cl. 3 of the Act, and invalid within its meaning. [*Narotam Dass* v. *Sheo Pargash Singh*] 522

ACT XXIV OF 1870, S. 25.
See RES-JUDICATA 4.

XXIV OF 1870.
See ACT XXIV OF 1870.

VIII OF 1871.
See REGISTRATION 2.

IX OF 1871, S. 20.
See LIMITATION 4.

IX OF 1871, S. 10 AND NOS. 118, 123, AND 145.
See LIMITATION 12.

IX OF 1871, SS. 24, 27, SCH. II, ART. 31, PART V.
See LIMITATION 8.

IX OF 1871, SCH. II, ARTS. 48, 26, AND 188.
See LIMITATION 16.

IX OF 1871, SCH. II, ARTS. 65, 132.
See LIMITATION 17.

IX OF 1871, SCH. II, CL. 93.
See LIMITATION 9.

IX OF 1871, SCH. II, ART. 118.
See PRINCIPAL AND AGENT.

IX OF 1871, SCH. II, ART. 129.
See LIMITATION 20.

IX OF 1871, SCH. II, CL. 144.
See LIMITATION 10.

IX OF 1871, SCH. II, NO. 145.
See LIMITATION 12.

IX OF 1871, SCH. II, ART. 145.
See LIMITATION 3.

XXIII OF 1871, SS. 4 AND 6.
See ACKNOWLEDGMENT AS SON.

XXIII OF 1871.
See TODAGORASHAK.

I OF 1872, S. 32, SUB. S. 5.
See EVIDENCE 4.

I OF 1872, SS. 35, 48.
See EVIDENCE 1.

I OF 1872 S. 115.
See LIMITATION 1

IX OF 1872. S. 135.
See PRINCIPAL AND SURETY.

XVII OF 1873.
See JURISDICTION 1.

XVII OF 1875, S. 4.
See BUDDHIST LAW IN BRITISH BURMAH.

IV OF 1876, (CAL. MUNI. ACT).
See RIGHT OF WAY.

I OF 1877, S. 31.
See RECTIFICATION OF INSTRUMENTS.

I OF 1877, S. 42.
See TRUST 2.

III OF 1877, SS. 17, 49.
See REGISTERED INSTRUMENT CONFIRMING A PRIOR ONE.

X OF 1877, S. 13.
See RES-JUDICATA 2, 5, 6, 7.

X OF 1877, S. 43.
See SPLITTING CLAIMS.

X OF 1877, SS. 223, 228.
See HIGH COURT.

X OF 1877. SS. 231, 588, 593, 610.
See LETTERS PATENT, 1865, S. 15.
— PRACTICE 2.

ACT X OF 1877, SS. 244, 588 CLS. j & r.
See APPEALABLE ORDER.

X OF 1877, S. 246.
See CIVIL PROCEDURE CODE 3.

X OF 1877, SS. 274, 276.
See ATTACHMENT BEFORE JUDGMENT.

X OF 1877, S. 311.
See SALE IN EXECUTION OF DECREE.

X OF 1877, S. 565.
See APPELLATE COURT.

X OF 1877, S. 602.
See CIVIL PROCEDURE CODE, 549.
— PRACTICE 6.

X OF 1877, S. 622, AS AMENDED BY S. 92, OF XII OF 1879.
See CONSTRUCTION.

XIV OF 1877, SCH. II, ARTS. 134, 144.
See H. L. GIFT 2.

XV OF 1877, S. 10.
See LIMITATION 19.

XV OF 1877, SCH. II, ART. 109.
See LIMITATION 16.

XV OF 1877 SCH. II, ARTS. 120, 127.
See H. L. JOINT-FAMILY 2.

XV OF 1877, SCH. II, ART. 127.
See LIMITATION 18.

XV OF 1877, SCH. II, ART. 132.
See RES-JUDICATA 3.

XV OF 1877, SCH. II, ART. 144.
See LIMITATION 21.
— SALE FOR ARREARS OF REVENUE.

X OF 1882, S. 5, (CR. PRO. CODE)
See CONTEMPT OF COURT.

XIV OF 1882, S. 608.
See APPEAL 3.

ADMISSION.
See ESTOPPEL
— PRACTICE 3.

ADMISSION ORAL, NOT SAFE TO REST UPON WHEN OTHER EVIDENCE AVAILABLE.
See PRACTICE 3.

ADOPTION.
See H. L. ADOPTION 1, 2, 3, 4, 5, 6, 7, 8.
— LIMITATION 1.
— H. L. CUSTOM.

ADOPTION BY WIDOW.
See H. L. ADOPTION 1, 2.

ADOPTION SIMULTANEOUS.
See H. L. ADOPTION 8.

ADOPTIVE FATHER, AGREEMENT BY.
See H. L. ADOPTION 1.

ADOPTED SON.
See H. L. ADOPTED SON.
— H. L. CUSTOM.

ADVERSE POSSESSION.
See LIMITATION 21.
— RES-JUDICATA 7.

AGENT.
See GUARANTEE.
— LIMITATION 4.
— PRINCIPAL.

AGENTS' MISCONDUCT, LIABILITY FROM.
See GUARANTEE.

AGREEMENT BY NATURAL FATHER RESTRICTING SON'S INTEREST IN THE INHERITANCE OF HIS ADOPTIVE FATHER.
See H. L. ADOPTION 1.

AGREEMENT OF JOINT OWNERS NOT TO ALIENATE.
See H. L. MITAKSHARA 2.

ALIENABILITY BY A COPARCENAR OF HIS UNDIVIDED SHARE.
See H. L. ANCESTRAL PROPERTY 2.

ALIENATION, AGREEMENT OF JOINT OWNERS AGAINST.
See H. L. MITAKSHARA 2.

ALIENATION, RESTRICTION UPON.
See M. L. WILL 2.

ALIENATION OF DEWUTTUR LANDS.
See NON-JOINDER OF PARTY.
— H. L. ANCESTRAL PROPERTY 1.

ALIENATION OF IMPARTIBLE ESTATE.
See H. L. IMPARTIBLE ESTATE.

AMENDMENT.
See REMAND.

ANCESTRAL PROPERTY.
See H. L. ANCESTRAL PROPERTY 1, 2, 3.

ANNUITY.
See GOVERNMENT SECURITIES.

APPEAL.

1 *Privy Council—Appeal—Concurrent findings on facts.*

Where the lower Courts have proceeded upon the evidence and have come to the same conclusion, it is an established rule of practice that the Judicial Committee of the Privy Council will not on appeal enter into the question whether the decision of the Courts below are or are not correct on matters of fact [*Jaimungul Koeri* v. *Mokhun Koeri*] 344

2 *Appeal—Evidence.*

An application having been made by the Defendant before the hearing in a suit to recover possession of certain land for the record in a former suit to be sent for, on the alleged ground that it related to an exchange of the same land, an order was made that the matter should be decided when the case was tried and the record sent for if necessary.

At the hearing no further application was made for the record in the other suit, and the case was decided upon oral evidence in favour of the Plaintiff.

Held, affirming the decree of the High Court, that under the circumstances the Defendant was not entitled to appeal on the ground that the record in the earlier suit had not been produced. [*Chundi Churn Sashmul* v *Doorga Pershad Mirdha*] ... 351

3 *Appeal to Privy Council—Security for performance of order to be made by Her Majesty in Council—Civil Procedure Code, 1882, s. 608—Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below.*

A party, to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the treasury in obedience to the decree. [*Maharani Inder Kumari* v *Maharani Jaipal Kumari*] 757

See MESNE PROFITS 1.
— PLEADER.
— PRACTICE 1, 2, 6.

APPEAL AGAINST AN ORDER REFUSING TRANSMISSION.
See PRACTICE 2.

APPEAL, JOINING UNTENABLE GROUNDS OF.

See MESNE PROFITS 1.

APPEAL-PARTY SUCCESSFUL-COSTS OF.

See COSTS.

APPEAL, RESTORATION OF, AFTER REJECTION FOR FAILURE TO FURNISH SECURITY.

See PRACTICE 6.

APPEALABLE ORDER.

Execution of Decree—Appealable Order—Civil Procedure Code (Act X of 1877), ss. 244 and 588, cls. (j) and (r).

An order for attachment and sale of property in execution of a decree, is an order "of the same nature" with an order made in the course of a suit for attachment of the debtor's property. The latter order is appealable under s 588 cl. (r) of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is [according to the requirment of s. 588, cl. (j)] "of the same nature with appealable orders made in the course of a suit;" and therefore is appealable under that section. [*Polokdhari Rai* v. *Rajah Radha Persad Singh*,] 279

APPELLATE COURT.

Appellate Court, Powers of—Power to vary decree as made in the lower Court—Decree confined to rights in issue between parties—Section 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the Plaintiff was, or the Defendants were, entitled to zemindari rights in certain mehals, a decree was made affirming the title of the Plaintiff, the evidence in support of the Defendants' case being discredited, and the latter were declared by the decree to be the "Plaintiff's undertenure holders of the said mehals." This was modified on appeal by the declaration that "the Defendants are putnidars of the same mouzahs."

Held, that it was unnecessary on this appeal to consider whether the Appellate Court was right in its conclusion that the Defendants were putnidar; because, upon the case which had been set up for the Defendants, and upon the issues framed and tried in the lower Court, the Appellate Court could not properly make such a declaration: the Defendants could not be in a better position than they would have been in had they claimed to be putnidars, in which case an issue as to that title would have been framed and tried.

Section 565 of Act X of 1877 (1) does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court. [*The Official Trustee* v. *Krishna Chunder Mozoomdar*,] 657

See REMAND.

APPELLATE COURT, POWERS OF.

See APPELLATE COURT.
— REMAND.

APPORTIONMENT OF LIABILITY OF A PURCHASER OF A PORTION OF MORTGAGE PROPERTY.

See MORTGAGE 7.

ARATHDARS, PAYMENTS MADE BY.

See CUSTOM.

ARBITRATION.

1 *Arbitration—Submission—Reciprocity of obligation of parties to award.*

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of village houses and property, such member being deaf and dumb, and not a party to the arbitration and award. He afterwards sued for separate possession as against the others, who in their defence denied his title to inherit by Hindu Law on account of his physical infirmity which was from birth. The award having been produced at the hearing, *held* that this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award; and that he, consequently, could not avail himself of what the award contained in his favour. [*Hira Singh* v. *Gunga Sahai*,]... ... 491

2 *Arbitration—Defence of submission to arbitration and award upon the matter in suit before suit brought.*

An award upon a question referred to arbitrators, on whose part no misconduct or mis-

take appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.

Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole.

The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only.

Held that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties. [*Rani Bhagoti* v. *Rani Chandan*,] 624

ARIAT.

See M. L. GIFT 2.

ARRANGEMENT BETWEEN A FIRM AND ITS CREDITORS, SECURING DEBTS.

See MORTGAGE 10.

ASSESSMENT OF LAND FOR SALT WORKS.

Assessment of land formerly occupied for Government Salt Works—Reg. I of 1824.

Upon the relinquishment by the Government of lands, within the ambit of a permanently-settled zemindari, continuously used before and since the perpetual settlement as salt works, from the commencement of salt-making by the Government, until after the passing of Reg. I of 1824, the provisions of that Regulation are applicable to the mutual rights of the zeminder and of the Government.

Such lands were held by the officers of the Salt Department, in terms of cl. 11 of that Regulation, "free of rent" and "under a perpetual title of occupancy," whether belonging to a permanently settled estate or not. The force of the Regulation and the right of the Government to assess such lands, are not affected by 'khalari' payments having been made, among other compensations, by the Government to the zemindar; and cl. 11 appears to contemplate some such payment. On a settlement of the relinquished lands, 'khalari' payments, being "sums remitted to the zemindars and to be allowed in perpetuity," within the meaning of the 4th clause of s. 9 of Reg. I of 1824, must be continued to the zeminder; or, if a settlement should be made with others, he should be assessed only for the land retained by him. [*The Secretary of State* v. *Ranee Anundmoyi*,] ... 281

ASSESSMENT OF RENT, SUIT FOR.

See KABULYAT.

ASSETS BY DESCENT.

See H. L. MITAKSHARA.

ASSIGNEE, RIGHTS OF, AGAINST ORIGINAL LESSOR.

See SPECIFIC PERFORMANCE.

ASSIGNMENT BY INSOLVENT.

See INSOLVENCY.

ATTACHMENT.

See SALE PRIVATE.

ATTACHMENT BEFORE JUDGMENT.

Attachment before Judgment—Civil Procedure Code (Act VIII of 1859), *s.* 240—*Objection as to non-compliance with requirements of s.* 239—*Burden of Proof—Civil Procedure Code (Act X of* 1877), *ss.* 274, 276.

A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semble—A re-attachment of property after decree does not imply an abandonment of an

attachment obtained before decree. [*Ram Krishna Das Surrowji* v. *Surfunnissa Begum*,] 167

ATTEMPT BY TWO WIDOWS TO ADOPT EACH A SON SIMULTANEOUSLY.
See H. L. ADOPTION 8.

ATTEMPT TO ENFORCE A DEED, EFFECT OF.
See LIMITATION 9.

AUTHORITY TO ADOPT, CONSTRUCTION OF.
See H. L. ADOPTION 8.

AUTHORITY TO ADOPT, TERMINATION OF.
See H. L. ADOPTION 6.

AWARD BINDING ONLY BETWEEN PARTIES SUBMITTING TO IT.
See ARBITRATION 1.

AWARD CONCLUSIVE, IN THE ABSENCE OF MISCONDUCT OR MISTAKE.
See ARBITRATION 2.

BAFARZANDAN, NOT ESSENTIAL TO CONVEY HEREDITARY RIGHT.
See CONSTRUCTION 5.

BARGAIN UNCONSCIONABLE.
See REMAND.

BENEFICIAL INTEREST IN SURPLUS.
See WILL 1.

BENAMI TRANSACTION.

1 *Benami transaction—Purchase in the name of Hindu wife.*

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself, or for her husband, her name being used *benami* for him.

The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judical Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami*, in his wife's name. [*Dharani Kant Lahiri* v. *Kristo Kumari Chowdhrani*,] 709

2 *Hindu Law—Joint Family Property—unity of title—Benami purchase—Presumption—Receipt by one member.*

R obtained a decree establishing his title as brother by adoption to L and co-sharer in the family property, which however directed possession to be actually given only of the zemindari which was the principal family estate. Subsequently the Appellant an execution creditor of R took possession of two lots, no part of the zemindari proper; the one having been acquired as a separate inheritance by an ancestor and the other purchased by L *benami* in the name of the family priest:

Held, under the circumstances, that R's title to the two lots was precisely the same as that in the zemindari, and the burden of proof lay upon those who alleged the contrary.

The receipt by one member of a joint Hindu family of one part of an estate may be quite consistent with the title of the whole family thereto. [*Chand Hurree Maitee* v. *Rajah Norendro Narain Roy*,] ... 800
See BURDEN OF PROOF.

BIRT SHANKALLAPS.
See LIMITATION 5.

BONAFIDE PROCEEDING TO ENFORCE DECREE IN A WRONG COURT, EXCLUSION OF TIME OF.
See LIMITATION 6.

BONA-FIDE PURCHASER.
See CIV. PRO. CODE 3.

BREACH OF CONDITION.
See LIMITATION 10.

BREACH OF CONTRACT.
See CONTRACT.

BREACH OF WARRANTY BY VENDOR.
See CONTRACT.

BUDHIST LAW IN BRITISH BURMAH.

Act XVII of 1875, s. 4—Budhist law in British Burmah—Wife's claim upon husband for maintenance.

By the Budhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears that this law would not be applicable where she has sufficient means of her own. No authority has been found for saying that, where the wife has maintained herself, he can sue her husband for maintenance for the period during which she has done so.

A wife, married according to Burmese rights and customs, claimed from her husband in a Court in British Burmah, a certain sum for her expenses of necessaries and living for a past period during which she had maintained herself. *Held*, that this was a question "regarding marriage," within the meaning of the Burmah Courts Act XVII of 1875, s. 4, and that, therefore, the Budhist law formed the rule of decision. The law, as stated above, was accordingly applicable

Semble, that if this had been a case in which, by the above Act, a Court would have had to act according to the rule of justice, equity, and good conscience, there would have been no ground for making the husband liable upon this claim, regard being had to the Burmese law as to the property of married persons. [*Moung Hmoon Htaw* v *Mah Hpwah*,] 505

BURDEN OF PROOF.

Burden of proof—Benamidar—Certified purchaser.

The burden of proof is upon him who alleges that the certified purchaser and registered owner is a benamidar. [*Baijnath Sahay* v. *Rughonath Pershad Singh*,]... ... 372

See ATTACHMENT BEFORE JUDGMENT.

— CONTRACT.

— DESGHAT WATAN.

— PRACTICE 3.

— H. L. CUSTOM.

BURDEN OF PROOF AFTER ACCEPTANCE FOLLOWING UPON AN EXAMINATION BY PURCHASER.

See CONTRACT.

CANCELLATION OF INSTRUMENTS.

Equitable condition—Cancellation of deeds of sale and hypothecation for fraud.

Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction, *Held*, that the condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager, as he would have been justified in borrowing in the course of a prudent management of the estate. [*Rajah Ajit Singh* v. *Rajah Bijai Singh*,] 566

CARNATIC.

See H. L. CARNATIC.

CAUSE OF ACTION.

Cause of Action—Money interest—Performance of religious services.

A claim to certain pecuniary benefits and payments in kind which a Plaintiff alleges himself to be entitled to receive from the Defendants in respect of the performance of certain religious services, is a claim which the Courts of Justice are bound to entertain; and if, in order to determine the Plaintiff's right to such benefits, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and must decide that right. [*Tiru Krishnama Chariar* v. *Krishnasawmi Tata Chariar*,] ... 28

See CIV. PRO. CODE 2.

— LIMITATION 2.

CERTIFICATE.

See M. L. ACKNOWLEDGMENT AS SON.

CERTIFICATE GRANTED AFTER HEARING, EFFECT OF.

See M. L. ACKNOWLEDGMENT AS SON.

CERTIFICATE, OMISSION TO TAKE PREVIOUSLY TO SUIT.

See M. L. ACKNOWLEDGMENT AS SON.

CERTIFICATE OF SALE.

See CONSTRUCTION.

CERTIFIED PURCHASER.

See BURDEN OF PROOF.

CHARITABLE TRUST.

See H. L. CHARITABLE TRUST.

CHILDREN.

See M. L. ACKNOWLEDGMENT AS SON.

CHUR LAND.

See KABULYAT.

CIRCULAR ORDER 1861 SS. 1,24.

See LIMITATION. 5.

1 CIVIL PROCEDURE CODE.

Act VIII of 1859 *(Civil Procedure Code), s.* 5—*what constitutes "dwelling" within the meaning of that section—Commission, under a will, payable to manager of joint estate.*

A testator bequeathed the income of his "*altamgha*," "zemindari," and "thikadari lands" situate in the district of Delhi, Hissar, and Bulandshahur, to his five sons in equal shares, and to their issue; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as "*altamgha*" were in the Bulandshahur district within the local limits of the jurisdiction of the Civil Court of Meerut; and on them an establishment was maintained at the expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Delhi. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses "with mutual consent in the *altamgha* and zemindari"; also that certain memorials of the testator were to be retained by the manager at Bilaspur. At this place the manager used to stay, occasionally, though travelling, for the most part, about the estate during the cold weather.

No particular place for rendering the yearly accounts was fixed, either by contract or in practice, but they were rendered by the manager to the sharers at different times and in different places, including Delhi, Bilaspur, and Hansi; at which last place, it being the Sadar station of Hissar, the older records of the estate were kept.

When the suit was brought the manager was actually residing at the hill station of Mussurie, in the Saharanpur district, for the hot weather; and in his answer he stated that the unsettled accounts were open to inspection by sharers at Bilaspur.

Held, that a person might "dwell," within the meaning of Act VIII of 1859, s. 5, at more places than one; and that on the evidence, this manager so dwelt at Bilaspur as to make him subject to the jurisdiction of the Meerut Court in this suit. It was, accordingly, not necessary to consider whether he was or was not also subject to that court's jurisdiction by reason of the cause of action having arisen within its local limits; nor was it necessary to consider whether he had, or had not, such a dwelling-place at Hansi as would have rendered him subject to the jurisdiction of the Hissar (Punjab) Courts.

Other questions disposed of in the court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing, or varying, the order of the original court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was held to be settled by the indication of the latter mode of calculation in the will. [*Orde* and *Skinner* v. *Skinner*,] 178

2 *Act VIII of* 1859, *sect.* 7—*Separate Causes of Action.*

Sect. 7 of Act VIII of 1859 does not say that every suit shall include every cause of action, but that it shall include the whole of the claim arising out of the cause of action.

Where therefore a Plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession, and afterwards sued to recover from the same Defendant moveable property in consequence of its wrongful detention:—

Held, that the causes of action were distinct, and that sect. 7 did not apply.

[*Rajah of Pitapur* v. *Venkata Mahipati Surya*,] 638

3 *Civil Procedure Code.* 1877, *s.* 246 (1)—*Execution of cross-decrees—Jurisdiction—Bonâ-fide purchaser—Presumption of validity of order for sale.*

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the

property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Not withstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution.

Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide* and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. [*Rewa Mahton* v. *Ram Kishen Singh*,] 746

See REMAND.
— ACT VIII OF 1859.
— ACT X OF 1877.
— ACT XIV OF 1882.

COLLATERAL.
See H. L. ADOPTION 7.
— H. L. RAJ.

COLLATERAL RELATION, WIDOW OF.
See H. L. INHERITANCE 1.
— H. L. RAJ.

COLLUSION.
See H. L. ADOPTION 5.

COMMISSIONER UNDER NAWAB NAZIM'S DEBTS' ACT.
See JURISDICTION 1.

COMPROMISE.
See EVIDENCE 5.
— M. L. COMPROMISE.

COMPUTATION.
See LIMITATION 6.

CONCURRENT FINDING OF FACTS.
See APPEAL 1.
— EVIDENCE 5.

CONDITION SUBSEQUENT.
See GIFT.
— H. L. WILL 1.

CONDITION VOID.
See GIFT.

CONFISCATION.
Confiscation and restoration of lands in Oudh in 1858, and of immoveables in Lucknow—Gift - Title.

On a claim for a share in property consisting of (*a*) immoveables in Lucknow, and (*b*) revenue paying land in a district of Oudh, the defence was title by gift, with possession, from the former owner, a member of the family through which the Plaintiff claimed.

As to the immoveables in Lucknow, they having been included in the confiscation, which, having followed the capture of the town in 1858, was subsequently abandoned without any intention on the part of Government to make a regrant in favor of any person the result in regard to the present question was the same as if no such event had occurred.

The other property, (*b*), came under the general confiscation of Oudh lands in 1858, and also was restored through subsequent settlement operations in which the final order, relating to the land in question, was to the effect that settlement should be made with the "heirs" of the previous owner.

Held, that the above did not preclude the defence of exclusive title by gift; the order last mentioned, on its true construction, only designating all those who might take under and through the previous owner, (deceased at the time of settlement), without excluding any claimant, save those who might claim adversely to such title. The Government did not, in the settlement which followed the confiscation, make any arbitrary, or wholly new re-distribution of estates, or proceed as if the existence of previous titles (although they had been brought to an end), was to go for nothing. The enquiry in most cases was as to who would have been entitled, had there been no confiscation. As to both classes of property the gift was maintained. [*Mirza Jehan Kadr* v. *Nawab Badshoo Bahoo*,] 630

CONSENT OF PARTIES TO JURISDICTION, EFFECT OF.

See JURISDICTION.

CONSTRUCTION.

1 *Construction of agreement as to duration —Effect of recital in a document in regard to control over operative words.*

The parties during several years had transactions consisting of the deliveries of produce by the defendants to the plaintiffs' agent, under advances, upon separate contracts, specifying prices, and of consignments by the defendants through the plaintiffs. A "purchase account" and an "interest account," kept between them, resulted in a "general account;" and in 1872 a large sum was due thereon to the plaintiffs, to whom, in 1873, the defendants sent letters mortgaging property with instruments of title accompanying.

In the beginning of 1874 the parties entered into a written agreement which described the balance due in respect of previous advances as the "block account," comprising also an "interest account," and the transactions proceeded. The intention was shewn that the advances should be liquidated "by returns," but the only date mentioned from which an inference could be drawn as to the intended duration of the arrangement between the parties was the 30th June 1875.

In this suit, brought in December 1875, it was contended that the right construction of the agreement of 1874 required that it should continue to subsist (unless rescinded either by mutual agreement, or on breach of its stipulations by one party justifying its rescission by the other) until the liquidation of the balance by returns; at all events, as regarded the "block account."

In order to the working of an agreement for a liquidation in such a way, it would have been necessary to imply obligations, for which no express provision had been made; nothing, for instance, having been fixed as to the extent, or duration, of the business, or as to the rates at which produce as to be offered or accepted.

Held, that such provisions could not now be supplied, and that the stipulations as to the "block account" were binding only during the continuance of the arrangement for the conduct of the business by the parties, such arrangement being terminable at will, after the 30th June 1875.

The letters of 1873, and the documents of title deposited with them, were held to constitute a security for the general balance due from the defendants to the plaintiffs, and not only a security for advances on certain of the contracts referred to in a paragraph in the nature of a recital; for the latter was not necessarily repugnant to the wider construction, and the operative words were wide enough to apply to all the transactions between the parties.

The construction of an ambiguous stipulation in a written agreement may be governed or qualified by a recital; but, if the intention is clearly to be collected from the operative words, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital [*Pallikelagatha Marcar* v. *John Gothfried Sigh*,] 131

2 *Civil Procedure Code (Act VIII of 1859), s. 259—Certificate of Sale—Mesne Profits.*

The possession, with mesne profits, of land comprised in a *zur-i peshgi* lease of the year 1851, was decreed to the *zur-i peshgidars* in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favor of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the *zur-i peshgidars*; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

Held, (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by sale, but remained in the representatives. [*Ganeshee Lal Tewari* v. *Shamnarain*,] 161

3 *Construction of Pottah—Mokurari Ijara—Absence of Words of Inheritance.*

The word 'mokurari' does not necessarily import perpetuity, although it may do so. Used in connection with the grant of an *ijara* in a *pottah*, this word is not inconsistent with such interest being only for life.

By a *pottah* was granted a *mocurari ijara* at a fixed rent in a mouzah, consisting mainly of waste lands, part of the grantor's zemindari, without words of inheritance. On the death of the grantee, who brought the land under cultivation and died in possession many years after, the question arose whether the pottah was for life, or for heritable and transferable estate.

Held, that there being in the *pottah* no words importing perpetuity, notwithstanding the use of the word '*mocurari*, the question was whethere the intention of the parties that the grant should be perpetual, was; shown with sufficient certainty in any other way *e.g*, by the other terms of the instrument, its objects, the circumstances under which it was made, or the conduct of the parties to it. *Held* also, that such intention was not shown. [*Bilasmoni Dasi* v. *Sheopersad Singh*,] 325

4 *Pre-emption of village lands—Construction of wajib ul arz.*

The *wajib ul arz* of a village, divided into three *thoks* and comprising also undivided land, contained a clause giving the right of pre-emption to such brothers and nephews of the vendor as were sharers, "and in case of their refusal to the other owners of the *thok*:" *held*, that under this clause, an owner of one of the three *thoks* having sold all his interest in the village, no right of pre-emption attached to the ownership of another of the *thoks*. [*Lachho* v *Maya Ram*,]... 405

5 *Construction—"Istimrari mokurrari"—Bafarzandan—Naslan bad naslan—Conveyance of Hereditary Right.*

The words "istimrari mokurrari" in a *pottah* do not *per se* import an estate of inheritance.

But the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, may shew the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual.

The words "ba farzandan" or "naslan bad naslan" are not essential to convey an hereditary right. [*Toolshi Pershad Singh* v. *Rajah Ram Narain Singh*,] 646

6 *Construction of s 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879.*

A Court that has decided a suit over which it had jurisdiction, cannot only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally, or with material irregularity, within the meaning of s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879 [*Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*,] 559

See EVIDENCE 5.
— EXECUTION 1.
— GRANT.
— GUARANTEE.
— KABULYAT.
— MESNE PROFIT.
— MORTGAGE 5, 6.
— ORDER.
— PENALTY.
— POWER OF ATTORNEY.
— SALE FOR ARREARS OF RENT 2.
— SPECIFIC PERFORMANCE.
— WILL 1, 2, 3.
— H. L. CUSTOM.
— H. L. GIFT 1, 2.
— H. L. WILL 1, 2, 3.
— M. L. COMPROMISE.
— M. L. WILL 1, 2.

CONSTRUCTION OF GIFT.

See H. L. CUSTOM.
— H. L. GIFT 1.

CONTEMPT OF COURT.

Contempt of Court—Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—Defamation—Criminal Procedure Code X of 1882,) s. 5—Power of Courts of Record under common Law—Jurisdiction of High Court to punish summarily.

The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in the superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency Towns.

The Indian Penal Code does not provide against a contempt of Court Committed by the publication of a libel out of Court, when the Court is not sitting, and neither in chapter XXI. "of Defamation," nor elsewhere provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both.

The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the

Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character.

The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882.

By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. [*Surendranath Banerjea* v. *The Judges of the High Court*,] 474

CONTRACT.

Contract, Breach of—Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.

Under five contracts for the sale of good *Burma* cutch, to be delivered to a *Calcutta* firm, in *Calcutta*, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers.

The latter having sent advices of the purchase to a *New York* firm, with which they were in partnership, parcels of cutch were sold to different buyers in *America*, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the *Calcutta* firm.

On the arrival of the cutch, objection was taken to its quality by the *American* buyers, who refused to take delivery. The *Calcutta* firm, thereupon, sued the vendors under the five contracts above mentioned.

The burden of proof being upon the Plaintiffs, who had accepted the cutch after full examination in *Calcutta*, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held* that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the Plaintiffs, on the voyage from *India* to *America*, and at the port of arrival. [*Gan Kim Swee* v. *Ralli*,] 722

See DISQUALIFIED PROPRIETOR.
— GUARANTEE.
— KABULIYAT.
— LEX LOCI CONTRACTORS.
— REMAND.

CONTRACT AS TO RENT OF NEW CHUR.

See KABULIYAT.

CONVEYANCY OF HERIDITARY RIGHT.

See CONSTRUCTION 5.

CO-PARCENARS.

See EXECUTION SALE 4.
— MESNE PROFITS 2.
— H. L. ANCESTRAL PROPERTY 1, 2.

CO-SHARER.

See GUARDIAN AND WARD.
— LIMITATION 21.
— MESNE PROFITS 2.
— PURCHASER.

CO-SHARER IS NO GUARDIAN FOR THE PURPOSE OF BINDING THE MINOR CO-SHARER BY EXECUTION OF A BOND CHARGING THE ESTATE.

See GUARDIAN AND WARD.

COSTS.

Costs—Set-off of cost ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal.

It is not the usual practice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later.

Although an Appellant only party succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs [*Radha Pershad Singh* v. *Ram Purmeswar Singh*,] 421

See MESNE PROFITS 1.
— PRINCIPAL AND AGENT 1.
— RES JUDICATA 5.
— WILL 2.

COSTS OF INSERTING IRRELEVANT MATTERS.
See RESJUDICATA 5.

COURT COMPETENT.
See RES-JUDICATA 2.

COURTS OF RECORD, POWER OF.
See CONTEMPT OF COURT.

COURT OF WARDS.
See DISQUALIFIED PROPRIETOR.
— LUNATIC.

CREDITOR.
See PROBATE.

CROSS APPEAL.
See ACCOUNT.
— RES JUDICATA 6.

CROSS DECREES.
See CIVIL PROCEDURE CODE 3.

CUSTOM.
Trade Custom of Beawar—Payments made by 'Arathdars.'

By a custom of Beawar, a merchant coming there from another district is allowed to trade, only in the name and on the credit of some local *arath*, or banking firm, which guarantees his dealings, and to which, on the conclusion of transactions, a '*panri*,' or memorandum thereof is sent by the stranger merchant.

C. coming to Beawar, made several purchases in accordance with the above custom, using the firm of *S* and *M* as his *arath*. On leaving Beawar, he sent *S* and *M* a *panri*, in which all his purchases, except the last and largest, under which he had taken no delivery and had made no payment, were entered.

On application by the vendors in the last transaction to *S* and *M* as guarantors of *C* to make good the purchase-money, they at first refused on the ground that the transaction was not entered in the *panri* sent them, but afterwards they consented to pay the vendors the amount of the loss occasioned by *C's* failure to pay and take delivery.

In a suit by *S* and *M* against *C* to recover the amount so paid—

Held, that if the plaintiffs were cognizant of, and allowed their name to be used in, the last transaction, as was shown to have been the case in previous transactions, they were, according to the custom, liable to the vendors, and consequently entitled to recover over from the defendant what they had paid: and that, even if there was no actual authority given at the time of the transaction, still, as the defendant had used the name of the plaintiffs as his guarantors, and had held them out as liable to pay on his behalf for the goods he purchased, they were thereby authorized, if they thought fit, to make the subsequent payment which they did on behalf of the defendant, or (in other words), to ratify the use which the defendant had made of their name, and were not deprived of their right to do so by their having for a time repudiated liability. [*Sameer Mull* v. *Chogalall*,] 79

See DESCHAT WATAN.
— EVIDENCE 1, 5.
— GRANT.
— PRACTICE 4.
— PRIMOGENITURE 2.
— H. L. CUSTOM.
— H. L. IMPARTIBLE ESTATE.
— H. L. MOHUNT.

CUSTOM NOT ALLOWING ADOPTION GOVERNING A FAMILY NOT SUBJECT TO HINDU LAW.
See H. L. CUSTOM.

DARMAKURARI INTEREST, SURRENDER OF, HOW PROVED.
See SALE FOR ARREARS OF REVENUES.

DAUGHTER.
See H. L. CARNATIC.

DEATH BEFORE FINAL DECREE.
See H. L. PARTITION.

DEWUTTUR LAND ALIENATION OF.
See NON-JOINDER OF PARTY.

DEBT.

See H. L. ANCESTRAL PROPERTY 1.
— H. L. MITAKSHARA 1.
— H. L. SALE BY WIDOW.

DECLARATORY DECREE.

Declaratory decree, Suit for—Civil Procedure Code (Act VIII of 1859), s. 15—Hindu widow's control over savings of her limited estate.

A suit brought during the life of a Hindu widow by the presumptive heir, entitle on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life, is among the exceptions to the general rule established by decision upon Act VIII of 1859, s. 15, *viz.*, that, except in certain cases, a declaratory decree is not to be made unless the plaintiff shows a title to, though he does not ask for, consequential relief.

Held, that although to grant a declaratory decree under the above section, was discretionary with a Court, yet in a suit of this class, known to the law, and in many cases the only practical mode of enforcing the presumptive heir's right to interfere with the widow's alienation, the grounds for the discretionary refusal of the decree should be strong. In this case, the difficulty of the question raised, and the expense of the litigation, which had been referred to as grounds for refusing it, were insufficient reasons.

A widow's savings from the income of her limited estate are not her *stridhun*; and if she has made no attempt to dispose of them in her life-time, there is no dispute but that they follow the estate from which they arose. But it is not always possible to fix the line which separates accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. Where, however, both the family property, and property purchased by the widow out of savings from her income, were alienated by her, with the object of changing the succession, *held*, that accretion was clearly established, and that the after-purchases were inalienable by her for any purpose that would not justify alienation of the original estate.

A daughter, obtaining a transfer from her deceased father's widows of their interests in his estate, does not acquire thereby an estate valid against the title of the father's collateral heirs, expectant on the deaths of the widows. [*Isri Dut* v. *Hansbutti*] 459

See H. L. PARTITION.

DECREE.

See APPELLATE COURT.
— CIVIL PROCEDURE CODE 3.
— DECLARATORY DECREE.
— MORTGAGE 7.
— ORDER.
— PENALTY.
— PRINCIPAL AND AGENT 1.

DECREE, FINAL.

See H. L. PARTITION.

DECREE FOR ACCOUNT OBJECT OF.

See PRINCIPAL AND AGENT 1.

DECREE, IN APPEAL, TO BE CONFINED TO RIGHTS IN ISSUE BETWEEN PARTIES.

See APPELLATE COURT.

DECREE MADE UPON A REGISTERED OBLIGATION.

See LIMITATION 14.

DEDICATION.

See H. L. CHARITABLE TRUST.

DEFAMATION.

See CONTEMPT OF COURT.

DESGHAT WATAN.

Desghat watan held by desai—Presumption as to partibility—Custom—Burden of proof.

In a suit for the partition of part of a *desghat watan*, brought by the younger brothers of a joint Hindu family against their eldest brother, the *desai*, the defence was that the *watan* was held by him as an impartible inheritance, subject to a right, by custom, that a brother should receive maintenance out of the income derived from it.

Held, that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the *desai*, to show that the *watan* had, contrary to the general Hindu law, been inherited by him alone.

It was for the *desai* to show, by evidence of the nature of the tenure of the *watan*, that it was impartible, or to show, by evidence of family custom, or of district, *i. e.*, local, custom, that impartibility attached to it, such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu law.

Where the defendant in a suit for the partition of a *desghat watan* held the hereditary office of *desai*, and the *watan* was property appertaining to the office, the decree for partition was accompanied by a declaration that it was made without prejudice to the right of the *desai* to any income, payable out of it, for the performance of his duties, to which he might be entitled under any law in force. [*Adrishappa Bin Gadgiappa* v. *Gurushidappa Bin Gadgiappa*,] ... 154

DEVISE OF TALOOK.

See WILL 3.

DEWUTTER LANDS.

See NON-JOINDER OF PARTIES.

DILUVION.

See REFORMATION OF LANDS.

DISPOSITION OF ESTATE AMONG CO-SHARERS.

See M. L. WILL 3.

DISPOSITION OF PROFITS ONLY FOR AN INDEFINITE PERIOD, VOID.

See H. L. WILL 3.

DOWER.

See M. L. GIFT 1.

DISQUALIFIED PROPRIETOR.

Regulation LII. of 1803—*Court of Wards—Incompetency of disqualified proprietor to contract.*

Under s. 7 of Regulation LII of 1803, *lakharaj* lands belonging to a disqualified proprietor may be committed by the Government, (on its appearing that this will be for its interests and those of such proprietor), to the charge of the Court of Wards; and, thereupon, the whole estate and effects, real and personal, of such proprietor, become vested in that Court.

An estate consisting of *lakharaj* lands was duly placed under the management of the Court of Wards, the proprietress, a Mohammedan, being disqualified under the Regulation. This ward having then become a party to a mortgage of such lands to secure repayment of money advanced to her, it was *held*: that she neither bound herself nor charged the estate.

This case distinguished from *Mohummud Zahoor Ali Khan* v. *Taukooranee Ratta Koer* (1), where the proprietress, no intention to treat her as disqualified having been shown, was adjudged capable of contracting, though the Court of Wards was in possession of her estate.

On the facts of this case it was also *held*: that, although the Court had given to this ward an authority, under certain limitations of which the plaintiff had notice, to borrow money for a special purpose, there had not been such a holding out to the world of her competency as would have induced any reasonable person to suppose that she had power to make the contract on which this suit was brought. [*Balkrishna* v. *Masuma*,] 398

See LUNATIC.

EASEMENT.

See LIMITATION 7.
— RIGHT OF WAY.

EMANCIPATED SLAVE.

See M. L. EMANCIPATED SLAVE.

ENCROACHMENT.

See REPARIAN PROPRIETORS.

ENDOWMENT.

See H. L. ENDOWMENT.

ESTATE LIMITATED TO TAKE EFFECT IN FAVOUR OF A PERSON AFTER ANOTHER'S DEATH.

See M. L. COMPROMISE.

EQUITY AND GOOD CONSCIENCE.

See FRAUD UPON CREDITORS.

ESTOPPEL.

Estoppel—Plea.

A *dur-putnidar* defended a suit for rent brought by his *putnidar* (who was also zemindar) on the plea that he had parted with his *dur-putni* interest to his wife and son, who were accordingly sued, and their *dur-putni* interest sold in execution to the zemindar.

In a suit by the zemindar, suing as *dur-putnidar*, against his tenant, the Appellant intervened and claimed title to the *dur-putni* under a mortgage from the former Defendant (made subsequent to the dismissal of the former suit). He alleged that the wife and son were merely *benamidars* and that he had completed his title by a purchase in execution of a decree obtained on his mortgage :—

Held, that the Appellant, who admittedly would have been estopped as mortgagee by the plea of his mortgagor from setting up his present claim, was in no better position by reason of his purchase in execution. [*Poreshnath Mookerjee* v. *Anathnath Deb*,] 384

See LIMITATION 14.
— RES-JUDICATA 5.

EVIDENCE.

1 *Proof of Custom—Indian Evidence Act (I. of 1872), ss. 35 and 48—Reg. VII. of 1822—Admissibility of Village Wajib-ul-arz.*

Held, on the question whether there did or did not exist a custom in the Bahrulia clan in Oudh excluding daughters from inheriting, that the *Wajib-ul-arz* of a mouza in the Talook, stating the custom of the Bahrulia clan as to inheritance, had been properly received in evidence under s. 35 of the Indian Evidence Act, 1872. Further, that this custom was a usage of the kind which Reg. VII of 1822 required officers to ascertain and record: and that it was no valid objection that this *wajib-ul-arz* had been prepared and attested by officers subordinate to the Settlement Officer.

Semble.—That had it been the case that these papers were not to be treated as records describing a custom, but as recording only the opinions of those likely to know it, the 48th section of the Act would have made them admissible. [*Ranee Lekraj Kuar* v. *Baboo Mahpal Singh*,] 93

2 *Evidence—Secondary Evidence of Contents of Document.*

By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original. [*Bhubaneswari Debee* v. *Harisaran Surma*.] 206

3 *Proof of Document—Secondary evidence.*

The proprietary right in a talooka was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserved part. Afterwards assignments on both sides took place, and the plaintiff, claiming through the vendor, sued the defendants, who derived title from the vendee, to enforce this liability. The plaintiff alleged, but did not produce, an *ikrar-nama* admitting this agreement between the original parties to the sale. The only proof adduced was a judgment in a suit in which this agreement had been held established. The plaintiff's case failed, as it has not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession.

In the suit in which that judgment was given, the *ikrar nama* not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal, inspection of the document having been offered to, and declined by the Appellate Court, secondary evidence was admitted.

On this appeal, the error was pointed out of allowing the plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document. [*Hira Lall* v. *Ganesh Pershad*,] ... 342

4 *Evidence Act. I of 1872, s. 32, sub-s. 5—Statement as to the existence of relationship—Special means of knowledge.*

The judgment of an Appellate Court, reversing that of a Court of first instance, on a question as to the existence of relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person since deceased, who was employed therein as *mukhtar* by certain members of the family. This judgment was reversed on a second appeal by the Court above on the ground that the statement was inadmissible, not coming within the meaning of Act I of 1872. s 32, sub-s. 5, as that of a person having special means of knowledge on the question.

Held, that the statement was inadmissible as it appeared that his only means of knowledge were from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns.

Held, also, that the Court of second appeal had rightly declined to send the case back for evidence to be taken as to whether he had, or had not, other means of knowledge. [*Sangram Singh* v. *Rajan Bai*,] ... 676

5 *Custom, Evidence as to—Wajib ul-araiz—Concurrent findings of Courts below—Construction of a razinama disposing of estate with words "naslan bad naslan."*

A custom of inheritance was alleged to prevail in an Oudh clan that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without regard to their degrees in kinship to the deceased. This custom was found not proved by the Original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul-arais*.

If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it could be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done.

In cases decided on the construction of documents, in which the expressions *mokurari*, *istemrari*, *istemrari mokurari*, have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words "*naslan bad naslan*" had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a *razinama* between parties dividing family estate, and expressly declaring that the shares should descend "*naslan-bad naslan*," *held*, that the insertion of these words was conclusive in itself; the expressed objects of this *razinama* pointing to the same construction, *viz.*, that the estate taken under it was absolute. [*Baksh Harihar* v. *Uman Pershad*,] 766

See APPEAL 2.
— ARBITRATION 1, 2.
— EXECUTION PROCEEDINGS 2.
— GRANT.
— LIMITATION 4.
— PRACTICE 3.
— STHANAM LANDS.

EXCLUSION FROM JOINT PROPERTY.

See LIMITATION 18.

EXCLUSION OF WIDOW FROM SUCCESSION TO JOINT ESTATE.

See H. L. RAJ.

EXECUTION OF DECREE.

See APPEALABLE ORDER.
— JURISDICTION 2.
— LIMITATION 8.
— MESNE PROFITS 1.

EXECUTION ON THE APPLICATION OF ONE OF SEVERAL DECREE HOLDERS.

See PRACTICE 2.

EXECUTION OF DECREES ON MORTGAGES OF SAME PROPERTY.

See MORTGAGE 3.

EXECUTION PROCEEDINGS.

1 *Execution proceedings,—Joint family—Hindu Law.*

When a member of a joint Hindu family makes a purchase of an immoveable property, the presumption would be that the purchase was made on account of the joint family.

The Substance of the decree is to be looked to in determining the question as to whether it was in respect of a Joint debt of the family and against the representative of the family, and as such could be properly executed against the joint family property.

Execution proceedings are not to be set aside upon mere technical grounds when they are substantially right. [*Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*,] 76

2 *Execution Proceedings—Prior adjudication—Conclusive Evidence.*

Where questions as to the rate of interest payable under a decree and the period therefore, have been adjudicated between the parties in the course of prior execution proceedings, and such decision has become final, the same question could not be reopened at a later stage of execution in the same or any superior court. [*Bani Ram* v. *Nanhu Mal*,] 564

See ORDER.

EXECUTION PROCEEDINGS, NOT TO BE SET ASIDE ON MERE TECHNICAL GROUNDS.

See EXECUTION PROCEEDINGS 1.

EXECUTION SALE.

1 *Sale in Execution of the "right, title, and interest" of a Judgment-Debtor in a partly executed Decree—Possession of land attached under Reg. V of* 1805, *s.* 26.—*Right of Purchaser.*

A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a talook, which had been since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Reg. V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Amin purporting to put the decree-holders into constructive possession of a certain number of mouzas of the talook.

In 1850, the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, "their right, title, and interest" in the decree of 1843. *Held*, that possession of the mouzah having been delivered, so far as it could be delivered, considering the attachment to which the talook containing these mouzas was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution-sale was only the unexecuted portion of the decree of 1843. [*Grishchunder Chuckerbutty* v. *Jibaneswari Debia*,] 170

2 *Test of what passes under execution-sale of Hindu widow's estate.*

Although a Hindu widow has, for some purposes, only a partial or qualified right, title, and interest in the estate which was her husband's, yet for other purposes she represents as absolute interest therein.

The question, whether on the sale of the right, title, and interest of the widow in execution of a decree, the whole interest, or inheritance in the family estate does, or does not, pass, depends on the nature of the suit in which the execution of the decree takes place. If the suit is a personal claim against the widow, then merely the widow's limited estate is sold.

If, on the other hand, the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution sale. The judgment which the decree has followed, may be examined in order to determine which of these two results attends the execution sale of the widow's right, title, and interest.

The principal in *Baijun Doobey* v. *Brij Bhookun Lall Awasti* (1) referred to and applied. [*Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore*,] 553

3 *Equitable grounds of setting aside sale in execution.*

Where a sale in execution took place under an order obtained notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for a postponement, the petition, so consented to, having been, by mistake, afterwards presented to, and filed by the judgment-debtor in the wrong Court; *held*, that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby. [*Gungaprshad Sahu* v. *Gopal Singh*,] 573

4 *Mitakshara and Mithila Law—Execution Sale—Rights of Coparceners—Joint Family Debt.*

In an execution sale it appeared that the debt was a joint family debt incurred by *G.*, the head of a joint Mithila family, and that the property sold was the share of the whole family in a certain mouzah:—

Held, that *Deendyal's Case* (1) did not bind the Court to hold that nothing but *G's* coparcenery interest passed to the purchasers.

What passes by such a sale depends upon the nature of the debt (*e. g.*, whether or not it is tainted with immorality) and the intention of the parties. The other coparceners not being parties to the sale or the execution proceedings, are entitled to try the fact of the nature of the debt in a suit of their own. The purchaser, if he has bought the entirety, may defend his title on any ground which would have justified the sale. [*Nanomi Babuasin* v. *Modun Mohun*,] 682

See ESTOPPEL
— II, L. ANCESTRAL PROPERTY 1.

FATHER ADOPTIVE.

See II. L. ADOPTION 1.

FATHER'S DEBTS.

See II. L. ANCESTRAL PROPERTY 1.
— II. L. MITAKSHARA 1.

FATHER NATURAL.

See H. L. ADOPTION.

FATHER'S DEBTS, CHARGE ON INHERITANCE IN POSSESSION OF SON.

See H. L. MITAKSHARA 1.

FORECLOSURE.

Foreclosure of Mortgage—Regulation XVII of 1806, s. 8—Service of copy of petition and of parwana, in the manner provided, essential.

The provisions of s. 8 of Regulation XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. *Norendro Narain Singh* v. *Dwarka Lall Mundur.* (1) referred to and followed.

Held, that although the mortgagor at the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy petition for foreclosure, and of the parwana signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal. [*Madho Parshad* v. *Gajadhar*,] 574

FORFEITURE.

See LIMITATION 10.

FRAUD.

See H. L. ADOPTION 7.

FRAUD UPON CREDITORS.

Statute 13 Eliz. c. 5—Fraud upon creditors—Hibba—Equity and good conscience.

Whether or not the Statute 13 Eliz c. 5 (1) (which may or may not extend to or operate in the "mofussil") is more than declaratory of the common law, so far as it avoids transactions intended to fraud creditors, its principles, and those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Courts, and have properly guided the decisions of the Courts in administering law according to justice, equity and good conscience.

A *hibba* having been found on the evidence to have been made not *bona fide*, nor on any good consideration, and by it creditors being delayed in their just rights, the maker having intended to protect his property thereby from those who at the time were his creditors;—*Held*, that the *hibba* was void according to equity and good conscience. [*Abdool Hye* v. *Mir Mohamed Mozuffer Hossein*,] 500

GHATWALI TENURE, NOT CHARGED BY PERMANENT SETTLEMENT OF THE ZEMINDARY.

See JAGHIR.

GIFT.

Gift—Condition subsequent—Void condition.

To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached.

Where a gift completed by transfer rested on a valid consideration at the time when it was made: *Held*, that even assuming that a condition could be afterwards imported into the transaction, and that condition an immoral one, this would not invalidate the gift, the general rule of law being that a gift to which such a condition is attached remains a good gift while the condition is void.

A gift of villages was complete, being followed by transfer of possession. Afterwards, in a petition to the Collector for "*dakhil kharij*" between the parties, the donor, stating the gift, added that it was on certain conditions. *Held*, that the petition must be treated as ineffective for the purpose of adding any condition. [*Ram Sarup* v. *Bela*,] 493

See GRANT.
— H. L. CUSTOM.
— H. L. GIFT.
— H. L. WILL 2.
— M. L. GIFT 1.

GIFT BY OWNER PREVIOUS TO CONFISCATION, EFFECT OF.

See CONFISCATION.

GIFT IN EFFECTUAL SO FAR AS IT DEPARTS FROM THE LAW OF INHERITANCE.

See H. L. WILL 2.

GIFT OVER OF ACCRUED SHARE.

See H. L. WILL 2.

GIFT TO ONE AS DONER'S ADOPTED SON, THE ADOPTION FAILING, INVALID.

See H. L. CUSTOM.

GIFT, PARTIAL FAILURE OF, NOT INVALIDATING THE WHOLE.

See H. L. GIFT.

GIFT WHEN OPERATIVE WITHOUT DELIVERY OF PROFESSION.

See H. L. GIFT 2.

GOVERNMENT SECURITY.

Government Securities—Deposit—Annuity—Conversion—Liability for deficit income.

When Government securities deposited in court for meeting certain annuities are converted to a lower rate of interest by the act of the Government and the court independently of the parties, the depositor is nevertheless bound to make good the deficit in the income thus caused to the annuitants. [*Rajah Sutteeshchunder Roy* v. *Samasoondry Debia*,] 777

GOTRAJA SAPINDA.

See H. L. INHERITANCE 1.

GRANT.

Grant—Construction of gift—Resumption—Tribal custom—Evidence of Intention.

In view of the circumstances under which an oral lease of villages at a favourable rate of rent, and of indefinite duration, was made by the proprietor, a talukdar, in favour of her daughter, it was *held* not to be a lease for life, but to be resumable at the lessor's pleasure.

The parties belonged to a tribe, (*Abhan*) appearing to be Mahomedan, but in regard to inheritance and maintenance, having customs of its own, which permitted the resumption.

There was no evidence of the lessor's intention contemporaneous with the making of the lease; but her will executed within two years after and made known to the Government to show the future succession to the taluk, contained a bequest of the same villages to the lessee, with express reservation of power to alter this disposition. *Held*, that this was evidence bearing on the question of intention. [*Najban Bibi* v. *Chand Bibi*,] 472

GUARANTEE.

Guarantee, Contract of—Construction of contract guaranteeing conduct of person employed as agent of the guarantor—Liability for loss resulting from such agent's misconduct towards his employer.

Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, *Held*, that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khazanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, appointed as his agent. The latter became a party to frauds by putting off upon the public forged stamps, in addition to the genuine ones issued from the Treasury, into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued, made the proceeds appear to correspond in his accounts with the value of the stamps issued to him; but, under cover of the above payment, he misappropriated certain genuine stamps.

Held, that although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps, and the false accounts rendered; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting. [*Sri Kishen* v. *The Secretary of State*,] ... 659

GUARDIAN AT LITEM.

See "GUARDIAN" & "WARD."

GUARDIAN AND WARD.

Act XL. of 1858—*Guardian and Ward—Minors—Relation of Manager of Joint Estate to Co-sharers under Age—Effect of Separation in Estate.*

A co-sharer in ancestral family estate, under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the estate, is not, in consequence, the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate: nor is the eldest male member of the family, being of full age, guardian of such minors for the purpose of defending suits brought against them for money advanced in respect of the estate, unless he has obtained a certificate of administration under Act XL. of 1858, s. 3. That Act shows that he is not guardian of the minors; the care of whose persons and property (unless taken under the protection of the Court of Wards, by s. 2) are subject to the jurisdiction of the Civil Courts.

A family having become separate in estate with apportionment of a debt, once joint, among its several members, the sons of one of the latter, on their father's decease, are not liable for the whole debt for which he, at one time, was responsible jointly with the rest of the family, but only for his portion of the debt. [*Doorga Persad* v. *Keshо Persad Singh*,] 332

See "MINOR."

GUARDIAN, POWER OF

See "MINOR."

HAWLADARI TENURE.

See "KABULIYAT."

HEIRS.

See H. L. "ZEMINDARI."

HIBBA.

See "FRAUD UPON CREDITORS."

HIGH COURT.

Superintendence of the High Court—24 and 25 Vic., c. 104, s. 15—Execution of decrees for rent—Act X of 1859, *ss.* 23, 77 *and* 160 *—Civil Procedure Code (Act VIII of* 1859) ss. 284, 294—(*Act X of* 1877); *ss.* 223, 228.

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic, c. 104, s. 15 Decrees for rent made by the Collector under s 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."—[*Rajah Nilmoni Singh* v. *Taranath Mookerjee*.] ... 392

HIGH COURT JURISDICTION OF, TO PUNISH SUMMARILY.

See "CONTEMPT OF COURT."

HINDU LAW.

See PART II.

HINDU WIDOWS ESTATE.

See DECLARATORY DECREE.

— EXECUTION SALE 2.

— MAGISTRATE'S PROCEEDING.

HINDU WIDOW.

See LIMITATION 2.

— H. L. WIDOW.

— IDOL, PROPERTY PURCHASED IN THE NAME OF.

HINDU WIDOW, SAVINGS OF.

See DECLARATORY DECREE.

HYPOTHECATION OF LANDS UNDER MANAGEMENT.

See ACT XXIV OF 1870.

— CANCELLATION OF INSTRUMENTS.

IJARA MOKARARI.

See CONSTRUCTION 3.

IMPARTIBLE ESTATE.

See PRIMOGENITIVE 2.
— H. L. CARNATIC.
— H. L. IMPARTIBLE ESTATE
— H. L. RAJ.

INAMS.

Madras Regulation XXV. of 1802, *sect.* 3 —*Inams—Presumption.*

Madras Regulation XXV. of 1802, sect. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zemindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription.

Where inamdars had received a grant in perpetuity of certain lands in 1811, and in 1863 had received a regrant thereof from the Appellant's predecessor on terms less favourable to themselves, *held*, that the Appellant had no power after the death of the last mentioned grantor to determine their tenancies by notices to quit. [*Maharajah of Vizianagram* v. *Pidaperti Surianarayana*,] 696

INCUMBRANCES, CREATED AFTER ATTACHMENT.

See SALE PRIVATE.

INCUMBRANCES, LIABILITY TO.

See SALE FOR ARREARS OF REVENUE.

INFRINGEMENT PARTICULARS OF, REQUIRED BY ACT XV OF 1859 S. 34.

See JURISDICTION 3.

INHERITANCE.

See H. L. ADOPTION SON.
— H. L. ANCESTRAL PROPERTY 3.
— H. L. CARNATIC.
— H. L. CHARITABLE TRUST.
— H. L. INHERITANCE 1, 2.
— H. L. MITAKSHARA 1.

INQUIRY INTO TITLE OF ALLEGED OWNERS OF SHARE SOLD.

See SALE FOR ARREARS OF REVENUE.

IRREGULARITY OF PUBLICATION OF NOTICE OF SALE.

See SALE IN EXECUTION OF DECREE.

INSOLVENCY.

Stat. 11 *and* 12, *Vic.*, *Cap.* 21, *s.* 24—*Insolvency—Voluntary transfer by insolvent.*

A firm, trading in *Calcutta*, having been there adjudicated insolvent, the transfer of a debt, transferred by one of its Branches, located in *Lucknow*, was held upon the evidence to have been a voluntary assignment, void under s. 24 of the Statute 11 and 12, Vic., Cap. 21, as against the official assignee.

A draft, dated of the day on which, at night, the insolvent firm stopped payment in *Calcutta*, adjudication having followed on the 2nd day after, purported to have been drawn by a debtor owing money to the *Lucknow* Branch under its assignment in favor of the defendant to the amount of such debt. The latter received the money. *Held* that under all the circumstances it was not necessary to decide whether the transfer was made on the date which the draft purported to bear, the conclusion, upon all the facts, being that the debt had been transferred "voluntarily" within the meaning of s. 24. [*Miller* v. *Skeo Pershad*,] 430

INSOLVENT, VOLUNTARY TRANSFER BY.

See INSOLVENCY.

INTEREST.

Interpretation of order—Interest—Legal rate —Compound interest.

Held, upon the construction of the words "the Plaintiff is to have judgment with interest at the full legal rate," in Her Majesty's previous order, that it was intended to award simple interest at 12 per cent. from the date of suit till realization.

The order did not authorise the Plaintiff in execution of his decree to make a rest at the date of the first Court's decree and calculate interest from that date upon the consolidated amount of principal interest and costs. [*Gopee Kissen Gossamee* v. *Brindaban Chunder Sircar*,] 809

See LIMITATION 16.
— MESNE PROFITS 1.
— MINOR
— PENALTY.
— REMAND.

INTERLOCUTORY ORDERS IN EXECUTION, LEAVE TO APPEAL FROM, TO PRIVY COUNCIL, GRANTED.

See APPEAL 3.

ISSUES, DECREES TO BE CONFINED TO.

See APPELLATE COURT.

ISTEMRARDAR.

Claim by istemrardar to resume a subordinate tenure.

A custom was alleged, entitling a Patwi Thakur, or Chief, belonging to the Rathor Clan of Rajputs, who was the istemrardar of an ancient and impartible talook in Ajmere, to resume land formerly part of it but granted some generations back, as a subordinate estate, to a collateral relation of the chief. The ground of the resumption claim was that the last successor to the estate so granted had died without issue and without adopting. *Held*, that the Commissioner's judgment, which was that a right of resumption, exerciseable merely on the above ground, had not been established, was correct; being supported, to some extent certainly, by answers received by the Chief Commissioner on inquiry from the neighbouring durbars of Rajputana Chiefs; and, on the whole, by the balance of evidence. [*Rao Bahadur Singh*, v. *Jawahir Kuar*,] 540

ISTEMRARI MOKURARI.

See CONSTRUCTION 5.

IZUFUTI TITLE.

See KHOTI TENURE.

JAGHIR.

Jaghir—Inclusion of Jaghir Lands in Area of Settled Zemindari—Ghatwali Tenure—Reg. XXIX. of 1814.

In the area of a zemindari were included at the Permanent Settlement the mauzahs which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zemindari assets on which the jama of the latter was fixed.

Held, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX. of 1814 (1), (the zemindari being *Pachete*, adjoining, and at one time included in, *Birbhum*,) the jaghir was analogous to such tenure as described in the preamble to Regulation.

Held also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained as before, public services, and continued to be due to the Government. That the zemindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahomedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of the jaghir mehal upon the death of the holder, and alienation during his life.

It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar so approved, as assets by descent in the possession of the latter. [*Rajah Nilmoni Singh* v. *Bakranath Singh*,] 335

JOINDER OF PARTIES.

See MORTGAGE 7.

JOINT FAMILY.

See EXECUTION PROCEEDINGS 1.
— EXECUTION SALE 4.
— LIMITATION 21.
— MESNE PROFITS 2.
— H. L. JOINT FAMILY 1, 2.

JOINT FAMILY, CO PROPRIETOR WITH.

See LIMITATION 21.

JOINT FAMILY DEBT.

See EXECUTION SALE 4.

JOINT FAMILY PROPERTY.

See PURCHASER.

JOINT OWNERS.

See H. L. MITAKSHARA 1.

JUDICIAL OFFICER.

See PUBLIC SERVANT.

JURISDICTION.

1 *Jurisdiction of Commissioners appointed under the Nawab Nazim's Debts' Act (XVII of* 1873)

The Commissioners appointed under the Nawab Nazim's Debts Act XVII of 1873, having ascertained and certified that a certain zemindari was nizamut property, (*i e*, held by the Government for the purpose of up-holding the dignity of the Nawab Nazim for the time being), the fact that this property had, before the passing of the Act, been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of s. 12 of the Act is not controlled by any words in the preamble.

A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed. [*Omrao Begum* v. *The Government Of India*,] 419

2 *Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it, notwithstanding certain special matters.*

The sale of mortgaged property was decreed by a Sudordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could not proceed therein, on the ground that the decree for sale was that of the Subordinate Court.

Held, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary.

Matter which had no bearing on the question raised on this appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs. [*Bishenmun Singh* v. *Land Mortgage Bank*,] 588

3 *Jurisdiction under Act XV of* 1859, *s* 22—*Objection to suit not competently brought —Civil Procedure Code, ss.* 25, 562, 564—*Withdrawal, transfer, and remand of suits —Effect of consent of parties as regards jurisdiction—Particulars of infringement required by Act XV of* 1859, *s.* 34—*Sufficiency of statement to satisfy that requirement.*

An order for the transfer of a suit from one Court to another, under s. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *peary Lall Mozoomdar* v. *Komal Kishore Dassia* (1) entirely approved.

When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process: although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision.

On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

A suit, having been instituted in a Court not of competent jurisdiction, was transferred, with the consent of parties, to a Court which was competent; but the defence of jurisdiction was set up before the issues

were fixed, and was afterwards insisted on throughout.

Held, that in the single fact that the Defendant had personally concurred in the transfer, there had been no waiver of the right to maintain this defence, and that the suit must be dismissed on the ground that it was not competently brought.

A Court of appeal, having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in the proper Court.

Held, that this order, equivalent to directing the plaintiff to institute a new suit, was wrong; and that, with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed.

The sole object of s. 34 of Act XV of 1859. "An Act for granting exclusive privileges to inventors," (substantially the same as s. 41 of the English Act of 1852, 15 and 16 Vic., c. 82) is to compel the plaintiff to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information is given in the plaint itself or in a separate paper. *Talbat* v. *La Roche* (2) and *Needham* v. *Oxley* (3) referred to and followed.

Particulars of breaches, upon an alleged infringement, are distinguish from particulars of objection for want of novelty in this, that, in the latter case, instances of use may not be within the knowledge of the patentee, and therefore must be specified, while, in the former, the defendant must himself know whether, and in what respects, he has infringed the patent.

The Plaintiff had three patents relating to one article, a brick-kiln; the second and third being for improvements upon the invention specified in the first The plaintiff indicated a kiln, constructed and used by the defendant, showing as to each of his patents the distinctive features of invention alleged to have been appropriated. *Held*, a sufficient compliance with s. 34. [*Ledgard* v. *Bull*,] 741

See CIVIL PROCEDURE CODE 1 and 3.
— CONSTRUCTION 6.
— EXECUTION OF CROSS DECREES
— M. L. ACKNOWLEDGMENT AS SON.

JURISDICTION, CONSENT OF PARTIES TO, EFFECT OF.

See JURISDICTION 3.

KABULIYAT.

Kabuliyat. Construction of—Stipulations as to rent of new Chur—Hawaludari tenure—Measurement and Assessment of Chur Land—Landlord and tenant—Bengal Act VIII of 1869, *s.* 14.

A kabuliyat, executed by the tenant of land held in hawala tenure, provided that on an adjoining chur becoming fit for cultivation the whole land, old and new, held by the tenant should be measured, and the old having been deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing pergunah rates. It provided also that either (*a*) rent should be realized according to law with interest thereon; or that (*b*) at the close of the year, the owner should, by a notice served on the hawaladar, require him to take a settlement of the excess land, and within fifteen days to file a kabuliyat; or (*c*) the excess land might be settled with others.

Such a chur having been formed, the zemindar measured without notice to, and in the absence of, the hawaladar. He then served a notice on the latter requiring him to execute a kabuliyat within fifteen days for payment of a fixed rent upon the excess land as found by the measurement, or to yield up possession.

Disregard of this led to a suit in which the zemindar claimed either khas possession or rent on measurement by order of Court.

Held, that neither the kabuliyat nor the terms of s. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement; nor did the absence of authentic measurement as prescribed by the kabuliyat have that effect, or affect the measurement by the amin; but that, until both the measurement and the assessment of the rent had taken place (which) might be either in the manner prescribed or by judicial determination), the zemindar could not put the hawaladar to his choice between (*b*) executing a kabuliyat for the rent, and (*c*) yielding up possession [*Ramcoomer Ghose* v. *Kali Krishna Tagore*] ... 737

KATKABALA

Regulation XVII of 1806, *ss.* 7, 8—*Mortgage by conditional sale—Redemption.*

In the part of India where Bengal Regulation XVII of 1806 is in force, the right

to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest.

Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagors contention, was, by the terms of the condition, treated as a separate debt.

Held, that, as the mortgagor had not deposited the interest due on the sum lent required, according to s. 7 of the Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption. [*Mansur Ali* v. *Sarju Parshad*] ... 749

See MORTGAGE—9.

KHOT, OWNERSHIP OF, OUR WOOD GROWING ON VILLAGE LANDS.

See KHOTI TENURE.

KHOTI TENURE.

Khoti tenure—Ownership of wood growing on village lands.

The plaintiff sought to raise the question whether, in virtue of his being *izafatdar* and *khot* of three fourths of a village, he was or was not proprietor of three-fourths thereof, and entitled, as such proprietor, to three-fourths of the wood, including teak as well as *izaili* wood, growing on the village lands.

His rights under the *izafati* title depended on two documents: one, an imperial *sanad*, dated in A. D. 1653; the other, a Marathi document, dated in A. D. 1722. The first was construed to confer upon the grantee, as collector of the revenue, certain perquisites, and to make hereditary a right which before had been only a personal right, with reversion to the sovereign, but not to confer any proprietary right in the village lands. By the second, all that was granted was a right to *babatas* or cesses, the grantee being the *desai*, or collector of the revenue, on behalf of the Government.

Therefore it was held that the *izafati* title did not carry with it the proprietary right.

On the question as to the *khoti*, it was held, without the expression of any opinion, that no *khot* is or can be the proprietor of the soil; that such a right is not vested in every *khot*. This *khot* of the three-fourths of a village had been authorized by the Government to carry on the management, as *khot*, of the remaining fourth, and had agreed, at the time of entering into this arrangement, that he would preserve for the Government all the trees in reserves marked by survey numbers, and all the teak trees in the village. He had admitted that the Government had the power to make such reserves.

It was not shown that the Government had cut down any *izaili* wood in the village: only that it had recovered the value of some *izaili* wood cut in the reserves without their leave.

It was decided that the *khot* had not made out a title to any teak wood as against the Government, nor a claim against it in respect of the *izaili* wood. [*Nagardas Sanbhagyadas* v. *The Conservator of Forests*,] 89

LAND ACQUISITION ACT.

See RES-JUDICATA 1.

LANDLORD AND TENANT.

See KABULIYAT.

LEASE.

See LUNATIC.
— MORTGAGE 5.
— SALE FOR ARREARS OF REVENUE.

LEGITIMATION BY ACKNOWLEDGMENT.

See M. L. LEGITIMATION BY ACKNOWLEDGMENT.

LESSOR.

See SPECIFIC PERFORMANCE.

LEX LOCI CONTRACTUS.

Surety—Lex Loci Contractus.

Under a contract, made and to be performed in the territory of an Independent State, between the State and contractors, the latter received an advance of money, for the repayment whereof, in case the contract should fail, a third party became surety to the State. The contract failed and was ter-

minated by the State, to which the surety repaid, on its demand, the money advanced, with some deduction on account of a part performance.

For this amount the surety sued the principals, who were subject to the jurisdiction of the Courts in British India. In deciding whether the contract had or had not failed within the meaning of the suretyship undertaken by the plaintiffs,—*held*, that not the law of British India, but what was in the contemplation of the parties as to the result of the contract when they entered into it, must be regarded. [*Sujan Singh* v. *Gunga Ram*,] 307

LIBEL REFLECTING UPON JUDGE IN JUDICIAL CAPACITY, PUBLICATION OF.

See CONTEMPT OF COURT.

LIFE ESTATE.

See WILL 3.

LIMITATION.

1 *Limitation—Suit on accrual of right to possess—Adoption.*

The law of Limitation provides that with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (or at the option of the plaintiff) the date of the death of the adoptive father." This provision, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued. [*Raj Bahadoor Singh* v. *Achumbit Lal*,] 15

2 *Maintenance—Limitation—Act XIV of 1859 Sec. 1, Cl. 13—Widow leaving ancestral house—Demand and refusal—Cause of action.*

By the Hindu common law the right of a widow to maintenance is one accruing from time to time according to her want and exigencies. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

A Hindu, disposing of his estate by will, expressed his hopes that his wives and sons would all live amicably together after his death, and would all look upon his eldest son as the head of the family; he then bequeathed the whole of his property to his eldest son, directing him to provide for his (the testator's) widows, and for the other members and dependents of the family, and he declared that he made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease.

In a suit brought more than sixteen years after the death of the testator by one of his widows against the eldest son to recover maintenance, it was pleaded for the defendant that the claim was barred by limitation under cl. 13, sec 1, Act XIV of 1859, which provides that suits for the recovery of maintenance, when the right to receive such maintenance is a charge on the inheritance of any estate, must be brought within twelve years from the death of the person on whose estate the maintenance is alleged to be a charge. It was also pleaded that, under the will of the deceased, it was a condition precedent to the plaintiff's right to maintenance, that she should live under the same roof and in joint family with the defendant. It was further pleaded that there having been no demand and refusal of maintenance, the plaintiff had no cause of action.

Held, 1st, that the testator had not created, by his will, a specific charge on the inheritance of his estate within the meaning of the provision of Act XIV 1859, but had merely imposed upon the defendant an obligation, in case the will would interfere with the ordinary Hindu law, entitling his widows to maintenance, to make allowances for their support of a kind analogous to that which the law would have provided.

2nd, that there was no condition in the will making the plaintiff's right to maintenance dependent upon her living under the same roof with the defendant, and that she was, therefore, left in the ordinary position of a Hindu widow, in whose case separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and position.

3rd, that, although there was no evidence of a specific demand for maintenance, there was ground for believing that maintenance had been withheld under circumstances

amounting to a refusal, giving rise to a cause of action. [*Naraynrao Ramchandra Pant* v. *Ramabai, widow of Ramchandra Pant,*] 24

3 *Limitation Act (IX of* 1871*), sched. ii. art.* 145.

The plaintiff and two other members of his family, *M.* and *S.*, held a zemindari in the following shares, *viz.* :—the plaintiff ten annas, *M.* two annas, and *S.* four annas. Having first held the land ijmali, or joint, they agreed, in the year 1839, to effect a batwara, or private partition, and of this the result was, that parcels of land representing his ten-annas share were allotted to the plaintiff, and other parcels representing their shares, which together made six annas, were allotted to *M.* and *S.*, who held jointly. *M.* died in 1842, and his share came to the plaintiff. The four annas share of *S.* was sold in execution of a decree against him in 1856, and the purchaser of it, not accepting the fact of partition, sued both *S.* and the plaintiff in 1858, to have it declared that there had been no partition, and for a declaration of his right to possession of a four-anna share of the whole estate. A decree was made to that effect in 1860; and in 1863, an appeal by *S.* alone, against this decree, was dismissed by the High Court. The purchaser's heirs, he having died, obtained possession of land representing the four-annas share under the decree of 1860. *S.* then set up a title to hold part of the lands, allotted under the batwara of 1839, to the six annas share, on the ground that they were lakhiraj lands, and distinct from the revenue-paying villages in which his interest had passed under the execution-sale.

The plaintiff sued, in September 1873, the defendant who had purchased this last alleged interest of *S.* at another sale in execution of a decree against him, claiming that the partition having been set aside and a four-annas share of the whole estate obtained by the purchasers under the decree of 1860, a right accrued to him to have his share, now twelve annas, declared upon the lands which had fallen within the six annas share. He also claimed to have it declared that the parcels alleged to be lakhiraj were not so.

On the question of limitation it was held, that the 14th article of the second schedule of Act IX of 1871 was applicable; and that even if, technically, the lands now in question remained in the possession of *S.* pending the appeal against the decree of 1860, there was no possession adverse to the plaintiff, rendering it necessary for him to assert his right until the dismissal of the appeal in 1863. [*Dewan Manwar Ali* v. *Annodaprosad Rai* 86

4 *Limitation—Act IX of* 1871, *sec.* 20—*Acknowledgment by agent—Evidence of authority—Parol evidence; not admissible, of existing documents.*

Held, upon the evidence, that the agent had no general authority to sign the acknowledgment of the debt, he then not being in the defendant's service, and that to the knowledge of the plaintiff.

Held also, upon the evidence that the agent had no special authority from defendant to sign the acknowledgment.

It is not simply a technical, but in reality a cardinal and substantial rule of evidence that an existing document is the best proof of its contents and it is dangerous to allow parol evidence to be given as to the same. If the letter containing the alleged special authority was not produced, and its non-production unexplained, the natural inference was either that the letter if written did not contain the alleged authority or that no such letter ever existed.

Held consequently that Act IX of 1871 sec. 20 did not save the suit from limitation. [*Dinomoyi Debi* v. *Luchmiput Singh*] 112

5 *Birt Shankallaps—Limitation—Circular Order,* 1861, *ss.* 1, 24—*Act XVI. of* 1865—*Act XIII. of* 1866—*Act XXVI. of* 1866, *ss.* 1, 2.

Sects. 1 and 24 of a Circular Order of 1861, which enact in effect that if a birteeah is out of possession in 1855 his claim cannot be recognised, have been treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself; but whether rightly so or not, they have in effect been repealed by Acts XVI. of 1865 and XIII of 1866.

The Circular Order applied to all birt tenures, including shankallaps, so far as the latter are in the nature of birts.

The effect of sects. 1 and 2 of Act XXVI of 1866 discussed. [*Maharajah Drig Bijai Singh* v. *Gopal Datt Panday,*] ... 117

6 *Limitation—Proceeding to enforce decree—Act XIV. of* 1859, *s.* 20.

It was the object of the Legislature in Act XIV. of 1859, s. 14, with regard to the limitation for the commencement of a suit, to

exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment creditor believed, *bonâ fide* though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly, —was a proceeding to enforce the decree within the meaning of s. 20. [*Hira Lal* v. *Badri Das*,] 157

7 *Limitation Act (IX of* 1871), *ss.* 24, 27; *sched. ii. art.* 31, *part v—Presumption of Title founded on long continued User—Easement—Obstructing a Watercourse—Continuing Act of Wrong.*

More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a *pyne*, or artificial watercourse, on the defendants' land, making compensation to them. The *pyne*, by a channel at one part of its course, contributed to the water in a *tal*, or reservoir, belonging to the defendants; and by a channel at another part, took the water which overflowed from the *tal*, after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the *payne* in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.

Held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all; but it did not exclude, or interfere with, other titles and modes of acquiring easements. And s. 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. Such along enjoyment as the plaintiff had proved should be referred to a legal origin, and the long user of, the *pyne* and of the superfluous water of the *tal*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstructions in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

Held also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, cl. 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit. [*Maharanee Rajroop Koer* v. *Abdul Hossein*,] ... 199.

8 *Limitation applicable to Execution of Decree in suit instituted before* 1*st April* 1873 *—Staying Sale of Attached Property—Striking off—Limitation Acts (XIV of* 1859, *s.* 20, *and Act IX of* 1871, *s.* 1).

An application for Execution of a decree is an application in the suit in which that decree has been obtained. From this, and from the enactment in s. 1 of Act IX of 1871, that nothing contained in s. 2, or in Part II of that Act, shall apply to suits instituted before the 1st April 1873, it follows, that nothing contained in sched. ii of that Act extended to an application for execution of a decree in a suit instituted before that date. No such application was barred by s. 20 of Act XIV of 1859, if made within three years from the date of a proceeding within the meaning of that section. Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

Where a sale of attached property is stayed by a Court upon the application of the judgment debtor, on condition of the attachment remaining in force, the subsequent striking off of such application from the file of the Court does not affect the rights of the decree holder. [*Mungul Pershad Dichit* v. *Grija Kant Lahiri*] ... 248

9 *Attempt to enforce Deed—Limitation Act (IX of 1871), sched. ii, cl. 93—Wasilat.*

In a suit in which the plaintiff had obtained a decree and the defendant had appealed to her Majesty in council, a third party applied to be added as a respondent, on the ground that, by registered deed, the plaintiff had conveyed to him a share of the property decreed. The defendant objected that the deed was a forgery; but an order was made that the applicant should be joined as a respondent, without deciding whether the deed was or was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the defendant."

Held, that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought, more than three years after the making of that order, by the appellant against the party so joined as a respondent, to have the deed set aside as being false and fabricated, was barred by limitation under Act IX of 1871, sched. ii, cl. 93.

A decree declared the plaintiff entitled to the possession of land with wasilat from a date named, directing "the amount thereof to be ascertained on local enquiry," and to bear interest from the date of its ascertainment until payment, without saying more.

Held, that the decree-holder was entitled to wasilat until the date of delivery of possession to him.

Semble.—It was not necessary for the judicial officer who made the enquiry to hold a Court on the spot. [*Fakharuddin Mahomed Ahsan Chowdhry* v. *Official Trustee* ... 270

10 *Limitation Act (IX of 1871), sched. ii, cl. 144—Breach of Condition—Forfeiture.*

A Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime. This share she sold as if she had held an absolute interest, and the purchaser's name was entered, instead of hers, in the revenue records; but no change of possession took place till her death.

To a suit brought by the cousin's heirs to recover the property purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, the defence was limitation under Act IX of 1871, sched. ii, cl. 144, commencing from the date of the sale, there having been, it was alleged, "a breach of condition or forfeiture" within the meaning of that clause.

By the terms of the arrangement contained in a solenama, the widow was to have no power to alienate; and after her death her share was to belong to the cousin.

Held, that these terms prohibited only such an alienation by the widow as would prevent the cousin's succeeding after her death, and the alienation made was good for the widow's lifetime. There was no condition against such an alienation; and if there had been, there was neither any rule of law, nor anything in the words used in the solenama, attaching forfeiture to the breach of such a condition. *Held*, accordingly, that cl. 144 did not apply, and the suit was not barred by limitation. [*Bibee Sahodra* v. *Jung Bahadoor*,] 294

11 *Limitation—Bengal Act VIII of 1869, s. 29—Suit for arrears of rent.*

After the expiration of the period prescribed by s. 29 of the Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it.

In *Rance Surnomoyee* v. *Shoshee Mookhee Burmonea* the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present.

The plaintiff's ancestor purchased a talook from the Government, subject to an ijara therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866—1872.

Held, that the suit was barred under s. 29, notwithstanding the proceedings of 1874. [*Huro Pershad Chowdhry* v. *Gopal Das Dutt*] 363

12 *Act IX of* 1871 (*Limitation Act*), *Sch.* ii, *No.* 145.—*Limitation—Collector's possession not adverse to true owner.*

Act IX of 1871, sch. ii, No. 145, enacting that suits for possession of immoveable property, or any interest therein, must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has become adverse to the plaintiff, differs from the rule formerly in force under Act XIV of 1859, s. 1, cl. 12. The latter was that the suit must be brought within twelve years from the time when the cause of action arose; and thus, the former rule that, where the cause of action arose upon an alleged dispossession, the burden was upon the plaintiff to show that he, or some one through whom he claimed, had actual possession within twelve years before the institution of the suit, has been superseded by the above.

Where the Government, in the Revenue Department, has taken possession of land, it is the duty of the Collector, after payment of the revenue, and the expenses of the collection, to pay over the surplus proceeds of the estate to the true owner. The Collector's possession does not become adverse to the owner, by reason of his making this payment to another claimant. [*Karan Singh* v. *Rajah Bakar Ali*] 382

13 *Act IX of* 1871 (*Limitation Act*), *ss.* 10, *and Nos* 118, 123, *and* 145—*Limitation of suit relating to property held in trust.*

A suit in order to fall within Act IX of 1871, s. 10, excepting suits against trustees from limitation, must be brought for the purpose of recovering the trust property for the benefit of the trust; that section meaning that when trust property is used for some purpose other than that of the trust, it may be recovered, without any bar of time, from the hands of those in whom it has been vested in trust.

Where the plaintiff sued to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property was being applied to such purposes by the manager in possession, the above section was *held* inapplicable.

The possession of the defendant having been adverse for more than 12 years, *held* that the suit might fall within art. 223 or 145 of the 2nd schedule of Act IX of 1871, in force when the suit was brought. Had it fallen within neither of the above, it would be barred under art. 118. [*Balwant Rao* v. *Purun Mal*,] 435

14 *Limitation Act (XIV of* 1859) *s.* 22—*Registration Act* (*XX of* 1866), *s.* 53—"*Decree*" *made upon a registered obligation—Summary decision—Petition to postpone sale in execution of decree—Estoppel—Evidence Act* (1 *of* 1872), *s* 115.

A summary decision means a decision arrived at by a summary proceeding; and a "decree," made under s. 53 of Act XX of 1866, is a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees, or orders, made in a regular suit; and s. 22 of the same Act was intended to apply to all other decisions.

A decree made in 1867 under s 53 of Act XX of 1866, *held* to be subject, as regards its execution, to the law of limitation provided in Act XIV of 1859, s. 22.

To petition for the postponement of a sale in execution of decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed and occasions no estoppel within the Indian Evidence Act, 1872, s. 115. The judgment-debtor can, notwithstanding his having filed such a petition, maintain that execution is barred by lapse of time. [*Mina Konwari* v. *Juggut Setani*,] 454

15 *Limitation Act, IX of* 1871, *Sch. II, Arts.* 48, 60, *and* 118.

The defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands: *Held*, that neither Art. 48 of Sch. II of Act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor Art. 60 of the same schedule, fixing the limitation of three years to suits for "money payable by the defendant to the plaintiff," and to suits "for money received to the plaintiffs use," were applicable to the present suit; but that, as a suit for which no period of limitation was provided elsewhere, it fell within Art. 118 of the same schedule, fixing for such suits the limitation of six years. [*Gooroo Das Pyne* v. *Ram Narain Sahoo*,] 548

16 *Limitation Act XV of* 1877, *Sch. II, Art* 109—*Mesne profits—Interest.*

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877 Sch. 11, Art. 109. An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Talukdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits.

Held, that a person who had not himself received the mesne profits having come into possession of the taluk upon its being released from management under the above Act, would not be chargeable with sums, which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default; there being nothing to show that such talukdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not. [*Kishna Nand* v. *Partab Narain Singh.*] 551

17 *Act IX of* 1871, *Sched. ii., Arts.* 65, 132 —*Limitation—Remedies of Mortagagee.*

Where a mortgagee sued in covenant and also to enforce his mortgage security, *held*, that under Act IX of 1871, sched. ii., art. 65, the personal remedy was barred in three years, but that art. 132 of the same schedule provided a limitation of twelve years as against the mortgaged property. [*Ramdin* v. *Kalka Pershad*,] 619

18 *Limitation Act (XV of* 1877,*) Sch. II., Art.* 127—*Exclusion from property.*

A collateral member of a Hindu family, alleging it to be joint, claimed his share of ancestral property in Oudh, part of which formed a taluk inherited, for a considerable time past, by the eldest son, who taking the whole of it had given maintenance to the other members. This taking was entered in the first and second of the lists made under the provisions of the Oudh Estates Act I of 1869, and as to it there was no ground of claim. But with respect to the savings, accumulations, and investments made from the income and proceeds of the taluk before the confiscation and restoration of Oudh lands in 1858, the contention was that each member was entitled to his share, and that, by the presumption in respect of a joint family, the burden was on the talukdar to prove that there were no savings, or accumulations, made otherwise than out of the talook, and before the confiscation.

Held, that, if it were assumed that the family was for some purposes undivided, still this was not the case of an ordinary undivided Hindu family, and that, in such a case as this, the presumption must depend on somewhat special circumstances.

However, this case must be decided on the distinct ground that, as the claimant had been excluded from his share, if he had one, for more than twelve years, he knowing of this exclusion, the law of limitation enacted in Act *XV* of 1877, Sch. 11, Art 127, was applicable, and the claim was barred by time. [*Ragunath Bali* v. *Maharaj Bali*,] 642

19 *Limitation—Act XV. of* 1877, *sect.* 10.

Held, that Act XV. of 1877, sect. 10, does not apply to the Government in possession of an estate in their own right under a claim of forfeiture arising from the conviction of the last holder, and not as trustee for a specific purpose. [*The Zemindar of Palcondah* v. *The Secretary of State* ... 644

20 *Limitation Act—(IX of* 1871), *Sch. II, Art.* 129.—*Meaning of "suit to set aside adoption."*

Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession.

The plaintiffs, as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognized in formal instruments, proceedings, and decrees to which the Plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs titles, (if any) had accrued at the death of the surviving widow, that the suits were barred under Art 129 of Sch. II of Act IX of 1871.

Part of the language of the judgment in *Rajah Bahadur Singh* v. *Achumbit Lall* referred to, and that case, in which the plaintiffs claim was not affected by the widow's adoption, distinguished from the present. [*Jagadamba Chowdhrani* v. *Dakhina Mohun Roy*] 715

21 *Limitation—Act XV. of* 1877, *sched. ii. art.* 144—*Adverse Possession—Presumption—Co-proprietor with joint Family.*

Where the husband of a female member of a Hindu joint family had been, on the purchase of an estate, admitted by the male members as a co-proprietor in respect of a one-fourth share thereof:—

Held, that possession of the whole estate by the joint family or its manager was adverse to such co-proprietor in respect of his fourth share unless shewn to have been authorized by him, and consequently that the plaintiff, who claimed title from him, was barred by *Limitation Act* XV. of 1877, sched. ii, art 144. [*The Collector Of Godavery* v. *Addanki Ramanna Pantulu*] ... 728

22 *Limitation, Cause of action.*

There being a term in a deed of gift that whenever certain properties which were in the possession of others, *viz*, certain Munduls should come to hand by personal possession, by amicable settlement or by suit, plaintiff is to get 2 annas share thereof. A suit was brought, and decree obtained, and possession taken, and subsequently the properties were sold by the Decreeholder to the Munduls. Plaintiff then brought the present suit for recovery of possession of his 2 annas share under the terms of the deed of gift.

Held, that the plaintiff's cause of action arose at any rate, at a period subsequent to the execution of the decree, and that being within the period of limitation, plaintiff's suit is not barred. [*Gunga Gobind Mundul* v. *Bhoopal Chunder Biswas*,] ... 781

See Res-judicata 3, 7.

— Sale for arrears of Revenue.

— H. L. Ancestral Property 2.

— H. L. Gift 2.

— H. L. Joint Family 2.

— Pauper Petition.

— Practice 1.

— Principal and Agent 1.

LOCUS STANDI.

See Probate.

LUNATIC.

Lunatic—Act XXXV of 1858, *s.* 9—*Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.*

The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh Talukder to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act, with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager.

A Civil Court having made an order declaring a talukder to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the District, who also acted as manager of the Court of Wards:

Held, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years. [*Sarabjit Singh* v. *Chapman*] 700

MAGISTRATE'S PROCEEDING.

Magistrate's Proceeding—Effect of—Nature of right and possession held under a Hindu widow.

Held that the proceeding of the Magistrate in 1841 quieting the possession of the Dur Mokrorecdars under the widows and remitting the Putnidar to a regular suit, which suit was not brought, is conclusive, unless its effect is altered by some other cogent evidence. A widow or a person claiming under a widow cannot destroy the title of the heir by allowing a friend or relative to have twelve years possession of the estate. In this case there is nothing to show that the possession was other than permissive, and there is evidence to support that presumption. The right of the plaintiff appellant, the purchaser from the former proprietor, the husband of the said widows, as Mukroredar, is not affected by the sale in 1849 of the Putni, under which the Mukrori is, such sale and possession by the same family, being perfectly consistent with the plaintiff appellant's case. [*Sheroocoomaree Debia* v. *Keshub Chunder Bosoo*,] 785

MAHOMEDAN LAW.

See PART III.

MAINTENANCE.

See BUDDHIST LAW IN BRITISH BURMAH.
— LIMITATION 2
— RES-JUDICATA 3.

MAKURARI IJARA.

See CONSTRUCTION 3.

MAKURARI ISTIMRARI.

See CONSTRUCTION 4.

MAKURARI LEASE.

See SALE FOR ARREARS OF REVENUE.

MANAGER OF JOINT ESTATE.

See GUARDIAN AND WARD.

MANAGER.

Manager—Settlement at an unusually low rate—no presumption of fraud—Subsequent Ekrar and receipt of rent operate as a recognition.

The mere fact that the land was let at an unusually low rate by the Manager to the defendant who was the Naib, was not sufficient to show that there was a fraud practised on the proprietor. By a subsequent Ekrar by the proprietor in 1866 the former lease must be taken to have been recognized by the Proprietor, and it has further been confirmed by the receipt of rent from the defendant to the present time. [*The Administrator General* v. *Anundo Chunder Bose*,] 823

MATERNAL GRAND-FATHER'S ESTATE INHERITED, NO SELF ACQUIRED PROPERTY.

See H. L. MITAKSHARA 1.

MATTERS DIRECTLY AND SUBSTANTIALLY IN ISSUE.

See RES-JUDICATA 7.

MESNE PROFITS.

1 *Interest on Mesne Profits—Execution of Decree—Practice—Costs—Grounds of Appeal.*

The term 'mesne profits' means the amount which might have been received from the land deducting the charges for collection; and does not include damage resulting from their not having been paid as they became due, or loss of interest year by year.

A decree stated that mesne profits were to be recovered, "with interest from the date of their ascertainment," *Held*, that the Court executing this decree had no authority to allow interest year by year, upon the collections which ought to have been received.

If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs. [*Hurro Durga Chowdhrani* v. *Surut Sundari Debi*,] 304

2 *Mesne profits—Account from date of exclusion of co-sharers.*

A question of the partibility of a zemindary disputed in a family of six brothers having been decided in favor of three who sued for their shares;—*Held* that the decree should be that the plaintiffs were entitled to recover one-half of the zemindary, together with the mesne profits thereon, from the time of their disposition; provided that they should recover such mesne profits for a period of no more than three years next before the commencement of the suit, subject to an allowance to the defendants for all, or any portion of, such mesne profits which the latter might prove to have been duly applied for the benefit of the joint family. [*Rajah Venkata Kamakamma Row* v. *Rajah Rajagopala Appa Row*,] 345

See CONSTRUCTION 2.
— LIMITATION 16.

MINOR.

Act XL of 1858, *s.* 18—*Power of guardian of minor to mortgage minor's property—Rate of interest.*

A guardian to whom a certificate had been granted under Act XL of 1858, (relating to minors) having obtained, under s 18, an order of a Court authorising the raising of

money by mortgage of the minor's immoveables, mortgaged accordingly. In the order so obtained, the rate of interest at which the money was to be raised was not specified. On a question whether, there being no proof of the necessity or expediency of agreeing to pay interest at a rate so high as eighteen per cent., the agreement to pay at this rate was rightly set aside by the High Court, which decreed interest at the twelve per cent., *held*, that the proper construction of the order, and the one most favourable to the lender regarding the rate of interest was, that the guardian was authorized to borrow only at a reasonable rate of interest; and that consequently the decree of the High Court was right. [*Gungapershad Sahu* v. *Maharani Bibi*,] 621

See GUARDIAN AND WARD.

— PURCHASER.

MINOR CO-SHARER.

See GUARDIAN AND WARD.

MISCONDUCT.

See PLEADER.

MISCONSTRUCTION OF WILL.

See WILL 2.

MISTAKE.

See EXECUTION-SALE 3.

MITAKSHARA.

See H. L. ANCESTRAL PROPERTY 1, 2.

— H. L. CARNATIC.

— H. L. CHARITABLE TRUST.

— H. L. RAJ.

MITHILA LAW.

See EXECUTION-SALE 4.

MITAKSHARA.

See EXECUTION-SALE 4.

MOHUNT.

See H. L. MOHUNT.

MORTGAGE.

1 *Mortgage—Acquisitions by Mortgagor and Mortgagee—Redemption.*

Semble.—Under the English law, which in so far as it rests on principles of equity and good conscience may properly be applied in India, it is recognized as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee; and, conversely, that many acquisitions by a mortgagee are, in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption.

But *semble.*—It cannot be affirmed that every purchase by a mortgagee, of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms;—*e. g.*, where there is a mortgage of a *zemindari* in Lower Bengal, out of which a *patni* tenure has been granted, the mortgagee in possession might buy the *patni* with his own funds and keep it alive for his own benefit.

An *Oudh talukdar* granted an usufructuary mortgage of a portion of his taluk, in respect of which there existed certain subordinate *birt* tenures. The mortgagee having subsequently acquired these *birt* tenures by purchase, did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the *taluk*. The mortgagor, many years after, brought a suit for redemption, when the question arose, whether upon repaying the sum expended by the mortgagee in the purchase of the *birts*, in addition to the amount due on the face of the mortgage-deed, the plaintiff was entitled to the possession of the estate as then enjoyed by the mortgagee; or whether the latter was entitled to retain the *birt* rights and interests purchased by him as an absolute under-proprietary tenure in subordination to the *talukdar*, and to have a sub-settlement on that basis,—

Held, that the plaintiff on repayment of the original mortgage debt, and on reimbursing the defendant the sum expended in purchasing the *birts*, was entitled to re-enter on the estate with all the rights and privileges enjoyed by the latter. [*Rajah Kishendatt Ram*, v. *Rajah Mumtaz Ali Khan*,] ... 17

2 *Usury laws under Regulation XXXIV of 1803—Obligation on mortgagee to file accounts.*

In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.* Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bonâ fide* agreed should be allowed to the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were take on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803: and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection. [*Badri Parshad* v. *Babu Murlidhur*,] ... 100

3 *Redemption—Priority—Mortgage—Execution of decrees on mortgages of same property.*

Two successive mortgages of the same property were executed by A, the first in favour of B, the second in favour of C, her husband, the money lent in each case being advanced by C, two suits were instituted upon the mortgages and on the same day a decree was made in each suit. The decree upon the second mortgage was executed first and at the sale in execution the present plaintiff became the purchaser. At the subsequent sale in execution of the other decree D the son of C became the nominal purchaser, the purchase money being advanced by his father.

In a suit by the plaintiff against B, C and D, A not being a party, to set aside the sale to D, and to have it declared that he (the plaintiff) was entitled to redeem.

Held, that the plaintiff was entitled to redeem: that the sale to D must be set aside, in as much as C was in fact the real purchaser after having caused the first sale to take place.

Held, further, that it was unnecessary in the decree to state whether the plaintiff was entitled to redeem as second mortgagee or as purchaser. [*Chooramun Singh* v. *Mahomed Ali*,] 329

4 *Mortgage, Payment of—Extinction of charge—Intention of Parties—Presumption.*

Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other.

A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee.

Held, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It being, also, presumable that the lender lent the money upon the security of the later mort-

gage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished. [*Mohesh Lal* v. *Mohunt Bawan Das*,] 424

5 *Mortgage—Sale of perpetual lease, with conditional agreement to sell back to vendor, not amounting to mortgage—Reservation of right to re-purchase—Right to redeem.*

A purchaser of land, another person advancing the purchase-money for him, granted to the latter a mokurari pottah or perpetual lease, not as a security for the debt, but as an absolute acquittance of it. At the same time an ekrarnama was executed, whereby it was stipulated that when the grantor or his heirs should pay to the grantee or his heirs the amount of the above debt without interest, out of his or their own moneys without borrowing from any other person, then the pottah should be cancelled, the grantor having no claim to mesne profits during the possession of the mokuraridar.

Held that, with regard to the terms of the instruments, and the circumstances under which they were made, this transaction was not a contract of mortgage, but evidence of a sale and acquittance of a debt with power reserved to the vendor to re-purchase under certain conditions personal to him. [*Situl Pershad* v. *Luchmi Pershad Singh*,] ... 470

6 *Construction of instrument of mortgage.*

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servents was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me."

Held, that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.

Held, accordingly, (on the contention that these words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale) that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one, *viz*, that the mortgagee should take possession upon such a default, and also might sell if the mortgagor objected to his applying the rents in reduction of the principal and interest due. [*The Deputy Commissioner of Rae Bareli* v. *Lal Rampal Singh*,] 585

7 *Possession. Suit for, by Mortgagee—Purchase by third parties of mortgagor's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Joinder of parties—Mortgage account—Form of Decree.*

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to pay the debt, his equity of redemption was sold, and was bought by the mortgagee.

In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion, *Held*, that (*a*), as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*), the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. *Naweb Azmat Ali Khan* v. *Jowahir Singh* (1) referred to.

A decree which ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was *held* to be incorrect, and was, accordingly, reversed. [*Nilakant Banerjee* v *Suresh Chunder Mullick*,] 685

8 *Mortgagor and Mortgagee—Suit to redeem barred—Former Suit by Mortgagees—Act XXIII. of* 1861, *s.* 11.

Where in 1877 a mortgagor sued to redeem lands which had been included in a mortgage executed in 1806, but based his claim on a decree obtained by the mortgagees in 1825, under which an account had been taken of what was due under the mortgage, no date being fixed for redemption:—

Held, that redemption could only under Act XXIII of 1861, s. 11, be effected under the said decree, and was barred, and that a fresh suit for the same purpose could not be brought. The plaintiff could not fall back contrary to his plaint, on the mortgage of 1806; nor could he contend that limitation ran from the acknowledgment thereof, no issue to that effect having been raised [*Hari Ravji Chiplunkar* v. *Shapurji Hormusji*,] 719

9 *Regulation XVII of* 1806, *ss.* 7, 8—*Mortgage by conditional sale—Redemption.*

In the part of India where Bengal Regulation XVII of 1806 is in force, the right to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest.

Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this according to the mortgagors contention, was, by the terms of the condition, treated as a separate debt.

Held, that as the mortgagor had not deposited the interest due on the sum lent required, according to s. 7 of Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption. [*Sayyid Mansur Ali Khan* v. *Babu Sarju Parshad*,] 749

10 *Arrangement between firm and its creditors —Giving time—Mortgage security.*

A firm, in difficulties, executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period.

Notwithstanding this two creditors, named in the deed, immediately sued for their debts, and obtained decrees.

Other creditors, named in the deed, afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect, unless all the creditors came in and were bound by it.

Held that the suits above-mentioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage deed [*Ajudhia Pershad* v. *Sidh Gopal*,] ... 769

11 *Mortgage—Bonâ fides—Onus Probandi.*

Suit for possession by mortgage in after foreclosure, against part purchaser of mortgaged property impugning the mortgage as a collussive transaction in fraud of creditors: —*Held*, that under the proved and apparent circumstances of the case it was necessary for the plaintiff to have given his own deposition and to have produced other evidence in his own power to establish the reality and *bonâ fides* of his mortgage. [*Woomesh Chunder Roy* v. *Gooroodoss Roy*,] 779

See FORECLOSURE.
— KUTKUBALA.
— MINOR.
— REDEMPTION.

MORTGAGE BY CONDITIONAL SALE

See KUTKABALA.
— MORTGAGE 9.

MORTGAGEE.

See ESTOPPEL.

MORTGAGEE, ACQUISITION BY.

See MORTGAGE 1.

MORTGAGEE BOUND BY MORTGAGOR'S PLEA.

See ESTOPPEL.

MORTGAGEE LIABLE TO FILE ACCOUNTS.

See MORTGAGE 2.

MORTGAGEE, REMEDIES OF.

See LIMITATION 17.

MORTGAGOR.

See ESTOPPEL.

MORTGAGOR, ACQUISITION BY.

See MORTGAGE 1.

MORTGAGE SECURITY.

See MORTGAGE 10.

MUKHTARNAMAH.

See PARDANASHIN WOMAN.

NASLAN BAD NASLAN, NOT ESSENTIAL TO CONVEY HEREDITARY RIGHT.

See CONSTRUCTION 5.

— EVIDENCE 5.

NATURAL FATHER.

See H. L. ADOPTION 1.

NAWAB NAZIM'S DEBTS' ACT.

See JURISDICTION.

NON-JOINDER OF PARTY.

Non-joinder of a Necessary Party—Alienation of Debuttur Lands—Trust for Religious Purposes.

The representatives of three out of four Hindus, who were joint *sebaits*, managing *debuttur* property, sued to have an alienation, made by the fourth *sebait* alone, set aside. They did not make the latter a party to the suit; nor did the plaintiffs ask the assistance of the Court to made him one, under s. 73 of Act VIII. of 1859. *Held*, that he was a necessary party. It was not enough that he was a member of the body of *sebaits*; and although indirectly he might have gained advantage from the suit brought by the other *sebaits*, this did not suffice to connect him with the suit as a party to it. No ground of making an exception to the general rule was presented. [*Rajendronath Dutt* v. *Shaikh Mahomed Lall*,] 254

NOTICE.

See H. L. ANCESTRAL PROPERTY 1.

NOTICE OF SALE, PUBLICATION OF.

See SALE FOR ARREARS OF RENT 1, 2,

— SALE IN EXECUTION OF DECREE.

NOTICE OF SALE, PUBLICATION OF, HOW PROVED.

See SALE FOR ARREARS OF REVENUE 1.

OLD DOCUMENT.

Old document—no witness—Proof of possession under it necessary.

A document is not proved in a suit brought in 1853. because it was more than thirty years old, and there being no witness to prove it, it is necessary to prove that possession had accompanied the document, *viz.*, a Merasi Pottah, and such possession was not proved in the case. [*Bisheshur Bhuttacharjee* v. *George Henry Lamb*,] 798

ONUS PROBANDI.

1 *Suit for land—Onus—Possession—Title.*

In a suit to recover possession of land admittedly in defendants' possession for 11 years, the onus is upon plaintiff to prove possession within twelve years as also title to possession. [*Beer Chunder Jobraj* v. *The Deputy Collector of Bhullooah*,] 778

2 *Suit for possession—onus of proof.*

In a suit to recover possession of land from a person in possession, plaintiff must recover upon the strength of his own, and not on the weakness of his adversary's title. [*Ranee Surnomoyee* v. *Watson and Co.*,] 820

See BURDEN OF PROOF.

— MORTGAGE 11.

— PRACTICE 3.

ORDER.

Construction of decree in order made in execution proceedings—Finality of such order.

A Court having jurisdiction decided in the course of execution proceedings, (in an order which was not appealed), that the decree to be executed awarded mesne profits according to its true construction. *Held* that this decision had become final between the parties, not under s 13 of Act X of 1877, but upon general principles of law, as an interlocutory order in the suit.

The order construing the decree having been made in the same suit in which the application was made, the question whether the law of "*res-judicata*" applied was not relevant, that term referring to a matter decided in another suit [*Ram Kirpal Shukul* v. *Rup Kuari,*] 489

OUDH TALOOKDAR.

See H. L. JOINT FAMILY 1.

PARDANISHIN WOMAN.

Mooktarnama—Pardanishin Woman—Extent of Liability—Account stated—Explanation of Document.

In order to charge a pardanishin woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to, and understood by, her.

A *mooktarnama* executed by a pardanishin woman appointed her husband to be her general *mooktar*, and declared that "all acts done by the said *mooktar*, such as giving and taking loans to and from others, executing on my behalf, getting executed in my favor, deed of absolute sale," and so on, "shall be accepted by me."

It was sought to render the principal liable, on an account stated by her husband as her *mooktar* so empowered, for a debt, without proof that the money constituting it had been borrowed on her account.

Held, on the construction of the *mooktarnama*, that the *mooktar* had no authority to bind her by such a statement of account, whatever authority he might have had to bind her by an actual borrowing of money on her behalf.

No implication of authority in the *mooktar* to bind the woman by his stated account had arisen from the carrying on of a course of business. Accordingly, when the evidence of express authority failed, the statement of account by the *mooktar* was insufficient to render the principal liable.

No evidence was given of the items lent, so as to establish an indebtedness independently of the account stated. [*Sudisht Lal* v. *Sheobarat Koer,*] 222

PAROL EVIDENCE NOT ADMISSIBLE OF EXISTING DOCUMENTS.

See LIMITATION 4.

PARTIES.

See MORTGAGE 7.

— NON-JOINDER OF PARTIES.

— H. L. ADOPTION 5.

PARTIBILITY.

See H. L. ZEMINDARY.

PARTITION.

See H. L. JOINT FAMILY 2.

— H. L. PARTITION.

PATNI.

See SALE FOR ARREARS OF RENT 1.

PAUPER PETITION.

Pauper petition—Payment of Court-fees by petitioner—Date of institution of suit—Limitation—Act VIII of 1859, *s.* 13—*Transfer of suit.*

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.

S. 13, Act VIII of 1859, enacts that where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority

to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quære.*—Whether Sudder Courts acting in concurrence have power to make such a transfer? [*Stuart Skinner alias Nawab Mirza* v. *William Orde,*] 31

PENALTY.

Decree—Construction of decree—Penalty—Higher rate of interest upon default in payment of instalment.

A decree, of which the terms had been arranged by *solehnama* between the parties, for payment of money by instalments with interest at six per cent., was construed to provide also for three contingencies, *viz.*, nonpayment at due date, (*a*) of the first instalment, two consecutive instalments being in arrear at the same time; (*b*) of instalments, other than the first; (*c*) of the first instalment, simply. Upon the occurrence of (*a*), or of (*b*), execution might issue for the whole decretal money with interest thereon at twelve per cent. Upon the occurrence of (*c*) execution might issue for that instalment, with interest at twelve per cent. from the date of the decree

The decree holder having accepted payment of the first instalment on the footing of (*c*), *held* that he had not, by any admission or settlement, precluded himself from insisting on the above construction as to (*b*). *Held*, also, that these provisions for double interest were but a reasonable substitution of a higher rate of interest for a lower, in a given state of circumstances, and were not in the nature of a penalty against which equitable relief might be claimed. [*Bal kishen Das* v. *Run Bahadur,*] ... 465

PERMANENT SETTLEMENT, EFFECT OF, ON GHATWALI TENURE.

See JAGHIR

PERPETUITY.

See H. L. WILL 3.

PETITION TO POSTPONE SALE IN EXECUTION OF DECREE CANNOT ESTOP JUDGMENT-DEBTOR FROM QUESTIONING THE VALIDITY OF THE DECREE.

See LIMITATION 14.

PLAINTIFF, DEATH OF BEFORE FINAL DECREE, EFFECT OF.

See H. L. PARTITION.

PLEA.

See ESTOPPEL.

PLEADER.

Suspension of a pleader for misconduct—Act XX of 1865—Special leave to appeal.

The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct.

The Judicial Committee, not being prepared to say, from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal

It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting. [*On Petition of F. W. Quarry,*] 99

POSSESSION.

Evidence—Title—Possession—Delay

Held, upon the whole case, reversing the High court's decision, that the plaintiffs (Respondents) had failed to prove either title or possession entitling them to disturb the defendant's long possession.

The High Court having originally treated the plaintiffs' title as depending upon a release by the commissioner, and finding that release not made out, fell back upon the Deputy Collector's proceeding, which they had not sufficiently considered as also the manner in which they had been dealt with by the Deputy Collector's official superiors. [*Wise* v. *Brojendro Comar Roy,*] ... 788

See LIMITATION 12, 21.
— ONUS PROBANDI 1, 2.
— REFORMATION OF LANDS.
— RES JUDICATA 7.
— M. L. GIFT 1.

POSSESSION OF COLLECTOR NOT ADVERSE TO TRUE OWNER.

See LIMITATION 12.

POTTAH.

See CONSTRUCTION 3.
— REGISTRATION 1.
— SPECIFIC PERFORMANCE.

POWER-OF ATTORNEY

Construction of Power of-Attorney—Power to "negotiate" Government notes.

An agent, with whom were deposited Government notes for safe custody, was authorized by power-of-attorney to negotiate, make sale, dispose of, assign, and transfer, or cause to be assigned, and transferred, at his discretion, all or any of them, and on the principal's behalf from time to time, at his discretion, to contract for, and purchase, Government notes, and accept the transfer thereof, into the principal's name; "and for the purposes aforesaid to sign for him in his name, and in his behalf, any and every contract, agreement, acceptance, or other document."

The agent, purporting to act as attorney, indorsed one of the notes, and borrowed money thereon for himself, and in fraud of his principal.

Held that, with regard to the general objects of the power, the agent had under it no authority to pledge, and that the lender of the money acquired no title to the note as against the principal.

The power-of-attorney was not in the same form as that in the *Bank of Bengal* v. *Macleod* (1) and the *Bank of Bengal* v. *Fagan* (2), not containing in express words, power to indorse. Had it done so, the question would have been whether there was anything to prevent it from being a power, in the discretion of the donee of it, to indorse the note, and convert it into one payable to bearer, whenever he thought fit to do so, for any purpose.

It was not laid down in the judgment on those cases that the words used in a power-of-attorney, to express its objects, are always to be construed disjunctively, though they may be so construed, and there is no reason why a rule of construction, intended to aid in arriving at the meaning of the parties, should not be applied in construing a power-of-attorney as much as any other document. [*Jonmenjoy Coondoo* v. *Watson*,] ... 523

PRACTICE.

1 *Practice in Appeals from Vice-Admiralty Court of Bengal—Time for Appealing.*

By rule 35 of the Rules respecting appeals from the Vice Admiralty Courts abroad, made and ordained by King William IV in council in pursuance of the Statute 2 Will. IV. c. 51, all appeals from the decrees of Vice-Admiralty Courts are to be asserted within fifteen days after the date of the decree.

Held, that the words "after the date of the decree" mean after the date when the decree is pronounced by the Admiralty or Vice-Admiralty Court, as the case may be; not the date when the decree is reduced to writing and signed.

On the 23rd July 1880, the High Court in its Appellate Jurisdiction, modifying a decree of the High Court as a Court of Vice Admiralty in a cause of damage by collision, referred it to the Registrar to assess the damages that had been incurred in reference to one of the ships, both of which were held to be in fault. The parties went, without protest, before the Registrar for that purpose, the impugnants, also, having taken out process to compel the appearance of the promovents before him, and the damages were assessed with the consent of both parties at a certain amount. On the 2nd September 1880, a notice of appeal was given on behalf of the impugnants, and was recorded as asserted pursuant to rule 35 above referred to.

Held, that the appeal was not within time, more than fifteen days having elapsed after the decree before the appeal was asserted. According to the law laid down in the Vice-Admiralty Courts, the proceedings taken before the Registrar were themselves sufficient also to prevent an appeal as of right. [*The ship "Brenhilda"* v. *The B. I. S N. Company*,] 236

2 *Transmission for execution of order of Her Majesty in Council—Civil Procedure Code, Act X of* 1877, *ss.* 231, 588, 593 *and* 610—*Evidence of Such order—Appeal against an order of a Judge of the High Court refusing transmission.—Letters Patent*, 1865, *s.* 15—*Execution on the application of one of several decree-holders.*

The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory,

having the object that proper information regarding the order shall be supplied to Courts in India.

Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: *Held* that a copy, though not certified by him, might accompany a petition for execution under s. 610.

A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s. 15 of the Letters Patent of 1865, and is appealable to the High Court.

Held, also, that a refusal to transmit such an order for execution was not a misaprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal.

Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court.

The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety of a taluk in the possesion of the defendant, who then purchased the interest of one of them: *Held* that the other co-plaintiff could obtain execution according to the extent of her interest in the estate. [*Hurrish Chunder Chowdhry* v. *Kali Sunderi Debia*,] 406

3 *Practice—Onus probandi—Verbal evidence when other evidence available.*

A Judgment is not safely rested on verbal admissions, when there are other means of proving the case, like accounts. [*Lalla Sheoparshad* v. *Juggernath*,] 446

4 *Act X of* 1877, *s.* 602—*Extension time for giving security in appeal—Custom—Wajib-ul-arz.*

The words in s. 602 of Act X of 1877, relating to the time within which security is to be given are directory only; and although they are not to be departed from without cogent reason, the Court from which the appeal is preferred has the right of extending the time. In this case, a satisfactory explanation having been given of delay in giving security until after the time limited by the above section had expired, *held* that the Court had rightly exercised discretion in extending the time. *In the matter of the petition of Soorjmukhi Koer* (1) approved.

The paternal grandmother of a deceased village shareholder claiming to inherit in preference to his male collateral relations, the issue was fixed the assent of the pleaders on both sides, whether the plaintiff, as a female, was excluded from inheriting by the custom of the family, or tribe. *Held*, that this was substantially a question of fact, and that on the evidence, which included the village *wajib-ul-arz*, the customary exclusion of females was not proved. [*Burjore* v. *Bhagana*,] 498

5 *Practice—Discussion of Evidence and its Effect.*

Case in which evidence is discussed and its true effect pointed out, and in which it is *held*, reversing a decree of the High Court, that an ikrarnamah relied upon by the respondents was fabricated. It was connected with other documents already found to be forgeries, its contents did not dispel suspicion, it was not established by credible witnesses, nor supported by evidence of possession under it. No order made as to costs, fabricated documents having also been put forward on behalf of the appellant. [*Coomari Rodeshwar* v. *Manroop Koer*,] ... 689

6 *Civil Procedure Code, s.* 549.

An appeal, although it may have been rejected by the appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.

The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix. [*Balwant Singh* v. *Doulut Singh*,] 707

7 *Practice—Petition for Rehearing.*

In a petition for rehearing of two appeals which had been fully heard upon their merits,

and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council :—

Held, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.

There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties ; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard. [*Venkata Narasimha Appa Row* v. *The Court of Wards*,] 755

See APPEAL 1, 2 AND 3.

— RES-JUDICATA 6.

PRACTICE IN CASE UNTENABLE GROUNDS ARE JOINED TO MAKE UP THE APPEALABLE VALUE.

See MESNE PROFITS 1.

PRECATORY WORDS.

See WILL 2.

PREEMPTION.

See CONSTRUCTION 4.

— LIMITATION 21.

— MORTGAGE 4.

— REFORMATION OF LANDS.

PRESCRIPTION.

See REFORMATION OF LANDS.

PRESUMPTION.

See CIVIL PROCEDURE CODE 3.

— DESGHAT WATAN.

— INAM.

PRESUMPTION OF IMPARTIBILITY.

See DESGHAT WATAN.

PRESUMPTION OF TITLE FROM LONG CONTINUED USER.

See LIMITATION 7.

PRESUMPTION OF VALIDITY OF ORDER FOR SALE.

See CIVIL PROCEDURE CODE 3.

PRIMOGENITURE.

1 "*Oudh Estates' Act*," *I of* 1869, *s.* 8—*Taluqdar in the second list—Estate descending to single heir—Primogeniture.*

In the "Oudh Estates' Act," I of 1869, rules were laid down as to the title of talookdars whose estates the Government had created, and as to the mode of succession thereto.

On a question whether or not a talook, to which the Act was applicable, descended according to the rules of lineal primogeniture, *held*, that where a talookdar's name was entered in the second, but not in the third, of the lists maintained under the above Act, the estate, although it was to descend to a single heir, was not to be considered as passing according to the rules of lineal primogeniture. [*Achal Ram* v. *Udai Partab Addiya Dat Singh*,] 507

2 *The Oudh Estates' Act I of* 1869—*Will of a Talookdar—Customary rule of succession in a family to impartible estate—Primogeniture.*

However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to impartible family estate, and to a talook also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity with s. 8 of the Oudh Estates' Act I of 1869. Before his death, this eldest brother made an instrument registered as a will, but using the words "tamlik," and stamped as a deed whereby he gave the talook to the third brother, reserving an interest on the whole for his own life, and in half for any son that might be born to him with maintenance to his wife on her becoming a widow.

Held, with reference to the indicia of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker

of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act.

Held, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that s. 11 of the above Act, giving to every heir and legatee of a talookdar power to transfer, or to bequeath, his estate, is not controlled by the proviso in s. 19, declaring that nothing in that section shall affect wills made before the passing of the Act.

The impartible family property other than the talook descending, like the latter to a single successor, one of these brothers, the question as to which of them that one should be, depended on the custom of the family. On the evidence adduced as to the custom in this respect, the plaintiff, who was out of possession, and on whom, in order to make out his title, was the burden of proving that the rule of primogeniture prevailed, failed so to do. [*Ishri Singh* v. *Baldeo Singh*,] 528

See H. L. INHERITANCE 2.

PRINCIPAL.

Principal—Agent—Repudiation of the Act of the Agent.

The purchase by agents of Indigo seeds in a rising market under order cannot be repudiated by the principal unless he can show affirmatively that the agents had been guilty of negligence in executing the order which he had given them. The agents could not have experimented at Madras in a rising market by showing a sample of the seed and waiting 8 or 10 days before they purchased to see whether it would germinate. They were only bound to use proper care and skill and act to the best of their judgment. [*Betts* v. *Arbuthnot and Co.*,] ... 783

PRINCIPAL AND AGENT.

1 *Principal and agent—Suit by principal for an account—Object of a decree for an account, as distinguished from a decree made upon the hearing—Costs—Limitation under Act IX of* 1871, *Sch. II, Art* 118.

A continued agency, or employment as dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. The dewan having denied the receipt of the money, and any kind of accountability, it was found against him that the relation of agency existed between the parties. But, on the ground that it was impossible to decide, upon the evidence adduced at the hearing, how much of the principal's money was unaccounted for, though the attempt had been made to prove a balance due, the Appellate Court dismissed the suit. *Held*, that such a suit was essentially one for an account, and that the Courts below should have followed the regular course, *viz*, to order an account to be taken of the defendant's dealings with the plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it.

As, however, the defendant had falsely denied his fiduciary position, he was ordered to pay the whole costs of this suit hitherto, including the costs of this appeal, without regard to the result of the account. Limitation under Act IX of 1871, s. 118, which was applicable, commenced from the date on which the agency ceased. [*Hurronath Roy* v. *Krishna Coomar Bukshi* 751

See GUARANTEE.

PRINCIPAL AND SURETY.

Principal and Surety—Giving Time—Interest paid in advance—Discharge of Surety—Accommodation Acceptor—Contract (Act IX of 1872), *s.* 135.

The drawer of *hundis* paid advance interest to the holder to obtain time, which he did obtain, for payment after due date. *Held*, that the liability of an accommodation acceptor of the *hundis* depended on whether he knew of and consented to this arrangement.

Held on the merits, that he knew of, and consented to, advance interest being taken. [*Gourchandra Rai* v. *Protapchandra Dass*,] 156

See GUARANTEE.

PRIORITY.

See MORTGAGE 3.

PRIOR MORTGAGE, EXTINCTION OF. CHARGE BY PAYMENT OUT OF SUBSEQUENT MORTGAGE MONEY.

See MORTGAGE 4.

PRIOR MORTGAGE, PAYMENT OF, BY SUBSEQUENT INCUMBRANCER.

See REDEMPTION.

PRIVITY IN ESTATE.

See RES-JUDICATA 5.

PRIVY COUNCIL APPEAL.

See APPEAL 1, 2 AND 3.

PROBATE.

Probate—Application for order revoking probate—Succession Act (X of 1865), s. 243—Locus standi of attaching creditor of next of kin to apply for revocation.

A will, on the evidence, was held duly proved An application for revocation of probate was made by a judgment-creditor who had attached his debtor's right, title, and interest in family estate, whereof a one-fourth share would, but for this will, which made other dispositions, have been inherited by such debtor. Whether such an attaching creditor can oppose the grant of probate, or apply to have it revoked, is a matter of grave doubt; at least, in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. *Baijnath Sahai* v. *Desputty Singh* (1), referred to, and *Komollochun Dutt* v. *Nilruttun Mundle* (2), distinguished. [*Rajah Nillmoni Singh* v. *Umanath Mookerjee*,] 449

PROCEDURE.

See REMAND.

PROPERTY PURCHASED IN THE NAME OF IDOL.

Property purchased in the name of an Idol—Right of widow to alienate.

A property was purchased by a person at a revenue sale in the name of his own idol, whom no one except himself has the power or right to worship. The property was dealt with by the person as his own.

Held, that there was no real endowment and there was nothing therefore to deprive the purchaser of the power of alienation, or his widow of that power to discharge his debts.

The property being out of the possession of the plaintiffs' family for upwards of 47 years. Limitation bars that plaintiffs' claim for possession after setting aside the alienation.

The High Court Circular No. 9, dated 26th February 1867, about the reception and printing of account books &c., directed to be enforced [*Maharanee Brojosoondery* v. *Ranee Luckmee Koonwaree*,] 810

PUBLICATION OF LIBEL REFLECTING UPON JUDGE IN JUDICIAL CAPACITY.

See CONTEMPT OF COURT.

PUBLIC SERVANTS.

Liability of public servant for injury done by his act, illegal though bonâ fide—Act XVIII of 1850—Protection of Judicial Officers—Cantonments Act (XXII of 1864) s. 11—Lunatic Asylums Act XXXVI of 1858) s. 4.

Act XVIII of 1850 is for the protection of Judicial Officers, acting Judicially, and of officers acting under their orders.

An officer commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he, might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the civil-surgeon of the station, for which purpose the same officer caused his further detention. The Commanding officer, who under Act XXII of 1864, s. 11, had control and direction of the police in the cantonment, did not proceed, or intend to proceed, under s. 4 of Act XXXVI of 1858.

Held, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not hav-

ing any legal authority for what he had done, was not protected from liability in respect of the above acts. [*Sinclair* v. *Broughton*,] 387

PURCHASE OF MORTGAGOR'S INTEREST IN PORTIONS OF THE MORTGAGED PROPERTY.

See MORTGAGE 7.

PURCHASE IN THE NAME OF HINDU WIFE.

See BENAMEE TRANSACTION.

PURCHASER.

Rights of purchaser of co-sharer's interest in joint family property—Formal objection to minor's representative.

When the right, title, and interest of a co-sharer in joint family estate are sold in execution to satisfy a decree against him personally, the purchaser acquires merely the right of the judgment-debtor to compel a partition against the other co-sharers. *Deendyal Lal* v. *Jugdeep Narain Singh* (1) referred to and followed.

A money decree having been made against the father of a family, and the decree-holder having caused to be attached the family estate, and brought to sale the father's right, title, and interest therein, *Held*, that by the sale, not the father's share, but that interest which he had, *viz.*, the right which he would have had to a partition, and to what would have come to him under it, passed to the purchaser.

The family, governed by the Mitakshara, consisting of father, mother, and minor son, at the time of the decree, the Court below had decreed to mother and son, one third each, leaving one third to the purchaser A second son was born, and the mother died pending this appeal, the two sons becoming parties in respect of her share. *Held*, that on this appeal, preferred by the purchaser, the decree should stand, the appellant having got quite as much as he would have got if the decree had been more correct in form, as he had obtained all that he would have been entitled to on a partition, without being left to demand it.

The suit having been brought by a manager, appointed by the Court of Wards on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed, as merely technical. [*Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*,] 508

See BURDEN OF PROOF.
— CIVIL PROCEDURE CODE 3.
— EXECUTION-SALE 1.
— H. L. ANCESTRAL PROPERTY 1.

PURCHASER, CERTIFIED.

See BURDEN OF PROOF.

PUTRA POUTRADI KRAME.

See H. L. WILL 1.

RECITAL IN A DOCUMENT, EFFECT OF.

See CONSTRUCTION 1.

RECTIFICATION OF INSTRUMENT.

Specific Relief Act (I of 1877), s. 31—Rectification of instrument.

A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under s. 31 of Act I of 1877 (the specific Relief Act) to have the instrument rectified was held to have been rightly dismissed. [*Amanat Bibi* v. *Lachman Pershad*,] 768

REDEMPTION.

Effect of payment of prior mortgage by a subsequent incumbrancer, as against intermediate charge.

The mortgagor's right, title, and interest in certain immoveables in the *Deccan*, subject to a first and a second mortgage, were sold in execution of a decree to a purchaser, who afterwards paid of the first mortgage.

Held that, as he had a right to extinguish the prior charge, or to keep it alive, the question was what intention was to be ascribed to him; and that, in the absence of evidence to the contrary, the presumption was that he intended to keep it alive for his own benefit. Where property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mort-

gage, it is a matter of course, according to the English practice, to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India a formal transfer for the purpose of a mortgage is never made, nor is an intention to keep it alive ever formally expressed.

It was ruled in the English Court of Chancery in *Toulmin* v. *Steere* (1) that the purchaser from an owner of an equity of redemption, with actual or constructive notice of another intermediate incumbrance, is precluded, in the absence of any contemporaneous expression of intention, from alleging that, as against such other incumbrance, the prior mortgage, paid off out of the purchase-money, is not extinguished. That case was not identical with this, where the prior mortgage was not paid off out of the purchase-money, but was paid of afterwards by the purchaser. The above ruling, however, is not to be extended to India; where the question to ask is, in the interests of justice, equity, and good conscience, there applicable,—what was the intention of the party paying off the charge. [*Gokuldass Gopaldass* v. *Rambux Seochand*,] 543

See KATKABALA.

— MORTGAGE 1, 3, 5, 7, 9.

REFORMATION OF LANDS.

Reg. XI. of 1825—*Reformation of Lands—Possession—Prescription.*

In a suit brought on the 11th of March, 1872, to recover certain plots of land, (1) as reformations after diluviation of lands which had belonged to the plaintiffs and as accretions thereto, (2), under a title by prescription; it appeared that the lands had formed in the bed of a river in 1859, and that the plaintiffs took possession thereof as of reformed lands and had been maintained in possession under Act. IV. awards, but that in 1868 they were ousted by the Collector, who assessed the same under Reg. XI. 1825, and settled the same with his co-defendants:—

Held, that whether or not in consequence of Act XI. of 1847 the Government were entitled to assess the lands, they were entitled to oust the plaintiffs and to take possession of the lands, a lands which had originally formed as an island, and were at their first formation surrounded by water which was not fordable;

Held, further, that sect. 15, Act XIV of 1859 barred the plaintiffs' title to recover simply on the strength of their previous possession, without entering into the question of title; the suit not having been brought within six months of dispossession.

Held, further, that possession for three years under an order of a magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription. [*J. P., Wise* v. *Ammeerunissa Khatoon*,] 127

REGISTERED INSTRUMENT CONFIRMING A PRIOR UNREGISTERED ONE.

Act III of 1877 *(Registration Act), ss.* 17, 49 —*Effect of a registered instrument confirming a prior one of the same purport not registered.*

An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s 17, sub section *b* of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act. [*Mitchel* v. *Mathura Das*,] 663

REGISTERED OWNER.

See BURDEN OF PROOF.

REGISTRATION.

1 *Registration—Puttah—Section* 2, *Act XX. of* 1866—*Sections* 3, 8, 9 *and* 11, *Madras Act VIII. of* 1865.

The puttahs and muchilkas mentioned in Section 3, Madras Act VIII. of 1865, must be understood to embrace those written agreements only which are mutually interchanged by a landlord and those of his tenants who are actually engaged in the cultivation of the lands to which they relate, since the remedies which the Act provides in

Sections 8 and 9, can only be made available where the relation of landlord and tenant, or a holding of some sort already exists upon such a basis that the landlord or the tenant, as the case may be, can come into the Court and claim to have a writing granted to him.

Semble, if a lease granted by a zemindar to an intermediate holder could be considered a puttah within the meaning of Section 3 of the Madras Act VIII of 1865, it would, under the proviso to Section 11 of that Act, be liable to be set aside by the successor of the grantor if granted at a lower rate than that generally payable on such lands, and not for the purposes mentioned in the said proviso. [*Ramasawmi Chetti* v. *The Collector of Madura*,] 50

2 "*Oudh Estates' Act*," *I of* 1869, *s.* 13—*Compulsory registration of will devising taluq—Deposit of will distinct from registration under Act VIII of* 1871.

A will devising a taluq to a sister's son of a taluqdar, in the lifetime of the taluqdar's brother, is not excepted from the necessity of being registered under s. 13 of the Oudh Estates' Act I of 1869, such sister's son not being one of those who, in the event of the taluqdar's having died intestate, would have succeeded to an interest in his estate, within the meaning of the exceptions made in s. 13, sub s. 1, of that Act.

It may be doubted whether the mere title to maintenance would be such an "interest" as would come within the meaning of the exceptions.

The deposit of a will under part IX of Act VIII of 1871 does not amount to the registration required by the above section of Act I of 1869. [*Haji Abdul Razzak* v. *Munshi Amir Haidar*,] 555

See WILL 3.

REGISTRATION COMPULSORY OF WILL DEVISING TALUQ UNDER ACT I OF 1869.

See REGISTRATION 2.

REGULATIONS (BENGAL.)

XXXIV OF 1803.

See MORTGAGE 2.

L OF 1803.

See DISQUALIFIED PROPRIETORS.

V OF 1805, S. 26.

See EXECUTION SALE 1.

XVII OF 1806, SS. 7, 8.

See KUTKUBALA.
— MORTGAGE 9.

XXIX OF 1814.

See JAGHEER.

VIII OF 1819, S. 8, PARA. 2.

See SALE FOR ARREARS OF RENT 1, 2.

VII OF 1822.

See EVIDENCE 1.

I OF 1824.

See ASSESSMENT OF LAND FOR SALT WORKS.

XI OF 1825, S. 2, S. 4, CL 2,

See ACCRETION.

XI OF 1825.

See REFORMATION OF LAND.

REGULATIONS (MADRAS.)

XXV OF 1802,

See H. L. CARNATIC.

XXV OF 1802, S. 3.

See INAM.

RE-HEARING.

See PRACTICE 7.

RELIGIOUS SERVICES.

See CAUSE OF ACTION.

REMAINDER, ACCELERATION OF, ON FAILURE OF LIFE ESTATE.

See WILL 3.

REMAND.

Remand—Powers of Appellate Court—property in different districts—Decrees of District Courts, Powers of Appellate Court to amend—Act VIII of 1859, *s.* 12 *—Procedure—Unconscionable Bargain—Interest.*

Neither under s. 12 of Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter.

Of two mortgages, between the same parties, the first comprised four village, of which three were in district A, and a fourth property was in district B The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *viz.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the plaintiff's right as purchaser of one of the properties; and in the suit in district B, for payment of the debt on the second mortgage. Both suits were dismissed.

The High Court, hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court of first instance in district A, to have the proportionate value of the properties determined, with a view to the apportionment of liabilities of the parties by way of contribution.

As the defendant who succeeded in both suits in the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no such consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly, authorized. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question into a suit of a description differing totally from that of either of them, as originally decreed; and this without the consent of the parties.

Fraud apart, a loan to a *purdanashin* woman from her own *mukhtear* at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the contract for such rate of interest will not be enforced. *Beynon* v. *Cook* (1) referred to and followed. [*Kaminee Sunderi* v. *Kaliprosonno Ghose*,] 652

REMAND.

See EVIDENCE 4.
— JURISDICTION 3.

RESJUDICATA

1 *Proceedings under the Land Acquisition Act* (*X of* 1870), *ss.* 38 *and* 39—*Finality.*

In proceedings under the Land Acquisition Act (X of 1870), ss. 38 and 39, the persons entitled to take land compulsorily, deal only with those who are in possession of it or who are ostensibly its owners. It may happen that the real owner, being an infant, or a person otherwise under disability, does not appear, and is not dealt with in the first instance. There is, therefore, a proviso in s. 40 to the effect that nothing contained in that or the preceding sections "shall affect the liability of any person who may receive the whole, or any part of any compensation awarded under the Act to pay the same to the person lawfully entitled thereto." This applies only to persons whose rights have not been dealt with in adjudications in pursuance of ss. 38, 39, and 40; and does not permit a person whose claim has been disposed of in the manner pointed out in the Act, to have that claim re-opened, and again heard, in another suit. [*Rajah Nilmoni Singh* v, *Ram Bandhu Rai*] 234

2 *Res judicata—Civil Procedure Code, Act X. of* 1877, *s* 13—*Competent Court*

The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive.

The words "Court of competent jurisdiction," used in s. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond

the powers of the Court which disposed of the prior one.

The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790.

Held, that the issue as to the amount of principal due on the bond had not been heard, finally decided by a Court of competent jurisdiction within the meaning of s. 13. [*Raghobardial* v. *Rajah Sheo Baksh Singh*.] 395

3 *Res-judicata—Suit for Maintenance—Limitation Act (XV of 1877.) Sch. 2, Art. 132.*

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time, founded on an *ekrarnama*, did not aford a defence under s. 3 of the Code of Civil Procedure.

Held, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877. [*Ahmud Hossein* v. *Nihaluddin*,] 442

4 *Representation of the estate of a Hindu taluqdar by his widow in a suit for the succession—Act I of 1869—Res-judicata—Act XXIV of 1870, s. 25.*

Issues substantially the same as those raised in the present suit, relating to the succession to a taluqdari estate, had been decided in a former suit, in which an order of Her Majesty in Council declared who had the right to succeed. *Held*, that a claimant, whose interest was such as would vest in him only upon the death of the widow of the last taluqdar, was bound by the order so made, on the ground that he was privy to the former suit, the whole estate, for the purpose of representing it, being vested in the widow, who was a party to that suit. *Kutama Nachiar* v. *The Rajah of Shivagunga* (1) referred to and followed.

That order declared that a will made by the last taluqdar, whereby a power to appoint a successor in the taluqdari had been given to the widow, had been revoked, and determined the right to succeed as upon an intestacy. The person whom the widow had appointed, by her will, now contending that he was not bound by the order, having been, when the former suit was instituted, a minor, without any duly appointed guardian, it was *held*, that whether he had, or had not, by acts, after attaining full age (having been nominally a party), become estopped from setting up the above, he was, at all events, bound by the order; on the ground that the widow, holding an estate at least as large as that of a Hindu widow in her husband's property, was the full representative of the estate in the former suit; the appointment made by her being such as would operate only on her death. *Held*, also, that although a manager of the estate had been appointed under the provisions of Act XXIV of 1870 (the Oudh Taluqdars' Relief Act), but had not been made a party to the suit. This omission did not, under section 25, affect the *validity* of the decree between the parties. [*Partab Narain Singh* v. *Trilokinath Singh*,] 567

5 *Res-Judicata—Act X of 1877 s. 13—Estoppel—Privity in estate—costs of inserting irrelevant matter in the printed record.*

A competent court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was held that the present suit was barred under Act X of 1877 Section 13 as *res-judicata* having been brought by the son of the defendant in the former suit, claiming through his father to establish the same adoption; and that the section applied although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged the father of the present plaintiff to share with the adopted son his ancestral estate. The adoption having been negative, the son in this suit, ought to be estopped from making title on

the ground that the adoption had placed the person from whom he claimed to inherit in the relation of father's brother to him.

Where irrelevant matter had been introduced into the record, the Registrar was directed to tax of the costs as if the record had not contained what he might consider to have been inserted unnecessarily. [*The Rajah of Pittapur* v. *Buchi Sittaya Garu.*] 598

6 *Res-judicata—Act VIII of* 1859, *s.* 2—*Act X of* 1877, *s.* 13—*Cross Appeal—Practice.*

The decision in a suit in order to be final and conclusive, as *res-judicata*, upon an issue raised in another suit, must be the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive.

This proposition stated in the judgment in *Mussumat Edun* v. *Mussumat Beckyn* (1), and affirmed by the Judicial Committee in *Misir Raghobardial* v. *Sheo Baksh Singh* (2), is applicable equally to cases under Act VIII. of 1859, s. 2 (as supplemented by the general law), and to cases under the more complete enactment in Act X of 1877, s. 13, which is not to be construed as having altered the former law.

A suit was brought in the Court of a Subordinate Judge by a Hindu against the widow of his deceased brother, claiming his property by right of survivorship, the issue being whether, at the death of the latter, the ownership of the brothers was joint or separate. An order under Act XXVII of 1860, granting a certificate to the widow did not, on the above issue, operate as *res judicata* in the widow's favour, being a proceeding of representation, and not otherwise of title.

Held, also, that a decision of the same issue in a Moonsiff's Court in a rent suit brought by the widow, the surviving brother, on his application, having been made a party defendant under s. 73 of Act VIII of 1859, did not constitute *res-judicata* in her favour.

Krishna Behari Roy v. *Brajeswari Chowdhrani* (3) referred to and followed.

Held, also, that the brother having appealed against a decree dismissing the suit as *res-judicata* (the judgment which that decree followed having, nevertheless, found that the widow was disentitled by reason of the brothers having been, in fact, joint in estate), the widow could have supported the decree without filing a cross appeal as to that finding, on the ground that the decree had been rightly made, (though not for the reason given) in her favour. [*Run Bahadoor Singh* v. *Lachoo Koer*,] 602

7 *Res-judicata—Civil Procedure Code Act X of* 1877, *s.* 13—*Matters directly and substantially in issue in a suit—Limitation—Adverse possession.*

Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties: *Held*, that the contest of title was conclusive between them under s. 13 of Act X of 1877.

In a suit brought by a ghatwal to resume, as determinable at will, an under-tenure granted by one of his ancestors of land, part of the ghatwali mohal, it was alleged for the defence that the under-tenure was permanent.

A prior judgment upon conflicting claims made by the ghatwal and the under-tenure holders to receive the abovementioned compensation money, which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, being founded on the under-tenure-holders having been in possession of it by the mere sufference of the ghatwal, who could put an end to it at any time: *Held*, that the question whether the latter had a permanent tenure, having been directly and substantially in issue in the former suit, could not be contested in another.

Limitation having been set up in bar of the suit, *Held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the ghatwal; and proceedings, either between the ghatwal or between under-tenure holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another.

There being nothing else to render the possession adverse, limitation only commenced at the date of the abovementioned claim to the compensation money which was made less than twelve years before the pre-

sent suit was brought; and accordingly the suit was not barred. [*Ram Chunder Singh* v. *Madho Kumari*,] 666

See EXECUTION PROCEEDINGS 2.

— LIMITATION 8.

— H. L. ANCESTRAL PROPERTY.

RESUMPTION.

See GRANT.

— ISTEMRARDAR.

— TENANCY UNDER TALUKDARI SETTLEMENT.

RESUMPTION OF UNDERTENURE BY ISTEMRARDAR.

See ISTEMRARDAR.

REVERSIONARY HEIR, CONTINGENT.

See H. L. ADOPTION 5.

REVOCATION OF PROBATE.

See PROBATE.

RIGHT OF WAY.

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of 1876).

As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cess pool connected with a privy belonging to the plaintiffs' house.

The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so.

In and after 1876, instead of the plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily.

Held, that the above was neither a discontinuance by the plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times. [*Judoo Lall Mullick* v. *Gopaul Chunder Mukerjee*,] 713

RIPARIAN PROPRIETORS.

Riparian Proprietors—Flow of water—Encroachment,

There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

The plaintiff and defendant were proprietors of land and gardens on opposite sides, just at the mouth of a *khal*, in which the tide in the River Hooghly flowed and reflowed; the sides being protected by walls erected one on each side of the *khal*. The defendant upon the wall on his side becoming somewhat delapidated constructed a fresh one, to some degree altering the direction of the wall, a portion of which was built further in towards defendant's land and another small portion a little further out, encroaching a triangular piece whose altitude and base were five and ten feet respectively.

The plaintiff, thereupon, brought a suit which was stated to be one for possession of land by demolishing a brick built retaining wall, basing his cause of action upon the averments—that injury had accrued to the retaining wall of the defendant's garden, that inconvenience had been caused to the passage of boats to the defendant's screw-house through the *khal*, and that apprehensions had been created of the screw house falling down eventually.

The *solum* on which the defendant built his wall was found to be vested in the Government and the defendant's act, though an encroachment, was by the first appellate court held not to entitle the plaintiff to have the wall removed, as no damage to plaintiff's property was established.

On special appeal, the High Court apparently on the authority of *Bickett* v. *Morris*

reversed the decision of the first two Courts and ordered a removal of a portion of the wall. [*Kali Kishen Tagore* v. *Jodoo Lal Mullick*,] 61

See ACCRETION.

RIVER.

Dried up bed of river—Right of Government.

When the bed of a river is not gained by Government by right of accretion or reformation, but is formed by the river being dried up, the dried up bed as such does not belong to Government. [*Ranee Surnomoyee* v. *Jardine, Skinner and Watson & Co.*] 813

RIVER, BOUNDARY.

See ACCRETION.

SALE.

See CANCELLATION OF INSTRUMENTS.
— INSOLVENCY.

SALE CERTIFICATE.

— *See* CONSTRUCTION 2.

SALE FOR ARREARS OF RENT.

1 *Sale for arrears of rent—Regulation VIII of 1819, s. 8, cl. 2—Proof of publication of notice before sale of patni talook for arrears of rent.*

The due publication of the notices prescribed by Regulation VIII of 1819 s. 8, cl. 2 forms an essential part of the foundation on which the summary power to sell a patni talook for non-payment of rent is exercised by the zemindar, who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted.

Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebee* v. *Lalchand Chowdhry* (1); yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zemindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee. [*The Maharajah of Burdwan* v. *Tara Soondari Debia*,] 414

2 *Sale for arrears of rent—Construction of Regulation VIII of 1819, sect 8, para. 2—Publication of copy or extract of such part of the notice of sale as may apply to the tenure of the defaulter.*

Publication of the notice of sale of a tenure under Regulation VIII of 1819 is required to be in the manner prescribed in sect. 8, clause 2; and personal service on the defaulter is not sufficient. The objects of directing local publication of the notice, *viz*, to warn the under-lessees of the sale proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant kucheree or to serve it personally.

If there is a kucheree on the land of the defaulting putnidar, meaning the land which is to be sold for arrears of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that kucheree, and if there is no such kucheree on the land held by the defaulter, the copy or extract must be published at the principal town or village on the land.

In the description of this in clause 2, as "the notice required to be sent into the mofussil," the word "mofussil" is opposed to the sadar kucheree of the zemindar, and refers to the subordinate estate, which is the subject of the sale proceedings.

Where a zemindar, selling the tenure of a defaulting putnidar under the Regulation, had caused to be stuck up the requisite petition and notice at the Collector's kucheree, and the notice at the zemindar's kucheree, but not the copy or extract which is directed by the regulation to be similarly published at the kucheree, nor had published it at any other place upon the land of the defaulter: *Held* that the zemindar had not observed a substantial part of the prescribed process, and that this was for the defaulting putnidar "a sufficient plea" within the meaning of the Regulation. [*Maharani of Burdwan*, v. *Murtunjoy Singh*,] 772

SALE FOR ARREARS OF REVENUE.

Sale for arrears of revenue—Liability to incumbrances—Act XI of 1859. ss. 13 and 54—Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Surrender of durmokurari interest how proved—Limitation Act (XV of 1877), Sch. II, Art. 144.

After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was

brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benâmi holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch. II, Art. 144, the twelve years' bar commencing from the date of possession first held adversely.

The mokuraridar having granted a durmokurari lease of part of his holding, which was afterwards surrendered for good consideration, ikrarnamahs to this effect were executed, but not being registered were not receivable in evidence.

Held, that to prove a formal deed of reconveyance was not necessary—the receipt of the money and the reliquishment of possession sufficiently showing what had become of the dur-mokurari interest.

The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid: *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding, if necessary. [*Imambandi Begum* v. *Kumleswari Pershad*. ... 732

SALE IN EXECUTION OF DECREE.

Sale in execution of decree—Civil Procedure Code (Act X of 1877), *s.* 311—*Irregularity in publication of intended sale.*

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of the first instance, which found that proclamation had been made.

Held, that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be Proved, as required by s. 311 of Act X of 1877.

Held, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity. [*Olpherts* v. *Mahabir Pershad Singh*,] 417

SALE OF PERPETUAL LEASE WITH CONDITIONAL AGREEMENT TO SELL BACK TO THE VENDOR, NOT AMOUNTING TO MORTGAGE, BUT CREATING ONLY A PERSONAL RIGHT TO REPURCHASE.

See MORTGAGE 5.

SALE, PRIVATE.

Private Sale of Property attached in Execution—Incumbrance created after attachment —Civil Procedure Code (Act VIII of 1859) *s.* 240.

The title obtained by the purchaser on a private sale of property in satisfaction of a decree, differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.

In 1858, the respondent obtained a decree against *B*. In 1863, in satisfaction thereof, he caused to be attached a decree for mesne profits made in favor of *B* against the appellants in 1860. In May 1865, the respondent obtained an order for the sale thereof; but instead of proceeding to execution sale, he purchased, in 1866, the whole of the mesne profits due under the decree of 1860, by private sale from *B*. Meanwhile, in September 1865, an order of Court had been made, between *B* and the appellants, on their consent (but without the respondent being a party to it), whereby the decree for mesne profits was set off, *pro tanto*, against a prior decree for a larger amount, which the appellants had obtained against *B*.

Held, that the sale of 1866 having been a private one, and not in process of execution, the respondent only obtained such title as *B* had in the decree of 1860—*viz.*, a title subject to the effect of the order of September 1865. [*Dinendronath Sannyal* v. *Ramcoomar Ghose*,] 213

See H. L. SALE BY WIDOW.

SAPINDA, ASSENT BY, NECESSARY TO SUPPORT ADOPTION.

See ADOPTION 3.

SAPINDA, GOTRAJA.

See H. L. INHERITANCE 1.

SAVINGS OF INCOME OF HINDU WIDOW'S ESTATE.

See DECLARATORY DECREE.

SECONDARY EVIDENCE.

See EVIDENCE 2, 3.

SECONDARY EVIDENCE, ADMISSION OF, WITHOUT INSPECTION OF THE ORIGINAL IN THE CUSTODY OF PLAINTIFF, IMPROPER.

See EVIDENCE 3.

SECURITY.

See MORTGAGE 10.

SELF-ACQUISITION.

See H. L. MITAKSHARA 1.

SEPARATION IN ESTATE, EFFECT OF.

See GUARDIAN AND WARD.
— H. L. PARTITION.

SERVICE OF COPY OF PETITION AND PARWANA IN THE MANNER PROVIDED, ESSENTIAL.

See FORECLOSURE.

SERVITUDE.

See RIGHT OF WAY.

SETTING ASIDE EXECUTION PROCEEDINGS.

See EXECUTION PROCEEDINGS 1.

SETTING ASIDE EXECUTION-SALE.

See EXECUTION SALE 3.

SET OFF.

See ACCOUNT.
— COSTS.

SET OFF OF COSTS ORDERED AT A PREVIOUS STAGE AGAINST COSTS FINALLY AWARDED.

See COSTS.

SHARERS.

See M. L. WILL 2.

SHEBAIT.

See H. L. ENDOWMENT.

SLAVE.

See M. L. EMANCIPATED SLAVE.

SON.

See H. L. MITAKSHARA 1.
— M. L. ACKNOWLEDGMENT AS SON.

SON'S LIABILITY FOR FATHER'S DEBTS.

See H. L. ANCESTRAL PROPERTY 1.

SON'S SHARE.

See H. L. ANCESTRAL PROPERTY. 1, 3.

SON'S INTEREST, ON BIRTH.

See ANCESTRAL PROPERTY 3.

SPECIAL APPEAL.

See EVIDENCE 4.

SPECIAL LEAVE TO APPEAL.

See PLEADER.
— WILL 2.

SPECIFIC PERFORMANCE.

Specific Performance—Construction of Agreement in a pottah—Assignment of Pottah—Rights of Assignees against original Lessors.

The owners of ancestral village lands gave a *mokurari pottah* of land in a *mouza* to the proprietor of a neighbouring collieries "for quarrying coal, for building stores, for garden, for orchard, for road-making, and for other uses." The *pottah*, besides the above contained the following, as translated:—"You will build a factory according to any plan you choose, and possess the same. Within that aforesaid *mouza* we will not give settlement to any body. If you take possession, according to your requirements, of extra land over and above this *pottah*, we shall settle such land with you at a proper rate. Thereat we shall make no objection." The lessee, after being in possession for some years under the *pottah*, assigned it to the plaintiffs, who afterwards took possession of the whole of the extra land, and demanded a *pottah* therefore from the defendants, and made a contract advantageous to themselves to sell it to third persons. The defendants refused to grant them a *pottah*. In a suit for specific performance,—*Held* on the construction of the *pottah*, that if the lesee, or his assigns, had required additional land for the purpose of carrying out the objects for which the *pottah* was granted, then the lessors would have been bound to settle so much of the adjoining land with them as might have been necessary for such requirements.

Held also, that the plaintiffs, the assignees, were not entitled to compel the defendants to grant them a *pottah* of the extra land, even at a reasonable rate, merely for the purpose of selling it.

Semble.—In a suit for specific performance of an agreement to sell land, the fact that on account of the extraordinary character of the property, as its containing coal or other valuable minerals, there is considerable difficulty in fixing a reasonable rate for it, is not a sufficient reason for refusing a decree. [*The New Beerbhoom Coal Company* v. *Bularam Mahata*,] 145

SPLITING CLAIMS.

Civil Procedure Code, Act X of 1877, *s.* 43—*Spliting claims.*

A decree for damages in a suit instituted on 2nd June 1879 (27th Joist 1286 F) on a breach of contract for not having given possession of land according to the terms of a zar-i-peshgi potta, awarded the profits of the lands for 1283 F, which would have been received by the plaintiff had the contract been performed.

The decree-holder then brought the present suit (14th June 1880 or 21st Joist 1287 F.), for damages on the breach of the same contract, claiming the profits accrued during 1284, 1285 and 1286 F. (1876-77 to 1878-79).

Held, that the High Court had rightly decided that, in regard to Act X of 1877, s. 43, the plaintiff could not recover so much of the profits as had already accrued at the date of the institution of the prior suit, inasmuch as the claim in respect of such profits might have been included therein, *viz.*, the profits for the two years 1284 and 1285 F., which had expired when that suit was brought. [*Madan Mohan Lal* v. *Sheosanker*,] 674

See CIVIL PROCEDURE CODE 2.

STATEMENT OF THE EXISTENCE OF RELATIONSHIP BY A MUKHTAR UPON INSTRUCTION, INADMISSIBLE.

See EVIDENCE 4.

STATUTE.

13 ELIZ. C. 5.

See FRAUD UPON CREDITORS.

11 AND 12, VIC. C. 21, S. 24.

See INSOLVENCY.

24 AND 25, VIC. C. 104, S. 15.

See HIGH COURT.

STAYING SALE OF ATTACHED PROPERTY.

See LIMITATION 8.

STHANAM LANDS.

Sthanam lands: Evidence.

A Rajah having made a perpetual lease of Sthanam lands appertaining to the Raj, one

of his successors sought to set it aside on the ground that the property was devaswam, or the endowment of temples. That it was devaswam was denied; and after questions of the admissibillity of evidence, the construction of documents and the effect to be given to judgments had arisen, the fact was found in the affirmative by two Courts concurrently. Upon an examination of the evidence by the Judicial Committee it was, however, found that the plaintiff had not proved his case. [*Venkateswara Iyan* v. *Shekhari Varma*.] 259

STRIDHAN.
See H. L. STRIDHAN.

STRIKING OFF OF EXECUTION PROCEEDINGS, EFFECT OF.
See LIMITATION 8.

SUBSEQUENT INCUMBRANCER.
See REDEMPTION.

SUCCESSION.
See PRIMOGENITURE 2.
— H. L. ADOPTED SON.
— H. L. ADOPTION 6.
— H. L. ENDOWMENT.
— H. L. INHERITANCE 1, 2.
— H. L. MOHUNT.
— H. L. RAJ.
— M. L, EMANCIPATED SLAVE.

SUCCESSION, CUSTOMARY RULE OF.
See PRIMOGENITURE 2.

SUCCESSION OF ADOPTED SON ON THE MOTHER'S SIDE.
See H. L. ADOPTED SON.

SUCCESSION OF ADOPTED SON TO COLLATERALS IN GOTRA NOT THAT OF ADOPTIVE FATHER.
See H. L. ADOPTION 6.

SUCCESSION, ORDER OF, BY THE HINDU LAW OF WESTERN INDIA.
See H. L. INHERITANCE 1.

SUCCESSION TO ESTATE OF COLLATERAL RELATION VESTED IN AN HEIR BEFORE THE ADOPTION.
See H. L. ADOPTION 7,

SUDRAS.
See H. L. ADOPTION 2, 4.

SUIT.
See CAUSE OF ACTION.
— DECLATORY DECREE,

SUIT FOR ASSESSMENT OF RENT UPON MEASUREMENT.
See KUBULIYAT.

SUIT FOR REDEMPTION.
See KATKABLA.

SUIT FOR RECOVERY OF POSSESSION IS NOT GOVERNED BY LIMITATION OF SETTING ASIDE ADOPTION BUT BY 12 YEARS' LIMITATION.
See LIMITATION 1.

SUIT, REMAND OF.
See JURISDICTION 3.

SUIT, TRANSFER OF.
See JURISDICTION 3.
— PAUPER PETITION.

SUIT, WITHDRAWAL OF.
See JURISDICTION 3.

SUIT FOR SETTING ASIDE A DEED AFTER ATTEMPT TO ENFORCE IT.
See LIMITATION 9,

SUIT FOR ARREARS OF RENT.
See LIMITATION 1.

SUIT RELATING TO PROPERTY HELD IN TRUST.
See LIMITATION 13.

SUIT TO SET ASIDE ADOPTION, MEANING OF.
See LIMITATION 20.

SUIT FOR POSSESSION BY MORTGAGE.
See MORTGAGE 7.

SUIT FOR REDEPMPTION BARRED.
See MORTGAGE 8.

SUIT FOR ACCOUNT BY PRINCIPAL.
See PRINCIPAL AND AGENT 1.

SUIT FOR MAINTENANCE.
See RES-JUDICATA 3.

SUIT FOR SUCCESSION, REPRESENTATION OF THE ESTATE OF A HINDU TALUKDAR BY HIS WIDOW.
See RES-JUDICATA 4.

SUPERINTENDENCE OF HIGH COURT.
See HIGH COURT

SURETY.
See LEX LOCI CONTRACTUS.
— PRINCIPAL AND SURETY.

SURETY, DISCHARGE OF.
See PRINCIPAL AND SURETY.

SURPLUS, BENEFICIAL INTEREST IN.
See WILL 1.

SURRENDER OF DARMAKURARI INTEREST HOW PROVED.
See SALE FOR ARREARS OF REVENUE.

TALOOK.
See WILL 3.
— H. L. JOINT FAMILY 2.

TALOOKDAR.
See TRUST 1.
— H. L. JOINT FAMILY 1, 2.

TENANCY-AT-WILL.
See TENANCY UNDER TALOOKDARI SETTLEMENT.

TENANCY UNDER TALUQDARI SETTLEMENT

Tenancy under the Taluqdari Settlement—"Oudh Sub-settlement Act," XXVI of 1866—Tenancy-at-will—Right of Resumption—Absence of under proprietary right.

At the confiscation and restoration of Oudh lands in 1858, it was intended to settle and restore, under Regulation, to the taluqdars, with certain exceptions, the taluqdars' rights, and also to protect, as far as was necessary by sub-settlement, or otherwise, the existing rights of the occupiers, but there is nothing to show any intention to advance beyond what the rights were at the time.

Where the relation of taluqdar and tenant, at a rent of land within a taluq, has been shown to have existed at that date, and since the tenant cannot defeat the taluqdar's right of resumption on due notice, notwithstanding a lengthened duration of tenancy, either on the ground that, by reason of this estate of things having brought him within the meaning of para 2 of the Schedule to Act XXVI of 1866, he is entitled to an under-proprietary right, or on the ground that time and undisturbed enjoyment have ripened his holding into a species of ownership.

The issues between the parties raising only the question of some form of proprietary right, still, if the tenant had shown any right whatever to remain undisturbed by the taluqdar, such right would have been considered on this appeal, and would have received effect.

The allegation of a grant in perpetuity in 1826 at a rent to be varied according to the amount of revenue payable by the taluqdar, not having been proved, but the existence and origin of a tenancy having been shown at a rent, paid down to the commence-

ment of the suit: *Held*, that length of enjoyment, coupled with such payment of rent, could give no greater force to the tenant's right than it originally possessed [*Rohan Singh* v. *Surat Singh*,] 590

TESTAMENTARY POWER OF WIDOW.

See H. L. STRIDHAN.

TODA-GIRAS HAK.

Toda giras hak—The Pensions' Act XXIII of 1871.

In part of Western India annual payments, known as *toda-giras hak*, made by village communities and commuted by them into liabilities to *girasias*, have been recognized as a species of property, however unlawful their origin.

In 1862 a resolution of the Government of Bombay described the position of the *girasias* at the time, and gave them the option of resuming the collection of the *toda-giras hak* formely levied, resorting only to legal proceedings to enforce their claims, or of receiving, from the Government, allowances of an equivalent amount; the collections, in the latter case, being discontinued on all hands.

The ancestors of the adoptive father of the plaintiff formerly levied *toda giras hak;* and after 1862 the Government in respect thereof made payments, under the resolution, to three brothers, of whom one was the plaintiff's father; the latter receiving a one-third share, which, on his death in 1865, was no longer paid.

Held that a suit against the Government for payment of this third share with arrears fell under the Pensions' Act XXIII of 1871, sec. 4, which prohibits cognizance, save as in the Act provided, "of any suit relating to any pension or grant of money or land revenue conferred or made by the British, or any former, Government, whatever may have been the consideration for such pension or grant, or whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted."

Held that there was no reason, either in the language of the Act itself, or in any antecedent legislation, for construing these words as applicable only to rights in the nature of pensions. [*Maharaval Mohan Singhji Jeysinghji* v. *The Government of Bombay*] 230

TRADE CUSTOM OF BEAWAR.

See CUSTOM.

TRANSFER BY KARTA AND HIS SON TO MINOR GRAND SON.

See H. L. GIFT.

TRANSFER OF SUITS.

See JURISDICTION 3.

— PAUPER PETITION.

TRIBAL CUSTOM.

See GRANT.

TRUST.

1 *Oudh Estates Act*, 1869, *s.* 10—*Taloukdar —Declaration of Trust.*

In a suit by an adopted son against his father for a declaration of right with consequential relief in a share of certain estate, the defendant pleaded that he was absolute owner thereof, and in regard to two of the talooks named was entered in the talookdar's list prepared under Act I. of 1869.

It appeared that under a number of family transactions the property in suit had been given to the defendant for such interest and with such right of succession to the plaintiff as by virtue of the law of the Mitakshara attaches to ancestral immoveable estate as between father and son :—

Held, that the plaintiff was entitled to a declaration to that effect, and that sect. 10 was no bar to his assertion of the interest declared to be vested in him. [*Seth Jaidial* v. *Seth Seeta Ram*,] 297

2 *Oudh Estates Act* (*I of* 1869), *ss.* 8, 9, *and* 10—*Recognition of Trust—Specific Relief Act* (*I of* 1877), *s.* 42.

Notwithstanding the confiscation of land in oudh, followed by its restoration under the Government order of 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by "The Oudh Estates Act, 1869," the legal owner may, either by express agreement, or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad.

A talookdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny; a sanad granted to her as talookdar, with full power of alienation, and her name was afterwards entered in the lists prepared under s. 8 of "The Oudh Estates Act, 1869." But certain of her acts were not explicable except on the understanding that she was abiding by the will.

Held, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life.

Held also, in a suit by the remainderman for a declaration of the invalidity of the transfer by the widow as against him, that although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder, and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought, because his suit has been wrongly decided against him on the merits. [*Ramanand Kuar* v. *Raghunath Kuar*] 316

See NON-JOINDER OF PARTY.
— H. L. CHARITABLE TRUST.
— H. L. JOINT FAMILY 1.

TRUST FOR RELIGIOUS PURPOSES.
See NON-JOINDER OF PARTY.
— WILL 1.

TRUST, IMPLIED, FOR JOINT FAMILY.
See H. L. JOINT FAMILY 1.

UNCHASTITY, EFFECT OF WITH REGARD TO VESTED ESTATE.
See H. L. UNCHASTITY.

UNCONSCIONABLE BARGAIN.
See REMAND.

UNDERTENURE, RESUMPTION OF.
See ISTEMRARDAR.

UNDER-PROPRIETARY RIGHT.
See TENANCY UNDER TALUKDARI SETTLEMENT.

USAGE OF A RELIGIOUS INSTITUTION.
See H. L. ENDOWMENT.

USER.
See RIGHT OF WAY.

USARY LAWS.
See MORTGAGE 2.

VESTED ESTATE.
See H. L. UNCHASTITY.

VICE ADMIRALTY COURT OF BENGAL, APPEAL FROM.
See PRACTICE 1.

VOID DISPOSITION OF PROFITS ONLY.
See H. L. WILL 3.

VOLUNTARY PAYMENT.
Money paid, but not due, and paid under compulsion.

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.

Held, that this was not a voluntary payment, nor a payment of money equitably due; but one made under compulsion of law, *i. e.*, under pressure of the execution-proceedings. And *held*, that this might be recovered in a suit for a money-decree, the remedy not being confined to the execution-proceedings. [*Doolichand* v. *Ramkishen Singh*,] 245

VOLUNTARY TRANSFER BY INSOLVENT.
See INSOLVENCY.

WAJIB-UL-ARZ.
See CONSTRUCTION 4.
— EVIDENCE 1, 5.
— PRACTICE 4.

WARRANTY, BREACH OF.
See CONTRACT.

WASILAT.
See LIMITATION 9.

WATER COURSE, OBSTRUCTION OF.
See LIMITATION 7.

WATER, FLOW OF.
See RIPARIAN PROPRIETORS.

WIDOW.
See DECLARATORY DECREE.
— RES-JUDICATA 4.
— H. L. ADOPTION 1.
— H. L. INHERITANCE 1.
— H. L. RAJ.
— H. L. STRIDHAN.
— H. L. UNCHASTITY.

WIDOW OF HINDU TALOOKDAR, REPRESENTATION BY.
See RES-JUDICATA 4.

WIDOW'S DEBT, WHEN CHARGE ON INHERITANCE.
See H. L. SALE BY WIDOW.

WIDOW, EXCLUSION FROM SUCCESSION TO A JOINT ESTATE.
See H. L. RAJ.

WIDOW, TESTAMENTARY POWER OF.
See H. L. STRIDHAN.

WIFE.
See BENAMEE TRANSACTION.
— BUDHIST LAW IN BRITISH BURMAH.

WILL.

1 *Trust for Religious uses—Beneficial Interest in Surplus—Construction of Will.*

A Hindu lady left, by will to her sons lands belonging to her to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies, with a provision, that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family.

Held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable, and could not be presumed to be valueless.

Held also, that directions given by the testatrix in her will to the effect, that her heirs should have no power of gift or sale over the property bequeathed, and that it should not be attached or sold an account of their debts, being inconsistent with the interest actually given, were wholly beyond her power, and must be rejected as having no operation. [*Ashutosh Dutt* v. *Doorga Churn Chatterjee*,] 58

2 *Instruction of will—precatory words—Misstatement in petition for special leave to appeal—costs.*

In order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain.

A testator made a gift in these words: "I give to my dearly beloved wife the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her." *Held*, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created.

An order in council granting leave to appeal is liable at any time to be rescinded with costs, on its appearing that the petition upon which the order has been granted contains any misstatement, or any concealment of facts which ought to have been disclosed. Even if there has been no intention to mislead, a material misstatement having been made, the order is still liable

to be rescinded; and, to maintain it, to clear the case of bad faith is not sufficient. *Mohun Lall Sookul* v. *Beebee Doss* (1) referred to and followed.

Of three grounds on which special leave to appeal had been obtained, two had been correctly stated, but with the third was connected error in the petition, to which objection was taken at the hearing. On its appearing that there had been no intention to mislead, the appeal was heard and allowed; but in regard to the above, without costs. *Ram Sabuk Bose* v. *Monmohini Dossee* (2) referred to. [*The Mussoorie Bank* v. *Raynor*,] 346

3 *Legal Construction of Will—Devise of talook—The Oudh Estates' Act, I of* 1869—*Requirement of registration—Acceleration of remainder on failure of life estate.*

A gift in remainder, expectant on the termination of an estate for life, does not fail, but is accelerated, by reason of the gift of such prior life estate not taking effect.

The principle of the decision in *Lainson* v. *Lainson* (1) *held* applicable to a will made by a Hindu testator.

A talookdar, whose talook was entered in the third of the six lists prepared in conformity with s. 8 of "The Oudh Estates' Act," I of 1869, devised his estate by a will, which was not registered, to one of his wives for life, and after her death to his younger son by her. *Held*, as a consequence of the above rule, that it was not necessary to decide, upon a claim by the elder son as heir-at-law, whether the widow, as a person "who would have succeeded to an interest" in the talook, if the talookdar had died intestate, would have been within the exception, in reference to the effect of non-registration of will contained in s. 13 of the same Act. [*Ajudhia Buksh* v. *Rukmin Kuar*,] 497

See PRIMOGENITURE.
— REGISTRATION 2.
— H. L. WILL 1, 2, 3.
— M. L. WILL 1, 2.

WILL, DEPOSITE OF, DIFFERENT FROM REGISTRATION.
See REGISTRATION 2.

WILL OF A TALOOKDAR.
See PRIMOGENITURE 2.

WILLA.
See M. L. EMANCIPATED SLAVE.

WITHDRAWAL OF SUITS.
See JURISDICTION 3.

WORDS OF INHERITANCE, ABSENCE OF, IN MAKARARI IJARA.
See CONSTRUCTION 3.

WORDS OF DURATION OF ESTATE NOT DENOTING MORE THAN INTEREST FOR LIFE.
See M. L. WILL 4.

WOOD GROWING OVER VILLAGE LANDS, OWNERSHIP OF A KHOT OVER.
See KHOTI TENURE.

WRONG CONTINUING ACT OF.
See LIMITATION 7.

ZEMINDARI.
See H. L. ZEMINDARI.

PART II.

HINDU LAW.

ADOPTED SON.

Hindu Law—Inheritance—Succession of adopted son on the mother's side.

An adopted son under the Law prevailing in Bengal occupies, as regards inheritance, the same position in the family of the adopter as a natural born son (except in a few instances defined in the Dattaka Chandrika and Dattaka Mimansa,) succeeding collaterally, as well as lineally, his relations by adoption. *Pudma Kumari Dabi Chowdhrani* v. *The Court of Wards* (1), referred to and followed. Where a natural-born son, had there been one, would have been entitled to succeed a maternal uncle, as being brother's daughter's son to the latter, *held*, that an adopted son, who had been adopted by a widow under her deceased husband's authority, was entitled, in like manner, to inherit, at the death of the widow, from her father's brother. [*Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*,] 458

ADOPTION.

1 *Hindu Law—Adoption by widow—Agreement by natural father restricting son's interest in the inheritance of his adoptive father.*

The natural father of a boy whom the widow of a deceased Hindu proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father: *Held*, that the agreement was not void, but was at least capable of ratification when the adopted son became of age. *Chitko Raghunath Rajadiksh* v. *Janaki and others* (1) referred to. [*Ramasawmi Aiyan* v. *Vencataramaiyan*,] ... 42

2 *Hindu Law—Sudras in Bengal—Adoption.*

Among persons of the Sudra caste in Bengal, no ceremonies in adoption, besides the giving and taking a child, are necessary.

Query—Whether, where the ceremonies of an adoption are not performed at the proper time, the omission can be subsequently supplied? [*Indromoni Chowdhrani* v. *Beharilal Mullick*,] 120

3 *Hindu Law of Adoption—Alleged assent by the sapinda of a person deceased, to support adoption by the widow.*

The sapinda of a deceased person gave his child to the widow of the latter to be adopted in pursuance of an authority which she represented herself to have had from her husband. This natural father of the child was the eldest and managing member of a joint family consisting of himself and his three younger brothers, sons of the first cousin of the deceased. The three younger brothers disputed the validity of the adoption.

Two Courts having found against the existence of an authority to the widow given by her deceased husband, the question remained whether the manager giving his child, in the manner in which he had given it for adoption, he being a sapinda, and in a position to represent other sapindas of the deceased, was an assent by a sapinda to an adoption by a widow sufficient to support her adopting in the absence of an authority from her husband.

It was decided that under all the circumstances under which this child had been applied for by the widow and given by the father, the assent of the latter was not one which had rendered the adoption valid as against the brothers.

There was no sufficient evidence to show that the widow applied to the boy's father to give his assent as *sapinda* to an adoption, on the ground that she could not adopt without the *sapinda's* assent.

It was not necessary to determine whether this *sapinda* could alone have given a valid assent, if it had been given to the widow as

one having no authority from her husband to adopt; and if it had been given without his mind's having been influenced by other and undue considerations. [*Kurunabdhi Ganes Ratnamaiyar* v. *Gopala Ratnamaiyar*,] 149

4 *Hindu Law—Adoption among Sudras—Execution of Mutual Deeds—Actual giving and taking of Child.*

Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds. [*Shoshinath Ghose* v. *Krishna Soondari Dasi*,] 191

5 *Hindu Law—Adoption by Widow—Contingent Reversionary Heir—Collusion—Party to suit to contest Adoption.*

Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal* (1) approved. Reference made to *Kooer Golab Sing* v. *Rao Kurun Sing* (2).

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue; and whether it was requisite or not, that any nearear heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as naturally born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant *bandhu*, and that he had not a vested but at most contingent interest. And *held*, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated. [*Ranee Ananda Kunwar* v. *The Court of Wards*,] 195

6 *Adoption—Termination of Authority to Adopt—Succession of Adopted Son to Collaterals in Gotra not that of Father by Adoption.*

An instrument of permission (anumati patra) to a Hindu wife to adopt should she be left a widow, provided that "dattaka (adopted) son shall be entitled to perform your and my shradh and that of our ancestors, and to succeed to the property." The husband and wife had a son born, who survived his father, succeed to the property, and died before his mother, leaving a widow, who, as heir, took possession of it for her widow's estate. The mother then professed to exercise the above power, and in the suit arising thereupon—*Mussamut Bhoobunmoyi Debi* v. *Ramkishore Acharji Chawdhary* (1)—it was decided that the son's widow, having acquired a vested interest, a new heir could not be so substitude for her.

Held, that although such a substitution might have been disallowed without the adoption being held invalid for all other

purposes, the above decision had determined that, upon the vesting of the estate in the widow, the power of adoption was incapable of execution, and was at an end; and that this would have been the conclusion if the question of the validity of the power had been raised without any previous decision upon it.

An adopted son occupies the same position in the family of the adopter as natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, governing authorities in the Bengal school.

An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption. *Sumbhochunder Chowdhury* v. *Naraini Dibeh* (2) referred to and followed.

Held in this case, that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter's, was an heir nearer to him than such maternal grandfather's grandnephew. [*Pudma Coomari Debi* v. *The Court of Wards*,] ... 285

7 *Hindu law, Adoption—Adoption as regards succession to estate of a collateral relation vested in an heir before the adoption—Fraud on the part of such heir delaying adoption.*

According to Hindu Law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral.

Of three brothers deceased, the one who died first left one son; the second dying left a widow, who took her estate for life in her husband's property; and the third left a widow to whom he gave by will a power to adopt.

On the death of the widow of the second deceased, the son of the first inherited his uncle's share in the family estate, and by fraudulent acts caused delay in the exercise of the power to adopt by the widow of the third. Afterwards a boy, who had not been born in the lifetime of the widow who took for life as above stated, was adopted under the said power.

Held, that the adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him, under any circumstances, to have been made an adoptive heir to the uncle. [*Bhubaneswari Debi* v. *Nilcomul Lahiri*,] 651

8 *Hindu Law—Adoption—Construction of authority to adopt—attempt by two widows to adopt each a son simultaneously.*

Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed. "You... ..... the elder widow, may adopt three sons successively, and you..... the younger widow may adopt three sons successively." *Held*, that, this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions.

Held, also, that, supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions.

The opinion of W. H. Macnaghten (1) on the subject referred to and approved. [*Akhoy Chunder Bagchi* v. *Kalapahar Haji*,] 678

ANCESTRAL PROPERTY.

Mitakashara Law—Ancestral Property—Son's Share—Rights of Co-parceners—Alienations—Liability of Sons for Father's Debts—Execution Purchaser—Notice.

Under the law of the *Mitakshara* each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, and can compel his father to make partition of such estate.

The rights of the coparceners in a joint *Hindu* family consisting of a father and his sons do not differ from those of the coparcener in a like family consisting of undivided brethren, except in so far as the sons are affected by the obligation of the *Hindu* law to pay their father's debts, and by the fact that he is naturally the manager of the joint family estate.

It is a settled law in the *Madras* Presidency, that one coparcener may dispose of ancestral undivided estate to the extent of his own share, even by private conveyance, whether for value or by gift.

In the *Bombay* Presidency, unauthorized alienations voluntarily made by one copar-

cener, are good, even for his own share, only when made for value.

In *Bengal*, the law which prevails in the other Presidencies as to alienation by private deed has not yet been adopted, but it is now settled, that the purchaser of undivided property, sold in execution of a decree during the life of the debtor for his separate debt, acquires the debtor's interest in such property, with the power of ascertaining and realizing it by partition.

Under the *Hindu* law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father. Accordingly, where ancestral property has passed out of the family, either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debts, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution-sale, being a stranger to the suit without such notice, is not bound to make enquiry beyond what appears on the surface of the proceedings.

In a suit by the members of an undivided *Hindu* family governed by the law of the *Mitakshara*, to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that, prior to the sale, the plaintiffs had preferred a claim of objection thereto on the same grounds, and that the Court of execution had declined to adjudicate the claim, and had directed the sale to proceed, referring the claimants to a regular suit. *Held*, that the purchasers at the execution-sale must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order passed thereon by the Court, and to have purchased with knowledge of the plaintiffs' claim, and subject to the result of their suit. *Held* also, that the property having been attached for the debt of a co-sharer during his lifetime, the sale was good for his share, but, that as it appeared on the evidence in the suit that the debt was one for which, according to *Hindu* law, the other co-sharers could not be made liable, the sale was not good for their shares. [*Suraj Bunsi Koer* v. *Sheo Pershad Singh*,] 1

2 *Hindu Law—Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitation Act XIV of* 1859, *Section* 1, *Clause* 13—*Res-judicata—Act VIII of* 1859, *Section* 2.

A Hindu of the Southern Maratha Country, having two sons undivided from him, died in 1871, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed, on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveables the claim failed, because they were situate beyond the jurisdiction of the court.

Held, first, that this suit was not barred under Act VIII of 1859, section 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death.

Secondly; that the suit was not barred under the Limitation Act XIV of 1859, section 1, clause 13. As to the immoveables; seting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables on the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, section 14. As to the moveables; assuming that they could, on the questions of limitation, be treated as distinct from the moveable, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the moveables untill his father's death. The defendant in this suit who had taken the benefiit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous.

So far, also, as the father's interest was concerned, the succession only opened on his death.

Thirdly; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one third share.

Held, that under the Mitakshara law, as received in Bombay, the father could not dispose of his one third share by will.

The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond the decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will, were held to be sound and sufficient to support that dicision. [*Lakshman Dada Naik* v. *Ramchandra Dada Naik*,] ... 173

3 *Mitakshara Law—Inheritance of share in village—Interest of son acquired on birth.*

A mouzah, of which the proprietary right formerly belonged to one zemindar, the ancestor of the plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government, by purchase. The Government, before the birth of the plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the plaintiff's father, who thus obtained possession of a five biswas share. *Held* that, whatever interest the plaintiff, as son, might have under the Mitakshara law, in ancestral property, it could not be said that, at the time of his birth, there was any proportionate share in the mouzah in which he could, by birth, acquire an interest, except this five biswas share.

In this suit the plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five biswas share only. *Held* that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest. [*Ujagur Singh* v. *Pitam Singh*,] ... 275

CARNATIC.

Mitakshara—Inheritance—Daughter—Impartibility—Madras—Regulation XXV. of 1802.

The Mitakshara rule that property inherited by a female from a male is taken by her for only a restricted estate and devolves, on her death, in the line, if any exists, of such male, is applicable in the Carnatic. [*Tevar* v. *Tevar*,] 239

CHARITABLE TRUST.

Charitable Trusts—Dedication—Mitakshara law of inheritance.

A Hindu testator in Bombay who left a nephew, (son of a deceased brother,) made a bequest for charitable purposes. The nephew, entitled either as heir or as legatee of the residue of the estate, contended that the only property of which the testator during his life-time was in possession was joint family estate, and that under the law of the Mitakshara the testator had no power to dispose of it as he had attempted.

A specific part of the testator's estate having, after his death, been set apart as applicables to the trust for the charitable purpose, and the nephew having received the residue, he agreed with the executors that he would act jointly with them in carrying out the trust, and became one of the trustees.

Held that the property had been validity dedicated to the charitable purposes; whether or not the will alone was sufficient, with regard to the nature of the testator's interest in the estate, to constitute the trust as against the heir. [*Purmanundass Jeevundass* v. *Venayekrao Wassoodeo*,] 366

CUSTOM.

Custom—Adoption—Construction of gift—Burden of proof—Custom not allowing

adoption, governing a family not subject to Hindu law—Invalidity of gift made to a person as being the adopted son of donor, where the adoption failed.

A family in Bengal, affecting to be Hindu, but not Hindu by descent and origin, may be governed by customs at variance with Hindu law. A family took its origin in a tribe not Hindu and its customs differed from Hindu customs. The question having arisen whether succession in virtue of adoption was consistent with, or was contrary to, the customs of the family.

Held, first, that, with regard to the origin and history of the family, the point for inquiry was not whether the general Hindu law was, in this case, modified by a family custom forbidding adoption, but was whether, with respect to inheritance, the family was governed by Hindu law, or by customs not allowing an adopted son to inherit; secondly, upon the evidence that this family had retained, and was governed by, customs at variance with Hindu law, and that whatever Hindu customs might have been introduced into it, the custom of succession upon adoption had not. Whether, if the family had been shown to be Hindu, out and out, save only special customs, the evidence would have been sufficient to prove a special custom was not the question.

Held, also, in reference to the burden of proof that, in a suit brought to maintain the plaintiff's title as heir against a defendant, who relied upon an adoption as defeating the title of the plaintiff, the burden of proving the adoption to be permitted by the family custom was upon those who alleged it to be so; whereas, if the family had been generally governed by Hindu law, the onus would have been on those who alleged the exclusion of the right to adopt. *Rajah Bishnath Singh* v *Ram Charn Majmoodar* (1) referred to, as showing that even in a Hindu family there might be a custom which barred inheritance by adoption.

Held, upon the true construction of an *angikarpotro* whereby an estate was given to the donee in virtue of his being "adopted son" of the donor, that the gift did not take effect, inasmuch as the adoption was invalid.

The distinction between what is description only, and what is the reason or motive for a gift or bequest, may often be fine; but it must be drawn from a consideration of the language and the surrounding circumstances. *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2) distinguished. [*Fanindra Deb Raikat* v. *Rajeswar Dass*,] 610

ENDOWMENT.

Hindu Law—Endowment—Succession to the management of a religious endowment, as sebait— Usage of the institution.

On a claim to succeed to the management, as *sebait*, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the *sebait* led a family life.

Held, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title. [*Janoki Debi* v. *Sri Gopal Acharjee*,] 411

GIFT.

1 *Hindu Law—Transfer of shares in joint family estate, by the head of the family and his son, to minor grandson.—Construction of gift; partial failure not invalidating the whole.*

In a joint family, under the Mitakshara, consisting of a grandfather, his son, and that son's son, in pursuance of a family arrangement, the first, with the consent of the second, made by deed a gift of the whole ancestral estate to the third, including with him possible brothers that might be born thereafter. The father, in lieu of his share in the ancestral estate, received money for the payment of debts incurred by him. Possession was given to the minor, through his mother, appointed by the deed of gift to be his guardian. The minor then died, and the mother retained possession.

The family estate, on the death of the grandfather, was attached by one of the father's creditors, who held a decree against him; and, in a suit to avoid the deed of gift, it was *held*, that the transfer to the minor, having been made in good faith, and for good consideration, was valid; and that, though the gift to possible brothers could not take effect, the gift by the head of the family, with the consent of the son, to the next generation, of which the only existing

member, *viz.*, the minor grandson, was put into possession, was valid. It was not a partition; for (according to the Mitakshara, Chap. I, section V., verse 31) there could be no partition directly between grandfather and grandson while the father was alive. But it was a family arrangement, partaking so far of the nature of a partition that the father received a portion, and was thenceforth totally excluded; and, *quod ultra*, the grandfather surrendered his interest to the grandson.* [*Bishen Chand* v. *Asmaida Koer*,] 512

2 *Construction of gift, as to quantity of estate given—Limitation, Act* XV *of* 1877, *Sch.* II. *Arts.* 134 *and* 144—*Gift when operative without delivery of possession—Hindu Law.*

The rule as to the constructions of the language in which a gift is made, independently of the "Transfer of property Act," Act IV of 1882, (which may, or may not, have been expressed so as to lay down in favour of absolute gifts, a rule more positive,) is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention.

A gift being thus expressed,—"I put a stop to my interest in those taluqs, and withdraw my enjoyment thereof, and I make them over to you;" *held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control;" and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the donee should take the property for life only.

Held, also, that, consistently with the authorities in the Hindu law, a gift, were the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that were a donee, or vendee, is under the terms of the gift, or sale, entitled to possession, there is no reason why such gift, or sale, though not accompanied by possession, whether of moveable or immoveable property, (where the gift or sale, is not of such a nature as would make the giving effect to it to be contrary to public policy,) should not operate to give the donee, or vendee, a right to obtain possession. [*Kali Das Mullick* v. *Kanhya Lal Pundit*,] 578

IMPARTIBLE ESTATE.

Hindu Law—Alienation of Impartible Estate —Family Custom.

Impartibility of an inheritance does not, as a matter of law, render it inalienable.

The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required. *Anund Lal Singh Deo* v. *Maharaj Dheraj Guru Narain Deo* (1) followed.

In the case of a titular raj, of which the lately deceased Rajah had made a mokurari pottah, or grant in perpetuity, of part of the zemindari lands thereto belonging, in favor of a younger son, it was found, that the only custom proved was, that the raj estate descended to the eldest son to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant.

Held, that the mokurari grant was not invalidated by reason of the raj estate being by custom impartible. [*Raiah Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*,] ... 290

INHERITANCE.

1 *Hindu Law—Inheritance—Order of succession to inheritance by the Hindu law of Western India—Gotraja sapinda—Right of widow of collateral relation.*

By the Hindu law in force in Western India the widow of a collateral relation, although she is not specified in the texts among the heirs to members of her husband's family, may come into the succession as one of the classes of gotraja sapindas of that family.

According to the law of the Mitakshara, as accepted in Western India, the right to inherit in the classes of gotraja sapindas is to be determined by family relationship, or the community of corporal particles, and not only by the capacity of performing funerals rites.

The High Court having affirmed as a right, according to the law actually prevalent

in Western India, the claim of a widow of a first cousin, on the father's side, of the deceased to inherit his estate, as a gotraja sapinda, it was held that there was no reason for withholding from that doctrine the force of law; the right of the widow being mainly rested on the ground of positive acceptance and usage. In this case the widow of a first cousin of the deceased, on the father's side, was held to have become by her marriage gotraja sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease, in priority to male collateral gotraja sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor. [*Lulloobhoy Bappoobhoy, Cassidass Moolchund* v. *Cassibai*,] 164

2 *Hindu law of succession to an impartible inheritance among sons of different mothers —Primogeniture.*

The principles on which is founded the Judgment in *Ramalakshimi Ammal* v. *Sivananth Perumal Ammal* (1) as to the succession to an impartible inheritance apply with equal force whether the first-born son is born of a first married wife or of a wife afterwards married.

The text of *Menu*, chap. ix, v. 125. distinctly shows that among sons born of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother. In v. 122 of the same chapter the words "but of lower class," added by the gloss of *Culluca Bhatta* (2), are to be read as correctly inserted in the next.

Two wives of a Poligar of an impartible polliam having died before his marriage with a third and fourth wife it was contended that the third being in the position of a first married or "royal" wife, her son was entitled to succeed to his father in preference to an elder son born of the fourth. *Held* that the elder son, though born of the fourth wife, was entitled by primogeniture under the rule above referred to, and that it was, accordingly, immaterial to consider whether or not this third wife was in the position of a first married wife. What might be the effect of one wife being "of a lower class" than another was not in question. [*Pedda Ramappa* v. *Bangari Seshamma*,] ... 203

JOINT FAMILY.

1 *Oudh Talookdar—Implied trust for joint family—Act I. of* 1869.

Although the *talookdary Sunnud* was granted by Government in the name of the defendant alone, it is to be presumed from his acts and transactions that there was a declaration of trust by him in favour of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit, including the villages comprised in the Summary settlement, and those acquired from the profits thereof, as also the villages granted in reward for services during the mutiny, were held by the defendant, in trust for the family, as a joint family estate, governed by the rules of the *Mitakshara*.

The suit was commenced on the 28th August 1865 long before the passing of Act I. of 1869, but that act did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previouly held the estate.

The Court has nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, but the decree would be without prejudice to any question that may arise in respect to the said subsequent agreement or arrangement, if any. [*Thakoor Hurdeo Bux* v. *Thakoor Jowhir Singh*,] 10

2 *Hindu Law, Joint family—Rights of members of a joint Hindu family in a talukdari estate—The Oudh Estates Act (I of* 1869*) Partition and account against the talukdar—The Oudh Rent Act (XIX of* 1868), *s.* 83, *cl.* 15, *and s.* 106—*Limitation Act (XV of* 1877), *Sch. II, Arts.* 127 *and* 120.

A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate, as he has no definit share until partition. He may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account.

A talukdari estate, though entered in the name of one member of a joint family in the lists prepared in conformity with the Oudh Estates Act, I of 1869, may be subject to a trust, implied from the acts and declarations of the talukdar, for the joint family as a joint estate. *Hurdeo Bukhs* v. *Jowahir Singh* (1).

In that suit, commenced in 1865 by a member of a joint family for the declaration of his rights, partition not being claimed, the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari

estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the members of the family.

The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, sect. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits.

Held that, in regard to the order of Her Majesty above mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari estate could not be declared to be impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under proprietor under the talukdar, could not be allowed to stand.

Held, also, (*a*) that the first suit, as one for partition and an account, was not barred by limitation under Act XV of 1877, s. 120, and must be decreed; (*b*) that the provisions of the Oudh Rent Act, XIX of 1868, sect. 8, cl. 15, and s. 106, precluding proceedings in the Civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate; and (*c*) that the sections of the Code of Civil Procedure relating to mesne profits were not applicable to a suit for partition or for an account of the proceeds of family estate in which a plaintiff has no specific interest until decree. [*Pirthi Pal* v. *Thakoor Jowahir Singh*,] 758

MITAKSHARA.

1 *Mitakshara law—Assets by descent—Charge on inheritance in the possession of the son for the father's debt—Estate inherited from maternal grandfather.*

The estate which a son takes by heritage from his father constitutes assets by descent for the payment of his father's debt, not incurred for any immoral or vicious purpose. This estate may be attached and sold in execution of a decree upon such a debt; and that it is an impartible zemindary does not alter the case.

The principle that the ancestral property, in which the son acquires an interest by birth, is liable for the father's debt, unless within the above exception, holds good by the Mitakshara law as administered in *Madras* as well as in *Bombay* and *Bengal*. *Girdharee Lall* v. *Kanto Lall*, 14 B. L R., 187; s. c., L. R. 1, I. A., 321, referred to and followed.

Part of an impartible zemindary inherited from a maternal grandfather was hypothecated by the zemindar as security for a debt, not within the above exception. *Held*, that all the right, title, and interest which had come to his son by heritage from the indebted zemindar, as well in the hypothecated part as in the rest of the zemindary, were liable, so far as they had not been administered in payment of the father's debt, to be attached and sold in execution of a decree against the father, based on his admission of the debt.

A zemindary inherited from a maternal grandfather is not "self acquired" property.

Quære; Whether the zemindar, having inherited from his maternal grandfather, was under the same restriction, in reference to alienation as against the son, as he would have been if the property had come through the male line. [*Muttayan Chetti*, v. *Sangili Vira Pandia Chinnatambiar*,] ... 354

2 *Mitakshara Law—Agreement of Joint Owners not to alienate—Rights of Son.*

Where two Hindu Mitakshara brothers entered into an agreement that "in case of failure of 'aurasa' (self-begotten) male issue" of one, their joint immoveable property should go to the other, and should not be alienated by making adoption and the like; and it appeared that one of them had a son living at the date of the agreement:—

Held, that, whether or not this agreement bound the brothers, it could not bind the son or prevent that son's adoption from conferring title by inheritance. [*Venkata Mahapati Surya Rao* v. *Gangadhara Rama Rao*,] 725

MOHUNTS.

Succession of Mohunts—Custom.

With regard to the succession of mohunts, the only law to be observed is to be found in custom and practice, which must be proved.

Where the plaintiff failed to prove that the deceased mohunt had the power to appoint his successor, and that the sect to which he belonged were bound to instal the disciple whom he had selected :—*Held*, that his suit must be dismissed. [*Genda Puri* v. *Chhatar Puri*,] 726

PARTITION.

Partition under the Hindu Law—Declaratory order—Separation in estate—death of Plaintiff before final decree.

In a suit brought by the younger of two Hindu brothers against his elder brother for the partition of lands belonging to an ancestral joint estate, and against other defendants, claiming as encumbrancers or as absolute owners of portions of the said lands under titles derived from the plaintiff's father and elder brother, for the recovery of the plaintiff's share of the said lands freed from the interests claimed by these defendants, except in so far as such interests might be valid as against the plaintiff under the Hindu law, the Court passed an order to the effect that the property claimed was partible, and that the plaintiff was entitled to a moiety, but directed that with a view to ascertain how far the moiety awarded to the plaintiff was affected by the acts of the plaintiff's father and elder brother, a Commissioner should be appointed to investigate and accounts and report thereon to the Court. Before the inquiry thus directed to be made was completed, and before a final decree was passed for the division of the property, the plaintiff died. *Held*, that the order passed by Court was tantamount to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from its date, if they had not previously become so ; and, consequently that the plaintiff's interest in the property in suit would not pass to the defendant, his elder brother, as joint estate by survivorship, but to his own representatives as separate estate.

Appovier v. *Rama Subha Aiyan* (1) referred to and followed. [*Chidambaram Chettiar* v. *Gouri Nachiar*,] 55

RAJ.

Mitakshara—Impartible Raj—Succession in joint family to ancestral, impartible, estate —Right of nearest male collateral—Exclusion of widow, where the family is joint, and the estate not separate.

Impartible, ancestral, estate is not, merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves, so long as the family continues joint.

Chintamun Singh v. *Nowlukho Kunwari* (1) referred to and followed.

A female cannot inherit impartible, ancestral, estate, belonging to a joint family, under the Mitakshara, when there are any male members of the family who are qualified to succeed as heir ; a rule of law not dependent on custom ; and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.

Maharani Hiranath Koer v. *Ram Narayan Singh* (2) approved. Where Raj estate, ancestral and impartible, was not separate property and the family was undivided, and where no special custom existed, modifying the Mitakshara law of succession, *held* that the nearest male collateral relation of the last Rajah, who died without male issue, was entitled to succeed in preference to the Rajah's widow.

This relation viz., a brother of the late Rajah's deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held* that he had not thereby been deprived of his right of succeeding as a member of the joint family.

The raj estate in question originated in the partition of a more ancient one with others but of which minor estates were formed.

If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family, could be drawn. Such minor estates might have been separate (which estates granted for maintenance probably would be), and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another. [*Rup Singh* v. *Baisni*,]... 533

SALE BY WIDOW.

Grounds supporting charge on the Inheritance by a Widow for the debt.

In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor, seeking to enforce a charge on such estate, is bound, at

least, to show the nature of the transaction, and to show that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognized necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle, laid down in *Hunooman Pershad Panday* v. *Mussumat Babooee Munra Koonweree* (1), in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law, has made an alienation of ancestral family estate. [*Kameswar Pershad* v. *Run Bahadur Singh*,] 210

SURVIVORSHIP.

Survivorship—Rights of Widow—Grant by Government for maintenance of family.

The lands of three brothers having been confiscated, the Government afterwards assigned revenue paying lands for the benefit, in certain proportions, of the minor son of the eldest brother, also of the widow, minor son, and daughter of the youngest brother, (both these brothers being then deceased); and the second brother, who survived, was put into possession of a proportionate part of the property.

Held, that the widow of the youngest brother, on the deaths of his son and daughter, became, by survivorship, sole owner of the estate so assigned for their and her benefit; so that an alienation of part if made by her could not be set aside at the instance of the second brother, who failed to show, on the above state of things, that the estate was heritable property of the son, as whose uncle and heir he claimed. [*Narpat Singh* v. *Mahomed Ali Hussain Khan*,] 558

STRIDHAN.

Stridhanam—Testamentary power of widow.

The testamentary power of a Hindu female over her stridhan being commensurate with her power of disposition over it in her lifetime, and both being absolute, no distinction can be taken as regards a widow's power of disposition by will over immovables in the purchase of which she has invested money given to her by her husband. Such estate is subject to the disposition which the general law gives her the power to make of her *stridhanam*.

A widow who received presents of movable property from her husband from time to time during their married life, after his death purchased immovable estate, partly out of such property and partly with money the proceeds of jewellery forming part of her *stridhanam*.

Held that she could dispose of such immovable estate as her *stridhanam*. [*Venkata Rama Rao* v. *Venkata Suriya Rao*,] 209

2 *Hindu Widow—Sridhun—Right to sell—Estoppel—Heirs of husband bound by his representation.*

A Hindu Widow can sell her Stridhun property except land given to her by her husband. She can sell property acquired by her Stridhun. Misrepresentations of her husband that the property was acquired by her Stridhun, bind his heirs, and estop them, from claiming the property from the hands of a *bonâ fide* purchaser from her. [*Luchmun Churn Gossain* v. *Kalli Churn Singh*,] 802

UNCHASTITY.

Hindu Law—Widow's Estate—Effect of Widow's Unchastity in regard to Estate vested in her.

A widow, who succeeds to the estate of her husband in default of male issue, whether she takes by inheritance or by survivorship, does not take a mere life estate. The whole estate is, for the time vested in her; though in some respects for only a qualified interest. She holds an estate of inheritance to herself and the heirs of her husband; and upon the termination of that estate, the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death.

It has not been established that the estate of a widow forms an exception to the general rule, that the estate of a Hindu once vested by succession, or inheritance, is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance.

The general rule is stated in the Viramitrodaya, Chap. viii, "On exclusion from inheritance." paras 3, 4, and 5. This work, like the Mitakshara, may be referred to in Bengal in cases in regard to which the Dayabhaga is silent. A widow, who, not having been degraded or deprived of caste, had inherited the estate of her deceased husband, *held* not liable to forfeit that estate by reason of subsequent acts of unchastity.

Query as to the effect of her being degraded or deprived of caste for unchastity? [*Moniram Kolita* v. *Kerry Kolitany*,] 103

WILL.

1 *Hindu Law—Construction of Will—Use of words "putra poutradi krame"—Condition subsequent.*

In a will, the words "*putra poutradi krame*," recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants, and will include female heirs of a female, where by law the estate would descend to such heirs.

The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows :—

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then by granddaughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof '*putra poutradi krame.*'

"8. If the death of my wife should take place before my daughter's daughter arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for her life.

"20. If no son or daughter's daughter should be born to me and if my daughter's daughter should die before she bears a son or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

The will further directed the use of the money by the Government in that event, for certain charitable purposes.

In an administration suit brought by the Secretary of State in Council against the testator's brother, wife, and granddaughter, for the carrying out of the trusts of the will,—

Held, that clause 7, if it stood alone, would confer an absolute estate on the daughter's dauther on the death of the widow ;

That the disqualifications in clause 9 must come into operation, if at all, at or before the death of the widow ; and that it was unnecessary to decide whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law ;

That clause 20 was supplementary to clause 9, and that by it, the gift over to the Government was to take effect, if at all, immediately upon the widow's death, in the event of the granddaughter dying before her without having born a son, or in the event of the granddaughter being disqualified at the date of such death.

One possible event not having been provided for by the will, *viz.*, that of the granddaughter predeceasing the widow, having born a son, their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings.

Lady Langdale v. *Briggs* (1) as explained in the *Tagore case* approved. [*Ramlall Mookerjee v. The Secretary of State*,] 225

2 *Hindu law—Will, Construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.*

A gift by will, attempting to exclude the legal course of inheritance, is only effectual in favor of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows : "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively

shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor. [*Tarakeswar Roy*, v. *Shoshi Shikkareswar Roy*,] 439

3 *Hindu Law—Will—Construction of will—Perpetuity—Void disposition of profits only of an estate during an indefinite period—Accumulations—Account as among members of family.*

The Hindu law does not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, and for the maintenance of religious services, but not to dispose of the estate itself.

The testator directed that his estate should remain intact, providing for religious services to be kept up by his family from the profits of the estate, his will being that "his heirs, sons, sons' sons, great grandsons, and son in succession should be entitled to enjoy such profits." There were clauses for the accumulation of the profits of a certian portion of the estate, and forbiding alienation.

Held, that according to the true construction of the will taken altogether, the testator's intention was not to pass the estate. This was confirmed by the clauses against alienation, and for the accumulation, as long as the family should remain joint, of a certain share of the profits; another portion being assigned for the religious services. This was not a case in which a testator, having expressed an intention that his estate should pass, had added a clause against alienation, in which case the latter clause would have been merely void.

Held, accordingly, that this bequest was invalid.

An account of the profits of the estate, from the date of the death of the testator, having been ordered by the decree of the Court below, in favour of the inheritor of a share at whose instance the bequest was held invalid; *held*, that this did not mean that inquiry should be made into the different payments by the manager for the time being, or monies taken out by the members of the family, but that it should be ascertained to what portion of the savings of the family, or of the accumulations made, such sharer would be entitled; and that this order was accordingly correct. [*Shookhmoy Chunder Dass* v. *Monohurri Dasi*,] 639

See ANCESTRAL PROPERTY 2.

ZAMINDARI.

Zamindari—Partibility—New Zamindari—Heirs.

In 1793 the ancient zamindari of Nuzvid, which descended to a single heir, having been before British rule a raj, or principality, held on the tenure of military service was resumed by the Government for arrears of revenue.

In 1802 the Government formed two zemindaries out of it and granted one of them, since called Nuzvid, to the second son of the Rajah, under a "Sanad-i milkiat istemrari" which described the zamindari lands, compromised in it, as "the six pargannas of Nuzvid in the "Kondapalli Circar." The provisions of the sanad did not differ from those of an ordinary grant under the Permanent Settlement. On the question whether this zamindari was, or was not, subject to the same rule of impartibility as that to which the ancient and entire zamindari of Nuzvid had been subject before 1793. *Held* that the six pargannas, granted in 1802, were a new zamindari, in general; and the word "heirs" used in the sanad, construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu Law.

The Hansapur case. *Bir Pertab Sahi* v. *Maharajah Rajender Pertab Sahi* (1) distinguish. [*Rajah Venkata Nara Simgha Rau* v. *The Court of Wards*,] 81

PART III.

MAHOMEDAN LAW.

ACKNOWLEDGMENT AS SON.

Mahomedan Law—Acknowledgment of Children as Sons—Pensions Act (XXIII of 1871), ss. 4 and 6—Jurisdiction of Civil Court—Omission to obtain previously to suit Certificate enabling Court to entertain suit—Effect of Certificate granted after the hearing.

The acknowledgment and recognition of children by a Mahomedan as his sons, giving them then the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent.

The question whether such acknowledgment should be presumed or not, depends on the circumstances of each particular case. *Ashrufood Dowlali Ahmed Hossein Khan v. Hyder Hossein Khan* (1) referred to and followed.

Part of the property in suit consisted of land, which was assumed in the Courts below to be held on terms bringing it within the Pensions Act, 1871. After the judgment which disposed of the principal questions in the case, had been given, final judgment was suspended upon an objection that no certificate had been obtained under that Act. The certificate having been then obtained and delivered to the Court, *held*, that the original defect did not prevent the suit proceeding. [*Azmat Ali Khan* v. *Lalli Begum*,] 310

COMPROMISE.

Mahomedan Law—Deed of Compromise—Construction—Estate limited to take effect in favour of a person after another's death

It is not consistent with Mahomedan law to limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate.

The parties to a *solenamah* or compromise were, on the one side, the widow of a Mahomedan, she being in possession of villages in Oudh, which had belonged to him, and of which the summary settlement of 1858 had been made with her; and, on the other side, two brothers, alleged to be his sons. By the compromise, which was made in the course of proceedings at regular settlement, it was agreed that the widow should, during her lifetime, continue to hold possession, and remain proprietor, without power of alienation, and that after her death the two sons should possess each one-half of the property.

Held, that on the true construction of the compromise, the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their death in her lifetime. [*Abdul Wahid Khan v. Nuran Bibi*,] ... 627

EMANCIPATED SLAVE.

Mahomedan law—Willa—Succession—Emancipated slave—Act V of 1843.

Assuming that by the *Willa* rule of the Mahomedan law, the heirs of the master who emancipates a slave are entitled to the property of which the emancipated slave dies possessed to the exclusion of his natural heirs, the effect of section 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave," is to abrogate the rule of the Mahomedan law, and to secure the succession of the heirs of the emancipated slave, as if he had never been a slave.

The provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing.

The exclusion of the natural heirs of an emancipated slave in favour of the heirs of his emancipator, is a disability arising out of the *status* of slavery similar in its nature to the exclusion, under the Mahomedan law, of the natural heirs, of an unemancipated slave by a master or his heirs; and since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in construing it, to give it the widest remedial application which its language permits, and can not, consequently, limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death, when the words of the statue allow of its being applied to the property of any one who had at any time been a slave. [*Sayad Mir Ujmuddin Khan Valid Mir Khamrudin Khan, v. Ziaul-Nissa Begum,*] 37

GIFT.

1. *Gift—Possession—Dower.*

On an issue whether an oral gift of an estate, consisting of certain talooks and mauzas, had been made by a mahomedan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by mahomedan law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

The possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration.

Held, on the evidence, that the gift was effectively made. [*Kamar un-nissa Bibi, v. Hussaini Bibi*] 185

2 *Mahomedan Law—Gift—Ariat—Construction.*

One of two brothers, co-sharers in ancestral lands, died leaving a widow, who there upon became entitled to one-fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her. By another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows:—"I declare and record that the aforesaid sister-in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue."

Held that these words did not cut down previous words of gift to what in the Mahomedan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil ewaz*, or gift for consideration, granting the villages absolutely. [*Faiz Ahmed Khan* v. *Ghulam Ahmed Khan,*] 218

LEGITIMATION BY ACKNOWLEDGMENT.

Mahomedan Law—Legitimation of offspring by acknowledgment.

The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist.

Mahomed Azmat Ali Khan v. *Lalli Begum* (1) referred to.

Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question. [*Sadakut Hossein* v. *Mahomed Yusoof,*] ... 519

WILL.

1 *Mahomedan Law—Construction of Will—Gift.*

A testatrix entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that, after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S. K.*, whom she made her principal legatee:—

"I direct *S. K.*, under this will, to pay every month Rs. 644-1-7 (being one-third of Rs. 1,933-5 4, my monthly pay allowed by the Government for notes, which are deposited) to my dependants and personal ser-

vants, as detailed below.

Be it known, that the expenses of the imambarra, &c., will be continued for ever; and also the pay of G. K. and M. A. will be defrayed for ever, *i. e.*, generation after generation. The rest of the servants will be paid for life only."

Held, that these words constituted a bequest, and were not merely the expression of a wish. Also, that the bequest was not one of legacies payable out of a specified sum and no other; the statement that the monthly payments to be made amounted to one-third of the sum received monthly by the testatrix, not limiting the source of the legacies.

Quære.—Whether, under the Mahomedan law, the gift made to the testatrix was not a gift to her absolutely, the condition being void? [*Prince Suleman Kadr* v. *Darab Ali Khan*,] 267

2 *Mahommadan law—Will—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation.*

Words such as "always" and "for ever," used in an instrument disposing of property, do not in themselves denote an extention of interest beyond the life of the person named as taking their meaning being satisfied by the interest being for life.

An instrument in the nature of a will, made by a Mahomedan, gave shares in his property to his surviving widow, son, and grand-children, and devoted a share to charitable purposes. It directed that his son, "should continue in possession and occupancy of the full sixteen annas of all the estates ..... All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect, in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will: *held* that, on its true construction, the plaintiff, a sharer under it, was entitled to the full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers. [*Abdul Majid* v. *Fatima Bibi*,] 670